

2003

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Recommended Citation

Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DePaul L. Rev. 777 (2003).

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Author: Karen Musalo

Source: DePaul Law Review

Citation: 52 DePaul L. Rev. 777 (2003).

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REVISITING SOCIAL GROUP AND NEXUS IN GENDER ASYLUM CLAIMS: A UNIFYING RATIONALE FOR EVOLVING JURISPRUDENCE

*Karen Musalo**

INTRODUCTION

The meaning of the term “particular social group” and the determination of what is commonly referred to as “nexus,”—the shorthand term used in the refugee adjudication context to describe the required causal connection between persecution and a Convention reason¹—may be among the most thorny interpretive issues in refugee law. As the law relevant to the protection of women asylum seekers evolves, it becomes increasingly apparent that the parameters of protection depend to no small degree upon State interpretation and application of these two key concepts.

Since 1999, the tribunals of three countries—the United Kingdom,² New Zealand,³ and Australia⁴—have issued decisions addressing social group and nexus, with interpretations that are inclusive of women’s claims. In June 2002, the United Nations High Commissioner for Refugees (UNHCR) published guidelines on both social group⁵ and gender claims,⁶ which affirm in many respects the ap-

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1. As discussed *infra*, the “Convention reasons” are race, religion, nationality, membership in a particular social group, and political opinion. Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

2. *Islam v. Sec’y of State for the Home Dep’t.*, 2 All E.R. 546 (1999), available at http://www3.oup.co.uk/reflaw/hdb/Volume_11/Issue_03/pdf/110496.pdf (last visited Mar. 6, 2003).

3. Refugee Appeal No. 71427/99 (1999), available at <http://www.nzrefugeeappeals.govt.nz/default.asp> (last visited Feb. 11, 2003).

4. *Minister for Immigration and Multicultural Affairs v. Khawar*, (2002) 76 A.L.J.R. 667, available at http://www.austlii.edu.au/au/cases/cth/federal_ct/2002/574.html (last visited Mar. 6, 2003).

5. UNHCR, Guidelines on International Protection: Membership in a Particular Social Group, ¶ 19 (HCR/GIP/02/01, May 7, 2002) [hereinafter Social Group Guidelines].

6. 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 (HCR/GIP/02/01, May 7, 2002) [hereinafter Gender Guidelines].

proach taken by the three State tribunals. The jurisprudence in the United States on these key issues has been more of a question mark due to somewhat unusual developments, which included the issuance of two seemingly inconsistent opinions, *Matter of Kasinga*⁷ and *Matter of R-A*,⁸ followed by the intervention of then-Attorney General, Janet Reno, who vacated the latter of the two. *Matter of Kasinga* was roundly praised for opening the door to gender claims,⁹ while *Matter of R-A* was just as roundly condemned for slamming it shut.¹⁰ Even in the wake of the Attorney General's vacating of the offending *Matter of R-A* decision, commentators have characterized the U.S. position on gender claims as being out of step with evolving jurisprudence, and inconsistent with international norms.¹¹

This Article examines the analytical approach that informed the key decisions in these four countries—the United Kingdom, New Zealand, Australia, and the United States—and finds that they share a unifying rationale, which carries the potential to bring the United States fully into step with the positive adjudicatory trends of the three other countries. This unifying rationale applies not only to the interpretation of “particular social group,” but more importantly goes to the nexus analysis necessary to establish the causal connection between social

7. *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).

8. *In re R-A*, 22 I. & N. Dec. 906 (B.I.A. 1999), vacated 22 I. & N. Dec. 1328 (A.G. 2001).

9. See, e.g., Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN'S L.J. 281 (2002) (“The decision in *Matter of Kasinga* is hailed as a breakthrough insofar as it explicitly recognizes gender as a component of the ‘particular social group’ category.”); Megan Annitto, *Asylum for Victims of Domestic Violence: Is Protection Possible After In re R-A?*, 49 CATH. U. L. REV. 785, 789 (2000) (“*Kasinga* is . . . part of a gradually opening door in the United States through which women fleeing gender persecution can seek asylum.”); Connie M. Ericson, *In re Kasinga: An Expansion of the Grounds for Asylum for Women*, 20 Hous. J. INT'L L. 671, 672 (1998).

10. Andrea Binder, *Gender and the “Membership in a Particular Social Group” Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167, 184 (2001):

The Board's en banc opinion in *In re R-A* constitutes a binding landmark decision on the question of whether violence against and persecution of women can serve as a basis for political asylum in the U.S. The decision has garnered national and international attention and has been widely criticized as being inconsistent with U.S. case law and policy, and as having a devastating impact on asylum law.

Id.

Sharon Donovan, *No Where to Run . . . No Where to Hide: Battered Women Seeking Asylum in the United States Find Protection Hard to Come by: Matter of R-A*, 11 GEO. MASON U. CIV. RTS. L.J. 301, 333 (2001) (“The BIA's decision represents a setback in the recognition of gender-based asylum claims.”).

11. Stephen Knight, *Seeking Asylum from Gender Persecution: Progress Amid Uncertainty*, 79 INTERPRETER RELEASES 689, 696 (2002) (“[D]iscretionary decisions that have been made since control of the Department of Justice passed to Attorney General Ashcroft . . . are not positive, and indicate a heightened level of opposition and resistance to recognizing gender-based human rights violations as a basis for asylum.”).

group membership and the feared persecution in cases involving persecution by non-State actors. The key element of the nexus determination in the decisions of all four countries is the employment of a bifurcated analysis. The bifurcated approach does not limit the nexus consideration to an analysis of the motives of the individual perpetrator of the persecution, but includes societal and State factors in the equation. Although there is a difference in rationale and articulation of the bifurcated approach in the relevant U.S. decision, *Matter of Kasinga*, as compared to the United Kingdom, New Zealand and Australian decisions, there is sufficient similarity to reconcile the approaches. The recently-released UNHCR guidelines, which explicitly adopt an analytical framework incorporating a bifurcated nexus analysis, provide an additional basis for this unified approach to nexus determination.

II. BACKGROUND

Few substantive areas of refugee law have drawn the sustained attention that gender asylum¹² claims have. Beginning in 1985, when the Executive Committee (ExCom) of the UNHCR¹³ issued its first conclusion on refugee women,¹⁴ and perhaps more notably since 1993, when ExCom recommended that States develop appropriate guidelines for gender claims,¹⁵ there has been a steady stream of developments. At current count, five countries have issued guidelines for gender claims. Canada was the first in 1993,¹⁶ followed by the United States (1995),¹⁷ Australia (1996),¹⁸ the United Kingdom (2000),¹⁹ and

12. The term "gender asylum" is used to describe claims for asylum in which either the form of persecution or the reason for the persecution is related to gender.

13. The Executive Committee of the UNHCR was established in 1957. Its mandate includes advising the UNHCR on protection matters. See GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 9 (2d ed. 1996).

14. UNHCR Executive Committee, 36th Sess., No. 39 ¶ k (1985), *Conclusion on Refugee Women and International Protection*, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home> (last visited Feb. 11, 2003).

15. UNHCR Executive Committee, 44th Sess., No. 73 ¶ e (1993), No. 73(XLIV)-1993, *Conclusion on Refugee Protection and Sexual Violence*, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home> (last visited Feb. 11, 2003).

16. IMMIGRATION AND REFUGEE BD. OF CAN., *GUIDELINES ON WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION* (Mar. 1993); IMMIGR. AND REFUGEE BD. OF CAN., *GUIDELINE 4: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION: UPDATE* (Nov. 13, 1996).

17. OFFICE OF INT'L AFFAIRS, U.S. IMMIGR. AND NATURALIZATION SERV., *CONSIDERATION FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FOR WOMEN* (May 26, 1995).

18. AUSTL. DEP'T OF IMMIGR. AND MULTICULTURAL AFFAIRS, *REFUGEE AND HUMANITARIAN VISA APPLICANTS: GUIDELINES ON GENDER ISSUES FOR DECISION MAKERS* (July 1996), available at <http://www.uchastings.edu/cgrs/law/guidelines/guidelinesaust.pdf> (last visited Mar. 3, 2003).

Sweden (2001).²⁰ The European Parliament approved two resolutions on the issue,²¹ and a European Union Council Directive developed as part of the E.U. harmonization process also addresses it.²² The national legislation of Ireland²³ and South Africa²⁴ incorporate gender persecution as a basis for protection. Against this backdrop of extensive intergovernmental, executive and legislative activity on gender asylum, the refugee determination tribunals of a number of States have considered the issue and adjudicated gender-based claims.²⁵

A key catalyst for this activity has been the growing recognition that there has historically been a failure of protection for women refugees. The key international refugee instrument is the 1951 Convention Relating to the Status of Refugees (Refugee Convention or Convention) and its 1967 Protocol.²⁶ It is gender neutral, defining a refugee as any person with a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."²⁷ Notwithstanding its neutrality, commentators are legion who observe that the Convention has been interpreted within a male paradigm, which has resulted in the historic exclusion from protection of women.²⁸ It is this criticism, in tandem with the increasing

19. IMMIGRATION APPEAL AUTH. (U.K.), ASYLUM GENDER GUIDELINES (Nov. 2000), available at <http://www.iaa.gov.uk/GenInfo/Gender.pdf> (last visited Mar. 3, 2003).

20. MIGRATION BD., LEGAL PRAC. DIV., GENDER-BASED PERSECUTION: GUIDELINES FOR INVESTIGATION AND EVALUATION OF THE NEEDS OF WOMEN FOR PROTECTION (Mar. 28, 2001), available at <http://www.uchastings.edu/cgrs/law/guidelines.html> (last visited Mar. 7, 2003).

