A SHORT HISTORY OF GENDER ASYLUM IN THE UNITED STATES: RESISTANCE AND AMBIVALENCE MAY VERY SLOWLY BE INCHING TOWARDS RECOGNITION OF WOMEN'S CLAIMS

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This article provides an overview and analysis of protection for gender-related claims to refugee status, with a focus on the United States. It defines the term "gender-related" and explains the historical interpretive barriers to such claims. The article examines the earliest United Nations High Commissioner for Refugees pronouncements on the issue – beginning with Executive Committee of the High Commissioner's Programme Conclusion No. 39 in 1985, and the United Nations High Commissioner for Refugees' first Guidelines on the Protection of Refugee Women in 1991, and continues through its Social Group and Gender Guidelines, issued in 2002. Within this context (and the context of other developments – such as the 1993 issuance of Canadian Guidelines), the article discusses developments in the United States, beginning with the release of "Gender Considerations" in 1995. It reviews the subsequent development of the United States jurisprudence, from Matter of Kasinga in 1996, to the recent resolution of Matter of R-A- (the case of Rody Alvarado) in 2009. It explains the current position of the Obama Administration, as set forth in a brief in the case of L.R. Through the discussion of this jurisprudence, the article highlights the ambivalence among United States adjudicators, and examines the advances and setbacks in the recognition of gender-related claims to protection. It concludes that the United States appears to be adopting a position more consistent with international guidance, but that until there is binding precedent, adjudicators remain free to retreat from the small advances that have been made.

1. Introduction

In the United States (US), few refugee issues have been as controversial as that of gender asylum.[1] In 1996, the Board of Immigration Appeals (BIA) broke new

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[1] The term "gender-asylum" is generally understood to describe two types of claims: (1) claims in which the form of persecution is unique to, or disproportionately inflicted on women (for example, female genital cutting (FGC), domestic violence, rape, forced marriage) regardless of the 1951 Geneva Convention Relating

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ground, issuing a landmark decision, in the *Matter of Kasinga* case,[2] granting asylum to a young woman from Togo who fled FGC. Three years later – in 1999 – the BIA seemed to beat a hasty retreat from *Matter of Kasinga*, when it denied asylum to Rody Alvarado,[3] a Guatemalan woman who fled years of brutal domestic violence. The decision, *Matter of R-A-*,[4] provoked a firestorm of criticism, leading to the issuance of proposed regulations,[5] as well as the personal intervention of three successive Attorneys General (AG) of the United States.[6]

None of that was sufficient to resolve Ms Alvarado's case – it remained pending for an additional ten long years – and was only brought to conclusion in December 2009 when she was granted asylum by an immigration judge (IJ). The decision in Ms Alvarado's case is less than a sentence long; and although the victory has great symbolic significance, it has no precedential value.[7] Other recent developments indicate that the Obama Administration is more open to recognition of gender asylum claims than prior administrations, but progress on this issue is far from assured,[8] and there is a dearth of US jurisprudence to establish applicable norms.

The protracted gender asylum debate in the US leads one to question why this protection issue has been so controversial. A review of the arguments and comments made by opponents to gender asylum reveal two recurring sentiments – (1) the 1951 Refugee Convention,[9] and its 1967 Protocol Relating to the

to the Status of Refugees (Refugee Convention) ground for which it is inflicted and (2) claims in which the harm may or may not be gendered, but the reason (nexus) it is imposed is because of the victim's gender. A woman raped for political activism has suffered a gendered form of harm, imposed for non-gender reasons (political opinion), whereas a woman prohibited from attending school or working has suffered non-gendered forms of harm, which are imposed for gender reasons. It is not uncommon for claims to involve gendered forms of harm, which are also inflicted for reasons of gender. The clearest examples of such claims are those involving FGC.

2 *Matter of Kasinga* 21 I. & N. Dec. 357 (BIA 1996).

3 The correct spelling of Ms Alvarado's first name is "Rody". Court documents erroneously report the spelling as "Rodi" and it is this latter spelling which appears in the many decisions and commentary on the case.

4 *Matter of R-A-* 22 I. & N. Dec. 906 (BIA 1999).

5 Asylum and Withholding Definitions, 65 Fed. Reg. 76588 (7 Dec. 2000).

6 Attorneys General Janet Reno, John Ashcroft, and Michael Mukasey all took personal jurisdiction over the case. Their respective actions in the case are discussed in Section 3.3.3.

7 By the time the IJ decided Ms Alvarado's case, the Department of Homeland Security (DHS), which represents the Government in these proceedings, had stated that Ms Alvarado was "eligible for asylum and merits a grant of asylum as a matter of discretion". The IJ's decision simply stated that: "Inasmuch as there is no binding authority on the legal issues raised in this case, I conclude that I can conscientiously accept what is essentially the agreement of the parties [to grant asylum]." Decision of the IJ, 10 Dec. 2009 (on file with the author).