21. See HEAVEN CRAWLEY, REFUGEES AND GENDER: LAW AND PROCESS 14 (2001) (discussing 1984 resolution "calling upon States to consider women who have been victims of persecution as belonging to a 'particular social group' within the definition of the Refugee Convention" and a 1996 resolution urging "all Member States to adopt guidelines on women asylum seekers as agreed by the UNHCR Executive Committee").

22. Final Version of the Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who Otherwise Need International Protection, art. 7, ¶ d, available at http://www.ece.org/eu_developments/statqua.pdf (last visited Feb. 29, 2003).

23. Refugee Act of 1996, § 1(1), available at [http://www.justice.ie/80256996005F3617/vluFileCode2/flJWOD4RYH9F/\\$file/Refugee%20Act%20Consolidated.PDF](http://www.justice.ie/80256996005F3617/vluFileCode2/flJWOD4RYH9F/$file/Refugee%20Act%20Consolidated.PDF) (last visited Mar. 3, 2003).

24. Social group includes, "among others, a group of persons of particular gender, sexual orientation, disability, class or caste." South Africa Refugee Act, art. 1.xxxi, available at <http://www.lhr.org.za/projects/refugee/links.htm> (last visited Mar. 3, 2003).

25. See, e.g., The Center for Gender and Refugee Studies, *Asylum Law Page*, at <http://www.uchastings.edu/cgrs/law/intl.html> (last visited Mar. 3, 2003) (providing decisions from Australia, Austria, Canada, Germany, New Zealand, Spain, and the United Kingdom).

26. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 167.

27. *Id.* at art. 1.A(2).

28. See Gender Guidelines, *supra* note 6, ¶ 5 (noting that "[h]istorically the refugee definition has been interpreted through a framework of male experiences, which means that many claims

international attention to issues of women's human rights,²⁹ that has served as a key factor in the initiation of multiple measures addressing gender asylum. A stated objective of the majority of these initiatives—guidelines, directives, legislation, etc.—is to incorporate a gender perspective into substantive and procedural aspects³⁰ of the refugee determination process. In practical terms, this means that women should not be precluded from protection because their claims differ in salient ways from those of men.

III. SOCIAL GROUP AND NEXUS ANALYSIS

A. Defining Concepts—The Refugee Definition and Barriers to Women's Claims

A refugee is defined as a person with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”³¹ The refugee definition is understood to require proof of: (1) an objectively reasonable fear of a harm which is serious enough to be considered “persecution,” (2) which is causally linked, or bears a “nexus” to race, religion, nationality, membership of a particular social group, or political opinion.

The barriers to women that arose from this definition were threefold. First, the harms inflicted on women were often not considered to be persecution because they were condoned or required by culture or

of women . . . have gone unrecognised”); Karen Musalo & Stephen Knight, *Unequal Protection*, 58 BULL. OF THE ATOMIC SCI., Nov./Dec. 2002, at 56, 59:

The definition [of refugee] came of age during the Cold War and has been interpreted within an overwhelmingly male paradigm. The quintessential refugee was a political dissident in the Soviet Union or one of its allies. “Persecution” was understood to encompass beatings, torture, and political imprisonment, but not the multitude of violations that are inflicted mainly on women.

Id.

29. See, e.g., Dorothy Q. Thomas, *Women's Human Rights: From Visibility to Accountability*, 69 ST. JOHN'S L. REV. 217 (1995) (discussing the “increased recognition of human rights violations in the last decade, particularly in the realm of women's issues”); Charlotte Bunch, *The Global Campaign for Women's Human Rights: Where Next After Vienna?*, 69 ST. JOHN'S L. REV. 171, 173 (1995) (reflecting on successes at the 1993 United Nations World Conference on Women in Vienna, whose Declaration and Programme of Action “formally recognized the specific human rights concerns of women”); Karen Musalo & Stephen Knight, *Steps Forward and Steps Back: Uneven Progress in the Law of Social Group and Gender-Based Claims in the United States*, 13 INT'L J. OF REFUGEE LAW 51, 52 (2001) (noting the “successful organizing and advocacy of women at two world conferences, the World Conference on Human Rights in Vienna in 1993 and the Fourth World Conference on Women in Beijing in 1995, which led to formal recognition that ‘the human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights’”).

30. It is beyond the scope of this Article to discuss procedural issues; for an overview of these issues, see CRAWLEY, *supra* note 21, at 199-223.

31. See Refugee Convention, *supra* note 1, at art. 1.A(2).

religion (e.g., female genital mutilation (FGM), repressive social norms), disproportionately inflicted on women (e.g., domestic violence), or simply different from the harms suffered by men under similar circumstances (i.e., men may be beaten while women may be raped).³² Second, the perpetrators of these harms were often non-State actors, such as husbands, fathers, or members of the applicant's extended community. Although some Convention parties accept persecution by non-State actors as a basis for protection where the government cannot or will not control these actors, this recognition has been slow in coming and is not accepted by all parties to the Refugee Convention.³³ Third, and perhaps most importantly, women are often persecuted because of their gender, and gender is not one of the five grounds in the Convention definition.

It was in response to these interpretive barriers that the UNHCR,³⁴ other U.N. bodies,³⁵ and various States issued their recommendations and guidelines. Although cumulatively these measures cover a broad range of substantive and procedural issues, they focus in on the key issues—persecution, non-State actors, and nexus to a Convention ground. To a great degree, they share a common approach on these issues: (1) recommending the use of a human rights framework inclu-

32. For example, beatings and torture inflicted in a political context were adjudicated as political persecution, while rape in the same context was not. *See, e.g., Campos Guardado v. I.N.S.*, 809 F.2d 285 (5th Cir. 1987) (finding that a female asylum seeker forced to watch mutilation and murder of male family members, and who was raped while perpetrators shouted political slogans did not meet refugee definition). Immigration judges (IJ) have ruled that life under the Taliban for Afghan women was unpleasant but did not rise to the level of persecution. *See, e.g., Case Summary*, available at <http://www.uchastings.edu/cgrs/summaries/100-199/summary129.html> (last visited Mar. 7, 2003) (The decision of the IJ denying asylum was subsequently reversed in a *per curiam* decision by the Board of Immigration Appeals). Immigration judges have also ruled that female genital mutilation (FGM) was not persecution for a Convention reason, but a cultural norm carried out for the benefit of the entire community; this was the initial decision of the IJ in the *Kasinga* decision. *See infra* notes 119-125 and accompanying text.

33. France and Germany are among the countries that do not generally recognize refugee claims based on persecution by non-State agents. *See* ANDREA SUBHAN, ASYLUM IN THE E.U. MEMBER STATES 11-12 (European Parliament, Directorate Gen. for Research, Working Paper No. LIBE 108 EN, 2000).

34. *See Conclusion on Refugee Women and International Protection*, *supra* note 14; UNHCR Executive Committee, 39th Sess., No. 54 (1988), *Conclusion on Refugee Women*, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home> (last visited Feb. 11, 2003); UNHCR Executive Committee, 41st Sess., No. 64 (1990), *Conclusion on Refugee Women and International Protection*, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home> (last visited Feb. 11, 2003); *Conclusion on Refugee Protection and Sexual Violence*, *supra* note 15; Gender Guidelines, *supra* note 6.

35. *See, e.g.,* Report of the Special Rapporteur on Violence Against Women (recommending that "refugee and asylum laws should be broadened to include gender-based claims of persecution, including domestic violence"); Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, U.N. Comm'n HR., 52d Sess., Provisional Agenda Item 9(a), pt IV, 142(o), U.N. Doc. E/CN.4/1996/53 (1996).

sive of women's rights for assessing whether a harm constitutes persecution, with the corollary that persecution may include harms inflicted in the private sphere by non-State actors; and (2) suggesting that under appropriate circumstances women may constitute a particular social group, and may be able to establish a nexus between the persecution and their social group membership. A survey of recent jurisprudence reveals that the "harm as persecution" issue has been less intractable, and constituted less of a roadblock, than that of defining women as a particular social group and finding a nexus between the persecution suffered and their social group membership.

B. Nexus and the Definition of a Particular Social Group

The Refugee Convention requires a nexus between one or more of its five grounds and the feared persecution. The nexus analysis involves a two-step process: the identification of the relevant Convention ground, followed by the establishment of the causal connection between this ground and the persecution. It is when women are persecuted for their gender, rather than for reasons common to both men and women (as political opponents, or members of a disfavored ethnic, racial or religious group) that interpretive obstacles have arisen because gender is not one of the five Convention grounds. Beginning with its earliest pronouncements on the issue,³⁶ the UNHCR recommended that under certain circumstances, women could constitute a "particular social group" and that nexus could be established on that basis.

The acceptance that a particular social group may be defined in reference to gender was recognized in, and arose out of, principles established in the influential decisions of *Matter of Acosta*³⁷ in the United States and *Canada v. Ward*³⁸ in Canada. These cases based their analyses on two distinct but related concepts: the *ejusdem generis*³⁹ rule of interpretation and the non-discrimination principle. Applying the rule of *ejusdem generis*, the Board of Immigration Appeals (BIA) in *Mat-*

36. See *Conclusion on Refugee Women and International Protection*, *supra* note 14, ¶ k (recommending that "women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a particular social group"). This recommendation was reiterated by the UNHCR in 1991. Office of the United Nations High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women*, ¶ 54, U.N. Doc. ES/SCP/67 (1991).

37. 19 I. & N. Dec. 211 (B.I.A. 1985).

38. [1993] 2 S.C.R. 689.

39. Literally, "of the same kind or class." BALLENTINE'S LAW DICTIONARY 393 (1969). "[W]here general words are used . . . after specific terms, they are to be confined to things of the same kind or class as the things previously specified." *Id.*

ter of Acosta ruled that in order for the term “particular social group” to be “of the same kind” as the other four grounds, it should be limited to characteristics that are immutable or fundamental.⁴⁰ The BIA explicitly recognized sex as the type of characteristic that met this requirement.

In *Ward*, the Supreme Court of Canada cited *Matter of Acosta* and its *ejusdem generis* approach with approval. However, its analysis went further, exploring the objectives of the Convention’s drafters. The Supreme Court of Canada found that “[u]nderlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination.”⁴¹ The Convention drafters included race, religion, nationality, and political opinion because they constituted clear examples of status and beliefs deserving of protection under international norms of non-discrimination.⁴² The particular social group ground should, therefore, be interpreted to embrace groups similar to the other four specifically stated categories, and to reflect the non-discrimination principle.⁴³ As had the BIA in *Matter of Acosta*, the Court in *Ward* adopted criteria going to the immutable or fundamental nature of the defining characteristic and explicitly

40. The Board ruled:

The other grounds of persecution in the Act and the Protocol listed in association with “membership in a particular social group” are persecution on account of “race,” “religion,” “nationality,” and “political opinion.” Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.

Applying the doctrine of *ejusdem generis*, we interpret the phrase “persecution on account of membership in a particular social group” to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic Whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

In re Acosta, 19 I. & N. Dec. 233.

41. *Ward*, [1993] 2 S.C.R. at 733.

42. The Supreme Court in *Ward* quoted from Guy Goodwin-Gill as follows:

The references to “race, religion, nationality, membership of [sic] a particular social group, or political opinion” illustrate briefly the characteristics of individuals and groups which are considered worthy of special protection. These same factors have figured in the development of the fundamental principle of non-discrimination in general international law, and have contributed to the formulation of other fundamental human rights.

Id. at 734.

43. “In distilling the contents of . . . ‘particular social group’, therefore, it is appropriate to find inspiration in discrimination concepts.” *Id.*

identified gender as an example of a characteristic that is “innate” or “unchangeable.”⁴⁴

The only serious interpretive challenge to the immutable or fundamental criteria for social group formulation originated in the United States Court of Appeals for the Ninth Circuit, which ruled in its 1986 decision of *Sanchez-Trujillo v. INS*⁴⁵ that a voluntary associational relationship between group members, rather than innate or fundamental characteristics, was necessary to establish a particular social group. This approach, also referred to as the “cohesion” requirement, has been rejected by a number of tribunals,⁴⁶ as well as the UNHCR in its recently released guidelines.⁴⁷ The Ninth Circuit revisited the issue in 2000 in *Hernandez-Montiel v. INS*⁴⁸ and ruled that either immutable characteristics or a voluntary relationship may form the basis for a particular social group.

Decisions such as *Matter of Acosta* and *Ward* were extremely important in affirming that a particular social group could be defined in reference to gender. However, this recognition only resolved half of the nexus equation. The remaining, and more problematic, element has been to establish the nexus, or causal relationship, between the gender-defined social group and the feared persecution.

Much has been written about the nature of the nexus requirement,⁴⁹ which derives from the Convention language “for reasons of” (i.e.,

44. *Id.* at 739.

45. 801 F.2d 1571 (9th Cir. 1986).

46. The court in *Islam* stated:

The support in the case law for the Sanchez-Trujillo view is slender. In the literature on the subject there is no support; see the criticism in Hathaway, the Law of Refugee Status Considering that view on its merits I am satisfied that for the reasons given in Acosta's case the restrictive interpretation of “particular social group” by reference to an element of cohesiveness is not justified Loyalty to the text requires that one should take into account that there is a limitation involved in the words “particular social group” [based on principles of non-discrimination]. What is not justified is to introduce into that formulation an additional restriction of cohesiveness.

Islam, 2 All E.R. at 555.

In his opinion, Lord Steyn noted that the recognition of homosexuals as a particular social group was inconsistent with a requirement of cohesiveness, and that the tribunals of New Zealand, Germany, the Netherlands, Sweden, Denmark, Canada, and the United States have found that “homosexuals are capable of constituting a particular social group” within the meaning of the Refugee Convention. *Id.*

47. See Gender Guidelines, *supra* note 6, ¶ 15. The Guidelines affirm the innate, immutable criteria and state as a corollary that: “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.”

48. 225 F.3d 1084 (9th Cir. 2000).

49. See, e.g., Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179 (1994); Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1 (1997); Michelle Foster, *Causation in*

“well-founded fear of being persecuted for reasons of race, religion, membership of a particular social group or political opinion”). Although it is agreed that nexus requires a showing of some relationship between the feared harm and Convention ground, there is great variance as to the nature of that relationship.⁵⁰ One of the most demanding tests, which has been adopted by the United States, requires proof that the persecutor was motivated by a Convention reason. Other States have left open the question of what it means, or have indicated that its meaning may vary depending on the context of the claim.⁵¹

The nexus requirement has posed a substantial barrier to gender claims because adjudicators have been slow to accept a causal connection between an applicant’s gender and the harm inflicted upon her. The difficulty is exacerbated where the persecutor is a non-State actor, and it is presumed that the motivation for the harm is “personal” rather than related to gender. For example, in the United Kingdom, New Zealand, Australian and United States cases discussed herein, which involved domestic violence and FGM at the hands of private actors, the claims were all initially rejected by adjudicators who ruled that there was no causal link between the feared persecution and the gender of the asylum applicant. On appeal, the nexus issue was favorably resolved, and the approach adopted by the courts provides a positive framework for prospective gender claims.

In all five cases, the tribunals developed a bifurcated interpretive framework that allowed the requisite causal connection to be established in relation to *either* the non-State perpetrator *or* the State/society. This bifurcated approach provides a unifying rationale for evolving jurisprudence, and because it was employed in *Matter of Kas-inga*, which continues as controlling authority, it provides the conceptual basis for aligning the United States with international trends.

Context: Interpreting the Nexus Clause in the Refugee Convention, 23 MICH. J. INT’L L. 265 (2002); Shayna S. Cook, *Repairing the Legacy of INS v. Elias-Zacarias*, 23 MICH. J. INT’L L. 223 (2002); James C. Hathaway, *International Refugee Law: The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT’L L. 210 (2002).

50. See, e.g., Musalo, *supra* note 49, at 1228-34 (discussing the tests used in criminal, tort, and anti-discrimination law, and their applicability to nexus in the refugee context); Foster, *supra* note 49, at 332-33 (discussing various causation standards in refugee law, as well as standards in tort, equity and anti-discrimination law).

51. See *infra* notes 68, 92, and 109 and accompanying text.

IV. THE UNITED KINGDOM, NEW ZEALAND, AND AUSTRALIA

A. *Islam v. Secretary of State for the Home Department and Regina v. Immigration Appeal Tribunal, Ex Parte Shah*
(Islam; Ex Parte Shah)

The first within the trilogy of decisions discussed in this section is *Islam; Ex Parte Shah*. In this decision, the House of Lords considered the conjoined appeals of two Pakistani women who fled marital violence. Although the individual circumstances of the two women were different in various respects, both claims involved feared harm at the hands of non-State actors in situations where the State failed to provide protection.⁵² In order to decide the case, the House of Lords had to consider whether a particular social group could be defined by reference to gender and to determine if there was a requisite nexus between the feared persecution and the Convention ground. The House of Lords answered in the affirmative on both counts, employing a bifurcated analysis to resolve the nexus issue.⁵³

The first of the two appellants, Shahanna Islam, was a teacher.⁵⁴ Her husband had often been violent, but the catalyst for her flight was false accusations of infidelity, which resulted from her efforts to intervene in a fight between rival political factions at the school where she taught.⁵⁵ Subsequent to these accusations, her husband assaulted her so brutally that she was twice admitted to the hospital. Her attempts to escape him within Pakistan by staying with her brother were unsuccessful.⁵⁶ The second woman, Syeda Shah, had been forced out of her family home by her husband, and shortly after arriving in the United Kingdom, she gave birth. She feared that her husband would accuse her of adultery, and either beat her himself or denounce her under Sharia law for immorality, which could result in “lashes in public or stoning to death.”⁵⁷

The evidence in the record documented institutionalized discrimination against women in Pakistan. Although the Pakistani Constitution prohibits discrimination on the basis of sex, “a woman’s place in society in Pakistan is low.”⁵⁸ Domestic abuse is prevalent, which is both “tolerated” and “sanctioned” by the State.⁵⁹ Women must sub-

52. *Islam*, 2 All E.R. at 548.

53. *Id.* at 557-58.

54. *Id.* at 549.

55. *Id.* at 550.

56. *Id.* at 549-50.

57. *Id.* at 549.

58. *Islam*, 2 All E.R. at 548.

59. *Id.*

mit to the wills of their husbands, and women who are forced to leave home, or who decide to leave, are at special risk because they can be charged with adultery and/or sexual immorality.⁶⁰ In such cases, the statutory law discriminates against women by prohibiting their testimony, or considering them guilty unless they can establish themselves to be innocent.⁶¹

The decision makers below⁶² had not doubted that the fear of violence at the hands of the applicants' husbands was well-founded. However, they rejected the argument that the applicants were members of a particular social group⁶³ and that the persecution was linked to this membership. In a four to one decision, the House of Lords disagreed, finding that the women were members of a gender-defined social group and, that although their husbands did not persecute them for this reason, the State failed to protect them because they were women. On this basis, a social group nexus could be established.

60. *Id.*

61. The decision quotes at length from a report of Amnesty International on Women in Pakistan:

[S]everal Pakistani laws explicitly discriminate against women. In some cases they allow only the evidence of men to be heard, not of women. In particular, the Evidence Act and the *Zina* Ordinance, one of four *Hudood* Ordinances promulgated in 1979, have eroded women's rights and denied them equal protection by the law.

Women are also disadvantaged generally in the criminal justice system because of their position in society . . . women are particularly liable to be punished under the *Zina* Ordinance which deals with extramarital sexual intercourse Offenses under this law attract different punishments according to the evidence on which the conviction is based. In cases where the most severe (*hadd*) punishments may be imposed, the evidence of women is not admissible.

In a rape case the onus of proof falls on the victim. If a woman fails to prove that she did not give her consent to intercourse, the court may convict her of illicit sexual intercourse.

The majority of cases tried under the *Hudood* laws result in convictions carrying the less severe (*ta'zir*) punishments, but there are also some acquittals and a few convictions involving the most severe (*hadd*) punishments

About half the women prisoners in Pakistan are held on charges of *Zina* Arrests under the *Zina* Ordinance can be made without a magistrate first investigating whether there is any basis for the charge and issuing a warrant. As a result, women in Pakistan are often held under the *Zina* Ordinance for years although no evidence has ever been produced that they have committed any offense. Men frequently bring charges against their former wives, their daughters or their sisters in order to prevent them from marrying or remarrying against the man's wishes

Most women remain in jail for two to three years before their cases are decided, often on the basis of no evidence of any offense.

Id. at 548-49.

62. *Id.* at 550-51. The case had been considered by special adjudicators, the Immigration Appeal Tribunal, and the Court of Appeal.

63. *Id.* at 550. Political opinion had also been argued and rejected by the adjudicators.

Relying heavily on the BIA's decision in *Matter of Acosta*, as well as on principles of non-discrimination, three of the four Lords in the majority (Steyn, Hoffman, and Hope of Craighead) defined the relevant social group in terms of gender alone—"women in Pakistan."⁶⁴ The fourth Lord (Hutton) accepted a narrower subset described as Pakistani women suspected of adultery and unprotected by State and public authorities.⁶⁵ All four Lords rejected the government's argument of "cohesiveness" as a requirement.⁶⁶

After concluding that the women were "within the scope of the words 'particular social group,'" the Lords turned to the question of nexus between the persecution and membership in the gender-defined social groups. The Lords concluded that the "serious harm" of spousal violence was a "personal affair, directed against the applicants as individuals"⁶⁷ and therefore not causally linked to their gender-defined social group status. However, the Lords observed that persecution was not limited to the husbands' actions, but was the result of the separate and combined elements of the husbands' violence and the failure of State protection. The recognition of two constituent elements allowed the bifurcated analysis; the Lords ruled that although the husbands' actions were not linked to gender, the State's failure to protect was, and on this basis, nexus to the Convention ground of particular social group could be established.⁶⁸

Lord Hoffman expressed the bifurcated approach by the formula: ***Persecution = Serious Harm + Failure of State Protection***. Pursuant to this formula, the required nexus is established if *either* of the constituent elements of persecution are causally related to a Convention reason. Alternatively expressed, Lord Hoffman's rule is:

Persecution has two elements; nexus is established if either is linked to a Convention reason.

It can be expressed graphically as follows:

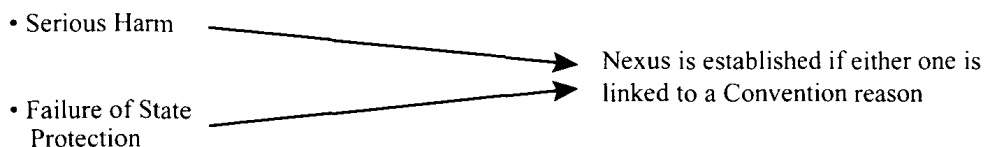
64. *Islam*, 2 All E.R. at 556. The Lords were influenced by the *Acosta* decision in accepting a broad gender-defined formulation: "The idea so incisively put forward by Lord Hoffmann [that the social group is women in Pakistan] is neither novel nor heterodox. It is simply a logical application of the seminal reasoning in *Acosta's* case [citation omitted]."

65. *Id.* at 557.

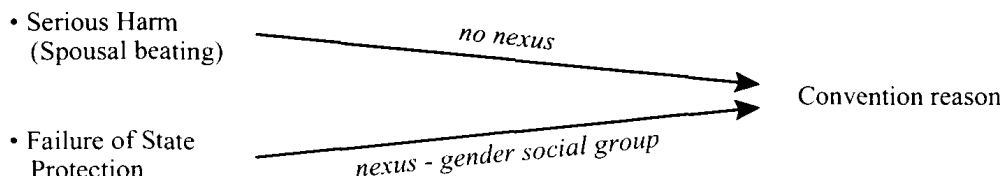
66. *Id.* at 552-56, 563, 568-69, 572.

67. *Id.* at 564 (per Lord Hoffman), 558 (per Lord Steyn).

68. As discussed in Section III(B) *supra*, a number of States, including the United Kingdom, have left open the question of the particular test most appropriate for determining nexus. The tests range from "sole cause," to "but for," to "contributing cause." Notable in this case is the fact that the Lords ruled that the connection between the applicant's gender-defined social group and the failure of state protection was so clear that nexus could be established "irrespective" of which test was applied. *Id.* at 558 (per Lord Hoffman).



Its application to the *Islam* case is as follows:



The House of Lords decision was historic because, by determining nexus in reference to the individual persecutor as well as the State, it found an analytical path around the barrier created by the characterization of family violence as “personal” rather than as a Convention reason. Furthermore, its approach is consistent with the growing recognition of State responsibility to provide protection to its nationals without discrimination.⁶⁹

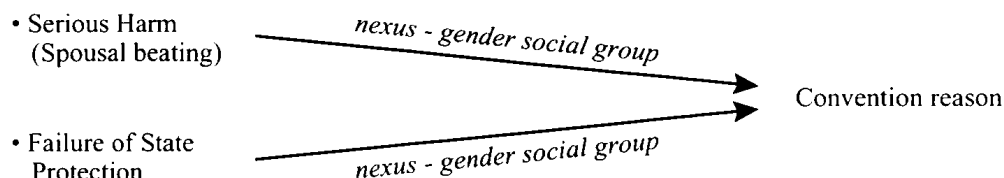
Notwithstanding the enlightened approach taken by the Lords, one might question the Lords’ assumption that spousal violence—because it is “individual” and private—is not causally related to gender. Although, as discussed *infra*, this is the analysis adopted consistently in domestic violence cases, it runs counter to a growing body of interdisciplinary literature on the issue.⁷⁰ Jurists decide cases on the

69. See, e.g., Rachel Bacon & Kate Booth, *The Intersection of Refugee Law and Gender: Private Harm and Public Responsibility: Islam; Ex Parte Shah Examined*, 23 UNIV. NEW S. WALES L.J. 135, 145 (2000) (“States are obliged to provide their nationals with effective protection from all kinds of harm, and by extension, this includes private harm. Further, states must do so without discrimination, for instance, on the basis of gender.”).

70. Although a comprehensive discussion of the context and dynamic of domestic violence is outside the scope of this Article, it should be noted that there is ample authority for affirming its essential relationship to gender and to power relations between men and women. See, e.g., Amber Ann Porter, *The Role of Domestic Violence in the Consideration of Gender-Based Asylum Claims: In re R-A- An Antiquated Approach*, 70 U. CIN. L. REV. 315, 333-34 (2001) (“Experts in the field of domestic violence generally agree that treating domestic abuse as irrational acts taken by disturbed individuals ‘ignores that fact that domestic violence is intentional behavior with a historical, culturally sanctioned purpose, which was and is for men to keep their wives in place.’”) (emphasis added) (quoting Liane V. Davis, in *ENCYCLOPEDIA OF SOCIAL WORK* 780, 784 (19th ed. 1995)); Anita Sinha, Note, *Domestic Violence and U.S. Asylum Law: Eliminating the ‘Cultural Hook’ for Claims Involving Gender-Related Persecution*, 76 N.Y.U. L. REV. 1562, 1587-88 (2001).

The majority’s insistence [in *Matter of R-A-*] on specific evidence of what motivated the persecutor blatantly ignores widely accepted understandings of what motivates domestic battering. Feminist activists and lawmakers, beginning in the 1970s, drew attention to the crisis of domestic abuse—women being threatened, beaten, and killed in their

records before them, and it is unclear what evidence the Lords had before them regarding the dynamic of domestic violence and its clear gender component. Had the record reflected the current understanding of domestic violence in this regard, it is certainly possible that the Lords would have found a Convention reason inherent in both elements of persecution: the spousal beatings and the failure of State protection. Such an analysis would look like this:



Although this approach would not have changed the outcome in the *Shah* case, it may be relevant in jurisdictions where a bifurcated analysis is not accepted.

B. New Zealand, Refugee Appeal No. 71427/99⁷¹

Several months after the House of Lords decided *Shah; Ex Parte Islam*, the Refugee Status Appeals Authority (RSAA) of New Zealand issued a decision in a gender claim that involved similar issues—persecution by a private actor (spouse) in a country with gender ine-

own homes. The battered women's movement, and recent studies documenting the problem, have made domestic violence a matter of public concern in the United States and have helped shape the current understanding of domestic violence as rooted in both power structures of inequality and gender-biased social norms. Far from being individual, random acts, violence against women at the hands of their partners is a pervasive and systemic exercise of patriarchal power.

The Special Rapporteur for Violence against Women has also underscored the gender dimension of domestic violence, noting that it:

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.

Report of the Special Rapporteur for Violence against Women, Its Causes and Consequences, U.N. Doc E/CN.4/1996/53, at 6 (1996).

The Presidential Task Force on Violence and the Family of the Am. Psychological Association has similarly analyzed domestic violence, noting that generally batterers "use violence to meet needs for power and control over others. Their actions are often fueled by stereotypical sex-role expectations for 'their' women." AM. PSYCHOLOGICAL ASS'N PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY, REPORT OF THE AM. PSYCHOLOGICAL ASS'N PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY (1996).

71. New Zealand, Refugee Appeal No. 71427/99, available at <http://www.uchastings.edu/cgrs/law/intl/71427-99.html> (last visited Feb. 12, 2003) [hereinafter Refugee Appeal].

quality and failed State protection for women. The applicant⁷² in the New Zealand case was a citizen of Iran whose husband was a member of the Revolutionary Guard.⁷³ The applicant's husband began to violently abuse her almost immediately after their arranged marriage and escalated his abuse when she became pregnant.⁷⁴ After she gave birth, he arranged for the baby to be taken away from her, and he told her that the child had died.⁷⁵ He stated that "there was no reason for her to continue living with him as he did not love her and there was no baby to look after."⁷⁶ He divorced her, and it was only then that the applicant learned her child had not in fact died. Her subsequent efforts to obtain access to the child brought further harassment from her husband, and from his friend in the Revolutionary Guard. Ultimately, the applicant obtained *de facto* custody of the child, which enraged her husband who considered it as an "embarrassment to him both as a man and as an official."⁷⁷ After an incident in which the applicant's ex-husband beat her mother in an attempt to find the applicant and the child, the applicant decided to flee Iran.⁷⁸ About a year before she had made the decision to flee Iran, a childhood friend of the applicant had proposed marriage. Out of fear that she would lose the *de facto* custody of her son, she entered into a "temporary,"⁷⁹ as opposed to "permanent," marriage. Her second husband helped her and the child escape and planned to join them afterwards. He was, however, unable to get out. The applicant later learned that he had been beaten, arrested, and otherwise harassed by the applicant's first husband.

Relying upon scholarly sources and human rights reports, the RSAA decision began with an "[o]verview of the institutionalised and

72. The Refugee Status Appeals Authority maintains the confidentiality of asylum applicants, and therefore the name of the applicant in this case is unknown.

73. See Refugee Appeal, *supra* note 71, ¶ 14.

74. *Id.* ¶ 16.

75. *Id.* ¶ 20.

76. *Id.* ¶ 21.

77. *Id.* ¶ 27.

78. *Id.* ¶ 33.

79. See Refugee Appeal, *supra* note 71, ¶ 32.

Marriage, according to the current Iranian law, consists of two kinds—permanent and temporary. In permanent marriage, as the name indicates, no duration is specified in the marriage contract. Temporary marriage, also known as *sigheh*, on the other hand, can last only for a specific period of time. In permanent marriage, a wife enjoys a higher degree of security and respect within the family. In temporary marriage, on the other hand, matrimonial relations are considered terminated and the wife must leave the husband's residence as soon as the specified period is over or if the husband waives his right to the remaining portion of the said period.

Id. ¶ 4(e).

state-sanctioned discrimination against women in the Iranian family context.”⁸⁰ The RSAA’s decision noted that in every aspect of marriage, divorce, and custody, the woman is subservient to the man. Women cannot choose their spouses without the consent of their father or paternal grandfathers.⁸¹ Men can divorce at will, while women can divorce only upon proof of “undue hardship.”⁸² Men can have several permanent spouses and unlimited temporary spouses; women cannot.⁸³ Legal custody of children automatically belongs to the father and paternal grandfather, although the actual care of the child can be conferred on the mother.⁸⁴ After reviewing the inequalities relating to marriage, divorce, and custody rights, the RSAA decision examined penal provisions, as well as law and policy related to domestic violence. The RSAA concluded that “[g]ender discrimination is . . . the central feature of the Iranian penal code,”⁸⁵ and that “the attitude to domestic violence by the Iranian state is one of condonation, if not complicity.”⁸⁶

The New Zealand tribunal explicitly adopted the *Shah* formula (*Persecution = Serious Harm + Failure of State Protection*). As in *Shah*, the applicant’s husband was a source of serious harm in the form of “physical and psychological violence,”⁸⁷ and the State failed to provide protection. The failure of protection was not only the result of State inaction; the tribunal commented that Iran “condone[d], if not actively encourage[d], non-state actors such as husbands or former husbands to cause serious harm to women.”⁸⁸

As did the Lords in *Shah*, the tribunal found that the husband’s actions were not “for reasons of” one of the Convention grounds, observing that it would be “artificial” to try to fit them within that context in light of the multiple “causes of violence in the home.”⁸⁹ There was a clear nexus, however, between the State’s actions and the grounds of social group, political opinion, and religion⁹⁰—with a gender-defined social group being the overarching factor. A number of

80. *Id.* ¶ 3.

81. *Id.* ¶ 4(e).

82. *Id.* ¶ 4(l).

83. *Id.* ¶ 4(j).

84. See Refugee Appeal, *supra* note 71, ¶ 4(n).

85. *Id.* ¶ 6.

86. *Id.* ¶ 10.

87. *Id.* ¶ 79.

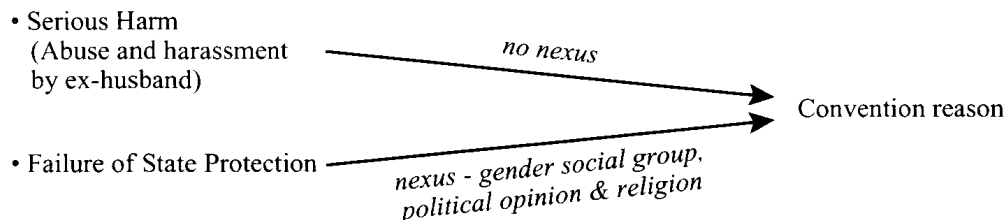
88. *Id.* ¶ 118.

89. *Id.* ¶ 116.

90. See Refugee Appeal, *supra* note 71, ¶¶ 86-88. Because Iran is a theocracy and many of the gender norms are characterized as religious dictates, the tribunal identified religion and political opinion as feasible grounds.

precedent decisions—including *Shah*, *Ward*, and *Matter of Acosta*⁹¹—considered in light of the basic anti-discrimination principles of the Refugee Convention, supported the formulation of a social group based on gender alone. As did Lord Steyn in *Shah*, the New Zealand tribunal found the nexus satisfied even in the absence of articulating the “appropriate causation test.”⁹²

When incorporated into the “persecution/nexus” framework described above, the New Zealand tribunal’s decision looks like this:



One notable distinction between the analysis in this decision and that of *Shah* is that the New Zealand tribunal found that considered cumulatively, the discriminatory measures against women in Iran constituted serious harm.⁹³ The significance of this finding is that a woman in Iran under appropriate circumstances—even in the absence of spousal abuse—could qualify for refugee status.

C. Minister for Immigration and Multicultural Affairs v. Khawar

This decision by the High Court of Australia constitutes the third in this trilogy of decisions applying a bifurcated nexus and affirming that women victims of family violence may qualify for protection as members of a persecuted social group. The Pakistani asylum seeker in this case, Naima Khawar, claimed that she had been physically abused and threatened with death by her husband and members of his family.⁹⁴ She had been hospitalized with injuries from beatings, and threatened by her husband and his family that she would be disfigured with acid or burned alive.⁹⁵ On one occasion, her husband and his brother “doused her with petrol” and only stopped when neighbors intervened.⁹⁶ Ms. Khawar stated that she had gone to the police on four

91. See *supra* notes 37-40, 64 and accompanying text.

92. See Refugee Appeal, *supra* note 71, ¶ 115.

93. “Taking into account the cumulative effect of these breaches on the appellant, our conclusion is that the policy of gender discrimination and the enforcement of gender-based norms against women as a group in Iran is of a nature which permits a finding of persecution.” *Id.* ¶ 78.

94. *Khawar*, 76 A.L.J.R. 667, ¶ 50.

95. *Id.*

96. *Id.*

occasions to report the violence, but the police never took her complaints seriously or acted on them. When she reported the dousing with petrol incident, the officer “told her that women always tried to blame their husbands for problems for which they themselves were the real cause.”⁹⁷

Ms. Khawar had submitted “substantial” evidence on the status of women in Pakistan: the documentation addressed gender discrimination in the legal system; the existence of widespread impunity in cases of killing or mutilation of women; and the failure of the police to act in cases of domestic violence.⁹⁸ She argued that her persecution was on account of various gender-defined social groups, including women, married women in Pakistan, married women in Pakistan without the protection of a male relative, married women in Pakistan suspected of adultery, or women who have transgressed the mores of Pakistani society.⁹⁹

Ms. Khawar’s claim for protection in Australia was denied in the first instance and she appealed to the administrative body, the Refugee Review Tribunal (RRT). Anonymous sources submitted information to the RRT accusing Ms. Khawar of fabricating her story. The RRT did not make a credibility determination, ruling instead that even if her facts were true, she would not qualify for relief because “those harming her [her husband and his family] were not motivated by her membership of any particular social group, but by purely personal considerations related to the circumstances of her marriage, the fact that she brought no dowry to the family and their dislike of her as an individual.”¹⁰⁰ In so ruling, the RRT did not make a determination whether Ms. Khawar was a member of a particular social group, or a factual finding regarding the failure of State protection.¹⁰¹ Ms. Khawar appealed to the Federal Court. Judge Branson ruled that the RRT had erred in not deciding these two issues because:

[h]ad the [T]ribunal made a finding that [Mrs. Khawar] was a member of a social group in Pakistan which was comprised of Pakistani women, or alternatively married Pakistani women, it may well have concluded, as Lord Steyn did on the evidence in . . . [*Ex parte Shah*] that:

“Given the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear perse-

97. *Id.* ¶ 94.

98. *Id.* ¶ 97.

99. *Id.* ¶ 52.

100. *Khawar*, 76 A.L.J.R. 667, ¶ 13.

101. *Id.* ¶ 55.

cution not because of their membership of a social group but because of the hostility of their husbands is unrealistic.”¹⁰²

Judge Branson’s decision was upheld by the full Federal Court, following which the government (the Minister for Immigration and Multicultural Affairs) sought review of the case in the High Court of Australia.

Addressing only the legal issues raised by Ms. Khawar’s claim, the High Court ruled four to one that a successful claim for protection could be established on the theory of a gender-defined social group in a context of gender discrimination and resultant failed State protection. The four Justices in the majority (Justices Gleeson, McHugh, Gummow, and Kirby) issued three opinions, with McHugh and Gummow issuing a joint opinion. In each of the opinions, the Justices stated that the relevant social group could simply be “women.”¹⁰³ Justice Gleeson observed in his opinion that “[w]omen in any society are a distinct and recognisable group.”¹⁰⁴ The Justices did not rule out that the appropriate social group could be defined as “gender +” other characteristics, which would result in a narrower group.¹⁰⁵

On the related issue of nexus, the analysis of the Australian High Court was strikingly similar to that of the House of Lords and Refugee Status Appeals Authority. First, the High Court adopted the same bifurcated nexus approach, expressed by the formulation that “**Persecution = Serious Harm + Failure of State Protection**” and stated that on this basis, the nexus requirement could be met when either the serious harm or failure of State protection is “for reasons of a Convention ground.”¹⁰⁶ Second, the High Court assumed¹⁰⁷—as had the other two tribunals—that the motivation for the non-State actors (husband and family) was not related to Ms. Khawar’s membership in a gender-defined social group, regardless of the specific formulation.¹⁰⁸ Third, the Court was less than definitive as to the particular test it employed to establish nexus or causation. Justice Kirby’s opinion commented most extensively on this element. He stated that although some “singling” out for a Convention reason is required to

102. *Id.*

103. *Id.* ¶¶ 35, 83, 127-29.

104. *Id.* ¶ 35.

105. *Id.* ¶ 81.

106. *Khawar*, 76 A.L.J.R. 667, ¶ 120.

107. The tribunals in the United Kingdom and New Zealand made findings on this issue, while Justice Kirby of the Australian High Court stated that he “accepted for the purposes of argument” the fact that the private actors were not motivated for a Convention reason. *Id.* ¶ 123.

108. *Id.*

establish causation, the motivation or intention for this singling out need not arise from enmity or malignant intentions.¹⁰⁹ Finally, the Court evoked the “history and broad humanitarian object of the Convention”¹¹⁰ in reaching its determination that the bifurcated nexus analysis, which considers serious harm and failure of State protection, is consistent with the multilateral treaty’s intent.¹¹¹

Because it limited its review to legal issues, the High Court did not make a ruling on Ms. Khawar’s specific claim for protection. The High Court remanded the case to the RRT to make the required factual findings and apply the articulated framework¹¹² to the facts.

V. THE UNITED STATES: *MATTER OF KASINGA*¹¹³ AND *MATTER OF R-A*¹¹⁴

The two most significant gender cases in the United States have been the decisions of the BIA in *Matter of Kasinga* and *Matter of R-A*-, decided respectively in 1996 and 1999. *Matter of Kasinga* involved the claim of a young woman from Togo fleeing FGM and forced polygamy. In a landmark decision, which accepted a gender-defined social group and applied a bifurcated nexus analysis—similar, but not identical, to that of the preceding cases—the BIA ruled eleven to one to grant asylum. In an apparent about face, in *Matter of R-A*-, which arose out of the claim of a Guatemalan woman who had endured ten years of brutal domestic violence, a majority of the BIA¹¹⁵ rejected a gender-defined social group and refused to apply any form of bifurcated analysis.

109. *Id.*

110. *Id.* ¶ 110.

111. The court stated:

[T]he Convention is one of several important international treaties designed to redress “violation[s] of basic human rights demonstrative of a failure of state protection.” It is the recognition of the failure of state protection, so often repeated in the history of the past hundred years, that led to the exceptional involvement of international law in matters concerning individual human rights. In that context, the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women (to both of which Australia is a party) are obviously important in expressing the concept of women’s equality before the law and the unacceptability of the state and its agencies discriminating unjustly against women solely by reason of their sex.

Id. ¶ 111 (footnotes omitted).

112. The framework is no different from that established by the House of Lords and the RSAA. For an extended discussion of the *Khawar* decision, see Stephen M. Knight, *Reflections on Khawar: Recognizing the Refugee from Family Violence*, HASTINGS WOMEN’S L.J. (forthcoming 2003).

113. *In re Kasinga*, 21 I. & N. Dec. 357.

114. *In re R-A*-, 22 I. & N. Dec. 906.

115. The Board was sharply divided in a ten to five decision.

The BIA's decision in *Matter of R-A-* was widely criticized as inconsistent with precedent, as well as developing gender norms, including the Immigration and Naturalization Service's (INS) own guidelines.¹¹⁶ These criticisms appeared to be taken seriously by former Attorney General Janet Reno, who took the unusual step of exercising her authority to review and vacate *Matter of R-A-*,¹¹⁷ remanding it back to the BIA. Reno's order instructed the BIA to reconsider the case under a set of proposed amendments to the asylum regulations that had been drafted by the INS and published on December 7, 2000 in the Federal Register.¹¹⁸ To date, these proposed regulations have yet to be issued as final. It is unclear whether the Bush administration will choose to move forward and ultimately issue these proposed regulations. Significant for purposes of this analysis, however, is the fact that the vacating of *Matter of R-A-* leaves *Matter of Kasinga* as the most relevant authority on gender asylum claims. It is on this basis that the unifying rationale of a bifurcated nexus analysis can be reinvigorated.

A. Social Group and Bifurcated Analysis in Matter of Kasinga

Fauziya Kasinga, a native of Togo and a member of the Tchamba-Kunsuntu ethnic group, requested asylum to escape FGM¹¹⁹ and forced polygamy. Her father, a rich and successful businessperson, was not in agreement with FGM or forced or polygamous marriages. While he was living, he protected his daughter from these customs.¹²⁰ When she was sixteen, her father died suddenly. Ms. Kasinga's paternal relatives took control of her life and forced her to become the fourth wife of a forty-five-year-old man who told her she would be required to undergo FGM as his wife. With the help of her mother and sister, Ms. Kasinga fled Togo and sought asylum in the United States.¹²¹

116. See *supra* note 10 and accompanying text.

117. *In re R-A-*, 22 I. & N. Dec. 906.

118. 65 Fed. Reg. 76588-98 (Dec. 7, 2000).

119. Female genital mutilation is the practice by which a portion or all of the female genitals are removed. Type I clitoridectomy involves the partial or complete removal of the clitoris. Type II clitoridectomy (excision) involves the excision of the clitoris and part of the labia minora. Type III infibulation involves the removal of the clitoris, labia minora, and parts of the labia majora. Type IV infibulation involves the same amount of cutting, but the labia majora are sutured together to cover the urethra and the vagina, leaving a very small opening by inserting a reed or piece of wood for the passage of urine and menstrual blood. Nahid Toubia, *Female Circumcision as a Public Health Issue*, 331 NEW ENG. J. MED. 712-16 (1994). The form of FGM to which Ms. Kasinga's was to be subjected was Type IV.

120. *In re Kasinga*, 21 I. & N. Dec. at 358.

121. *Id.*

The record in Ms. Kasinga's case documented extensive discrimination against women in Togo.¹²² Discrimination in the educational arena resulted in a far higher rate of illiteracy among women than their male counterparts. Men decided whether their wives were permitted to work and controlled their salaries. Violence against women, including wife beating, was pervasive and there was little police intervention. In addition, the specific practices upon which the claim was based—FGM, forced marriage, and polygamy—were documented as widespread among members of the applicant's ethnic group, the Tchamba-Kunsuntu.¹²³ It was often midwives or elders who carried out the FGM itself, which they believed was a positive act for the young woman and larger community.

At first instance, an immigration judge denied her claim. The judge found Ms. Kasinga not credible, but alternatively ruled that even if she were credible, she did not qualify for relief because FGM was not persecution, and it was not linked to one of the five "enumerated grounds" (i.e., Convention reasons).¹²⁴ The BIA reversed the immigration judge and ruled that FGM was persecution, and the applicant had established the requisite nexus between FGM and a gender defined social group. The particular social group was described as "[y]oung women of the Tchamba-Kunsuntu Tribe, who have not had FGM as practiced by the tribe, and who oppose the practice."¹²⁵ Although the BIA did not refer to it as such, it adopted a bifurcated analysis by considering nexus in relation to both the non-State actors (i.e., those who carried out the FGM) and the State/society. The BIA's ruling that the requisite nexus had been established is all the more significant when one considers that the nexus test in the United States is far more rigid than that of the other States herein discussed.

B. INS v. Zacarias: The Nexus "Test" and Its Application in Matter of Kasinga

The tribunals of the United Kingdom, New Zealand, and Australia explicitly stated that they were not bound to a specific test (e.g., "but for," "effective cause") in determining nexus between the feared persecution and one of the five Convention grounds. In contrast, ever since the United States Supreme Court's decision in *INS v.*

122. Karen Musalo, *In re Kasinga: A Big Step Forward for Gender-Based Asylum Claims*, 73 INTERPRETER RELEASES 853, 854 (1996); Brief for Respondent at 3-4, *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996) (on file with author).

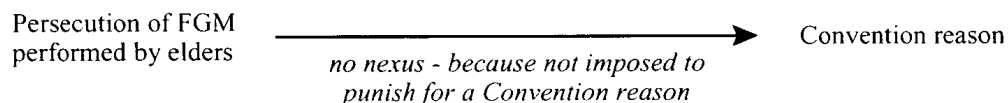
123. See Musalo, *supra* note 122, at 854.

124. *Id.* at 855.

125. *In re Kasinga*, 21 I. & N. Dec. at 365.

Zacarias,¹²⁶ proof of the perpetrator's intent or motivation to persecute because of one of the five grounds has been required to establish nexus.

Prior to *Matter of Kasinga*, the nexus analysis in U.S. jurisprudence appeared to be limited to the motivations of the actual perpetrator of harm. The analysis did not include—as did the decisions in the United Kingdom, New Zealand, and Australia—an examination of the role and motivations of the State or society. In addition, prior to *Matter of Kasinga*, the intent to persecute because of one of the five grounds was assumed to require a malignant motivation, rather than a simple causal connection. This exclusive focus on the actual perpetrator and the perception that a punitive or malignant intent was required, potentially caused an obstacle in *Matter of Kasinga* because the “perpetrators” of the feared harm of FGM were the midwives or elders who performed the rite. They did not have an intent to punish for a Convention reason; to the contrary, “presumably most of . . . [them] believe that they are simply performing an important cultural rite that bonds the individual to society.”¹²⁷ Viewed only in this limited context, the required nexus would fail because the claim would look like this:



In other words, the harm would not be found to have a punitive or malignant intent, nor would it be considered to be imposed with the intention of overcoming a protected status or trait (i.e., race, religion, nationality, political opinion, or particular social group). The argument, which was made on Ms. Kasinga's behalf addressed these issues, and suggested that the proper analysis would determine nexus not

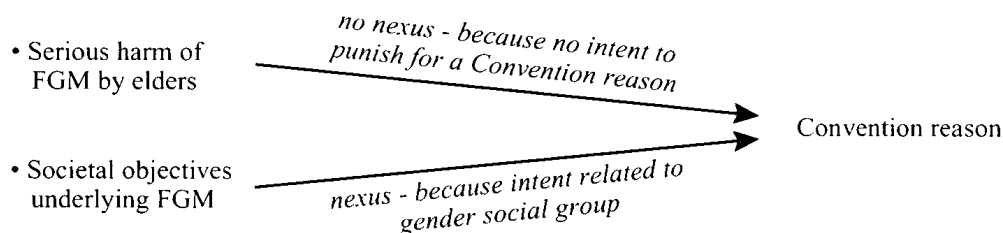
126. 502 U.S. 478 (1992). *INS v. Zacarias* involved the claim of a young Guatemalan male who feared being killed by the anti-government guerrillas of his country for his refusal to join their forces. The U.S. Supreme Court rejected his claim, ruling that he had failed to prove that the guerrillas would kill or otherwise harm him for his political opinion rather than because of his refusal to fight with them. In other words, he had failed to show that his persecutors were motivated by his political opinion, rather than by other non-protected factors. *Id.*

The Supreme Court's “proof of intent” test for establishing nexus has been criticized for posing considerable impediments to protection. The principle obstacles arising from the requirement are two-fold. First, as an evidentiary matter, it is frequently difficult to establish the state of mind or motivation of the persecutor. Second, it may often be the case that harm which is not imposed with the *intent* of punishing for a Convention reason has the *effect* of so punishing. See Musalo, *supra* note 49, at 1186, 1214-19.

127. INS Reply Brief at 16. *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996) (on file with author).

solely by reference to the individual perpetrators of FGM, but within a broader societal context. Documentation demonstrated that although the midwives and elders who carried out the FGM may have had only positive intentions, the societal objectives were less benign. The practice of FGM had “patriarchal underpinnings,” was carried out for the purpose of “gender subjugation,” and was “the most drastic measure taken by any society to control women’s sexuality and reproduction.”¹²⁸ The BIA accepted that these factors could be dispositive. In its decision, the BIA ruled that the applicant had established nexus in light of evidence that FGM was a form of “sexual oppression” with the societal objective of assuring “male dominance and exploitation.”¹²⁹

This analytical formulation bears significant resemblance to the formulations in the United Kingdom, New Zealand, and Australia in its use of a bifurcated analysis and its willingness to determine nexus, not only in relationship to the individual perpetrator of the harm, but in the broader State/societal context. The formulation arising from *Matter of Kasinga* looks like this:



The social group accepted by the BIA was defined by gender, ethnicity, and opposition to FGM. In contrast to the decisions such as *Shah* and *Khawar*, there was no extensive discussion as to whether the appropriate social group would be defined by gender alone, or gender in combination with other defining characteristics. The BIA simply cited *Matter of Acosta* for the principle that a particular social group is one that is defined by immutable or fundamental characteristics and found that the applicant’s gender and tribal affiliation were immutable, and her opposition to FGM was fundamental, therefore, she should not have to change.

128. Transcript of oral argument before the Board on behalf of Fauziya Kasinga, at 53-54. *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996) (on file with author).

129. *In re Kasinga*, 21 I. & N. Dec. at 366.

C. *Matter of R-A-: A Temporary Step Back from the Unifying Rationale*

Rodi Alvarado, the Guatemalan asylum seeker in *Matter of R-A-*, had been the victim of extreme spousal violence for over ten years. Her husband, a former soldier, broke windows and mirrors with her head, whipped her with electrical cords, pistol-whipped her, raped and sodomized her, and kicked her in the genitalia, causing severe bleeding.¹³⁰ Her attempts to secure protection through the police and judicial system were futile. The police told her they would not get involved, while a judge to whom her complaints had been referred told her that he “would not interfere in domestic disputes.”¹³¹ After unsuccessfully trying to hide from her husband within Guatemala, Rodi Alvarado fled to the United States and requested asylum.

Documentation from a range of sources established a bleak picture regarding the status of women in Guatemala. During the relevant time period, there was *de jure* gender discrimination reflected in the Guatemalan civil code, which recognized the “male as the married couple’s legal representative; the female [as] in charge of child care and other domestic responsibilities.”¹³² The civil code also provided that the husband could “legally forbid his wife to engage in activities outside the home” and accorded to the husband “the primary authority in disposing of joint property.”¹³³ Such provisions, which denied women equality under the law, prompted the U.N. Committee on the Elimination of Discrimination to express “increased . . . concern at the discrimination institutionalized in law.”¹³⁴ Domestic violence in Guatemala was pervasive, reflected entrenched cultural attitudes, and resulted in a failure of adequate response by the police and courts.¹³⁵

On the authority of the BIA’s *Matter of Kasinga* decision, an immigration judge granted asylum to Ms. Alvarado, finding that the persecution of spousal abuse was on account of her membership in a gender-defined social group, as well as her political opinion.¹³⁶ The social group was “gender +”—defined by gender, nationality, and

130. *In re R-A-*, 22 I. & N. Dec. at 5-9.

131. Karen Musalo, *Matter of R-A-: An Analysis of the Decision and Its Implications*, 75 INTERPRETER RELEASES 1177, 1179 (1999).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. The political opinion aspects of the decision are outside the scope of this Article, which is focused on gender-defined social groups and the use of a bifurcated analysis. For a discussion of the political opinion analysis in *Matter of R-A-*, see *id.* at 1183.

marital status.¹³⁷ The nexus analysis took into consideration the broader societal context in which the abuse took place.¹³⁸

On appeal, a majority of the BIA reversed the ruling. It ruled that the social group described by the immigration judge did not constitute a particular social group. The BIA held that the immutable or fundamental criteria of *Matter of Acosta* and *Matter of Kasinga* were only threshold requirements. To establish a cognizable social group, an individual also was required to demonstrate that members of the group “understand their own affiliation with the grouping as do other persons in the particular society,” and the harm suffered (e.g., spousal abuse) “is itself an important societal attribute, or in other words, that the characteristic of being abused is one that is important within Guatemalan society.”¹³⁹

The BIA ruled that the group defined by gender, nationality, and marital status did not meet these additional criteria because its members are not “recognized and understood to be a societal faction” and there is no evidence that “women are expected by society to be abused.”¹⁴⁰ Furthermore, even if the social group were cognizable, the claim would fail for failure to establish nexus. According to the BIA majority, the husband/persecutor’s motivation was unrelated to the applicant’s membership in the designated social group.

In its dissent, five members of the BIA disagreed that the husband was not motivated for reasons related to her gender and invoked the *Shah* decision for its bifurcated nexus analysis. The majority explicitly rejected *Shah* and the bifurcated approach, ruling that “[w]e understand the ‘on account of’ test to direct an inquiry into the motives of the entity *actually* inflicting the harm.”¹⁴¹ The BIA’s formulation in *Matter of R-A-* would appear to be as follows:

137. The IJ defined the social group as “Guatemalan women who have been involved intimately with Guatemalan male partners who believe that women are to live under male domination.” *In re R-A-*, 21 I. & N. Dec. at 12.

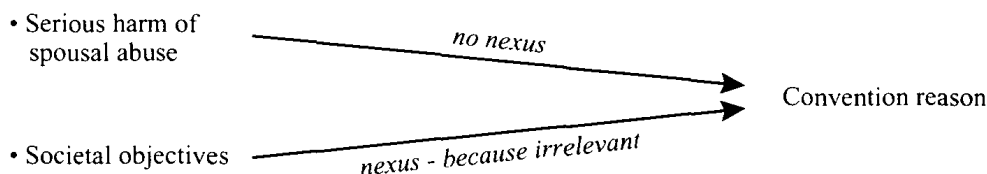
138. The IJ ruled: “The Board recently held that an asylum applicant who was unwilling to undergo female genital mutilation (FGM) had a well-founded fear of persecution on account of her membership in a social group of ‘young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who opposed the practice.’” *Id.* at 31.

The board recognized FGM as a form of sexual oppression to assure male dominance and exploitation. In similar ways the acceptance of spousal abuse assures male dominance and exploitation by enabling men to exert control over their female companions through threats or acts of violence. See also Musalo, *supra* note 131, at 1180.

139. *In re R-A-*, 22 I. & N. Dec. at 31.

140. *Id.* at 32.

141. *Id.* at 42 (emphasis added).



On January 19, 2001, then-Attorney General Janet Reno vacated the BIA's decision in *Matter of R-A-*. As a result, *Matter of Kasinga* is the controlling authority for defining social group and determining nexus. This provides an opportunity for U.S. jurisprudence to further develop the bifurcated nexus analysis first articulated in *Matter of Kasinga*. The analysis has become increasingly significant in the decisions of other Convention parties and, as discussed below, constitutes the analytical approach recommended in recently released UNHCR guidelines.

VI. THE UNHCR GUIDELINES ON SOCIAL GROUP AND GENDER

As part of its process of Global Consultations,¹⁴² in May 2002, the UNHCR issued guidelines on both membership in a particular social group¹⁴³ and gender-related persecution.¹⁴⁴ The guidelines, which are intended to provide broad interpretive guidance,¹⁴⁵ are significant for affirming gender-defined social groups and expressly adopting the bifurcated nexus analysis discussed above. The two sets of guidelines overlap in their areas of coverage and are mutually reinforcing.

A. *The Definition of Social Group in the Guidelines*

The Social Group Guidelines (Guidelines) recommend an expanded definition of social group, which incorporates the following two principal approaches in State practice: (1) the "protected characteristic approach," which recognizes groups united by immutable and fundamental characteristics; and (2) the "social perception" approach, which recognizes groups perceived by society as being a cognizable group. The cases discussed in Section IV have primarily relied upon

142. The Global Consultations marked the fiftieth anniversary of the drafting of the U.N. Refugee Convention and included a process of research and dialogue regarding key aspects of the refugee definition and contemporary refugee issues. For more on the Global Consultations, visit the UNHCR's website, at <http://www.unhcr.ch/cgi-bin/texis/vtx/global-consultations>.

143. See Social Group Guidelines, *supra* note 5.

144. See Gender Guidelines, *supra* note 6.

145. The Guidelines, which are issued pursuant to UNHCR mandate, are "intended to provide legal interpretive guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determinations in the field." They replace prior guidelines on the same topics, and are to be "read in conjunction with the UNHCR Handbook." *Id.* at 1.

the protected characteristic approach, but the Guidelines observe that a number of States have recognized women as constituting a particular social group under both the protected characteristic and social perception approaches.

The Guidelines articulate the standard resulting from the merger of the protected characteristic and social perception approaches as follows:

[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 innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.¹⁴⁶

The Guidelines note that women meet the social group definition both because of their "innate and immutable characteristics" and due to the fact that in society they "are frequently treated differently [than] men."¹⁴⁷ In underscoring the viability of gender-based social groups, the Guidelines expressly state that size of the group "is not a relevant criterion,"¹⁴⁸ and they reject the "cohesion" requirement, which, as discussed in Section III.B, has its origins in the *Sanchez-Trujillo* decision. On this point, the Guidelines provide that because cohesion is not a requirement, "women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic."¹⁴⁹

Although the Guidelines on Gender-Related Persecution (Gender Guidelines) note that any of the five Convention grounds may be implicated in women's claims, it recognizes that women's claims have often come within the social group ground "making a proper understanding of this term of paramount importance."¹⁵⁰ The Gender Guidelines expressly adopt the standard established in the Social Group Guidelines, and reiterate its applicability to women.¹⁵¹ As did the Social Group Guidelines, the Gender Guidelines repudiate those factors that have been relied on to negate gender-defined social groups, namely, the size of the group and the requirement of cohesiveness/voluntary association.¹⁵²

146. See Social Group Guidelines, *supra* note 5, ¶ 11.

147. *Id.* ¶ 12.

148. *Id.* ¶ 18.

149. *Id.* ¶ 15.

150. See Gender Guidelines, *supra* note 6, ¶ 28.

151. *Id.* ¶¶ 29-30.

152. *Id.* ¶ 31.

B. The Nexus Analysis

The Guidelines on Social Group and Gender-Related Persecution adopt without reservation the bifurcated analysis that characterized the decisions from the United Kingdom, Australia, and New Zealand. Nexus is established where the actions of the State or the non-State actor is related to a Convention reason. The Social Group Guidelines express the rule as follows:

The causal link may be satisfied: (1) where there is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) 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 a Convention reason.¹⁵³

Although the Social Group Guidelines have a broader application than gender, they make it quite clear that the bifurcated analysis is intended to help resolve the controversy over nexus in gender cases (i.e., the guidelines mention domestic violence as an example of a claim benefitting from the bifurcated approach).¹⁵⁴ The unequivocal adoption of this approach in the two sets of guidelines provides a welcome clarity to the UNHCR's position on the issue. By affirming the approach taken explicitly by the tribunals of the United Kingdom, Australia, and New Zealand, and implicitly by the United States in *Matter of Kasinga*, the UNHCR has made an important contribution to the evolving jurisprudence on the issue of gender persecution. Although its recommendations are non-binding, as the weight of authority supporting this interpretive approach grows, it will be increasingly difficult for States to reject this analytical approach and deny protection to women fleeing gender-related persecution.

153. See Social Group Guidelines, *supra* note 5, ¶ 23. Paragraph 21 of the Gender Guidelines articulate the same rule:

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 reasons of a Convention ground, the causal link is also established.

Id.

154. *Id.* ¶ 22.

VII. CONCLUSION

The increasing recognition of gender claims has not been without great controversy. Many of its most vocal critics have argued that a fair interpretation of the Refugee Convention, or the domestic refugee law of the United States, does not encompass such claims.¹⁵⁵ These recent decisions of the tribunals of the United Kingdom, New Zealand, and Australia present a different perspective. They clearly stand for the proposition that a social group may be defined by gender, and if the role of the State as well as the individual persecutor is considered, nexus can easily be established. This approach makes an invaluable contribution to the evolving jurisprudence and, most notably, it does so in a way that is entirely consistent with the underlying principles of the refugee protection regime: to provide surrogate protection when the individual's country of nationality fails to do so.¹⁵⁶ The recent UNHCR guidelines are significant for affirming this analytical approach and doing so in a way that is more explicit and direct than its prior pronouncements on the issue.

The United States has moved in a contradictory and unsteady manner on the issue. The BIA's *Matter of Kasinga* decision broke new ground and, although it employed a slightly different rationale than that of the trilogy of cases herein discussed, it too developed a bifurcated analysis, which allowed it to contextualize the claim within the country and society of the asylum seeker. With the issuance of its decision in *Matter of R-A-*, the BIA appeared poised to reverse itself and negate the progress made with *Matter of Kasinga*. The vacating of *Matter of R-A-* by former Attorney General Janet Reno gave the United States another opportunity to revisit the issue, and left *Matter of Kasinga* as the remaining single most significant relevant precedent in the United States. When the BIA revisits *Matter of R-A-*, it can reach a protection-oriented decision by applying its own *Matter of*

155. See, e.g., Dan Stein, *Gender Asylum Reflects Mistaken Priorities* (Human Rights Brief 1996), available at <http://www.wcl.american.edu/pub/humright/brief/v3i3/stein33.htm> (last visited Feb. 12, 2003) ("Asylum is designed to provide people protection from governments, not prevailing cultural norms,—no matter how much we may dislike them."). Another anti-immigration activist, Barbara Coe, expressed her opposition to gender asylum with the comment, "'You get a punch in the mouth, and you're home free.'" Anna Quindlen, *Torture Based on Sex Alone*, NEWSWEEK, Sept. 10, 2001, at 76 (quoting Barbara Coe).

156. See JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* 124 (1991):

[R]efugee law is designed to interpose the protection of the international community only in situations where there is no reasonable expectation that adequate national protection of core human rights will be forthcoming. Refugee law is therefore 'substitute protection' in the sense that it is a response to disenfranchisement from the usual benefits of nationality.

Id.

Kasinga precedent in a manner consonant with the rationale developed in its three sister-States, as well as the UNHCR. For the United States to do otherwise would be a regrettable rejection of well-developed refugee norms, as well as international principles of non-discrimination on the basis of gender.¹⁵⁷

157. As this article goes to print, there has been a significant development. Attorney General John Ashcroft has certified *Matter of R-A-* to himself for decision, and it is rumored that he intends to re-instate a decision very similar to the original negative decision issued by the Board of Immigration Appeals in 1999. (Letter of certification on file with author)