8 In April 2009, shortly after the Obama Administration came into power, the DHS filed a brief to the BIA in the asylum claim of a Mexican woman, known as *L.R.* who had suffered extreme domestic violence. Department of Homeland Security's Supplemental Brief, 13 Apr. 2009 (DHS L.R. Brief), available at: http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf (last visited 9 Jun. 2010). The case had been denied by an IJ in October 2007; and prior to the Obama Administration, the DHS had fully defended the IJ's decision. In its April 2009 brief, however, it retreated from that defence, and stated that in some cases, women who are victims of domestic violence could qualify for asylum. This case is discussed in detail in Section 3.4.

9 Geneva Convention Relating to the Status of Refugees, 189 UNTS 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954).

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Status of Refugees (Refugee Protocol)[10] were never intended to extend protection in these situations[11] and (2) accepting such claims will open the floodgates and result in a deluge of claims.[12] Both of these arguments are without basis in law or fact; as discussed below in Section 2.2, the guidance of the United Nations High Commissioner for Refugees (UNHCR) has unequivocally recognized that gender claims come within the 1951 Refugee Convention's intended scope of protection. Furthermore, history and experience demonstrate that the acceptance of gender asylum does not give rise to a skyrocketing number of claims.[13]

2. Interpretive barriers and UNHCR response

2.1. Interpretive barriers

The argument that the 1951 Refugee Convention was never intended to protect victims of gendered persecution arose from a number of perceived interpretive barriers. First, the harms suffered by women often consist of acts condoned or required by social norms or culture, such as FGC or forced marriage. Their characterization as social or cultural norms frequently resulted in a reluctance to define them as persecution.[14] Second, although gendered forms of persecution can be inflicted for any of the five Convention grounds, it is often imposed because of gender – which is not one of the grounds. Third, the perpetrators of

[10] Protocol Relating to the Status of Refugees, 606 UNTS 267, 31 Jan. 1967 (entry into force: 4 Oct. 1967).

[11] David Ray of the Federation for American Immigration Reform (FAIR) was quoted in an article as saying that asylum "was never meant to be divorce court [...]. To expect asylum law to address family issues is impractical and invites huge abuses of the system." K. Musalo, "Protecting Victims of Gendered Persecution: Fear of Floodgates, or Call to (Principled) Action", *Virginia Journal of Social Policy and the Law*, 14(119), 2007, 132 (footnote 36). The disparagement of such claims is illustrated by a comment reported in *Newsweek*, where one anti-immigrant activist snidely commented, "You get a punch in the mouth, and you're home free." A. Quindlen, "Torture Based on Sex Alone", *Newsweek*, 10 Sep. 2001, 76.

[12] David Ray of FAIR directly invoked the floodgates argument, commenting, "You can't just say, 'I'm in a bad situation and therefore I'm a member of some new social group.['] If the categories grow so large as to include millions of people, asylum policy is going to crumble." D. Stein, "Ashcroft Re-Considers Clinton-Era Asylum Rule", *The Stein Report*, 3 Mar. 2003, available at: www.steinreport.com/archives/001682.html (last visited 19 May 2010).

[13] The experience in Canada, which has accepted gender asylum claims since 1993, and in the US after the decision in *Matter of Kasinga* belie the myth of the floodgates: neither country experienced a surge of claims following their acceptance of the legitimacy of such claims. For a discussion of the floodgates, see, Musalo, "Protecting Victims of Gendered Persecution", 132–133. The reason that women have not deluged countries of asylum is explained as follows: "There are several explanations why the number of women asylum seekers has not dramatically increased with the legal recognition of gender claims for protection. First, women who would have legitimate claims for gender asylum often come from countries where they have little or no rights, which limits their ability to leave their countries in search of protection. Second, they are frequently – if not always – primary caretakers for their children and extended family. Thus they often have to choose between leaving family behind, or exposing them to the risks of travel to the potential country of refuge. [. . .] Finally, women asylum seekers often have little control over family resources, making it impossible for them to have the means to travel to a country where they might seek asylum." *Ibid*., 132.

[14] The reluctance to define cultural norms as persecution is illustrated by the position taken by the US immigration authorities in *Matter of Kasinga*. In its brief to the BIA, the then Immigration and Naturalization Service (INS) argued that it was difficult to consider FGC as persecution since "most of its practitioners believe that they are simply performing an important cultural rite that bonds the individual to society". Brief of the INS to the BIA in *Matter of Kasinga*, 28 Feb. 1996, 16–17, available at: www.justice.gov/eoir/efoia/kasinga3.pdf (last visited 17 May 2010).

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gendered harms are often non-state actors, such as husbands, fathers, or members of the applicant's extended community, and there was resistance to accepting such claims as coming within the refugee definition, owing to the paradigm of the State as the persecuting agent. Beginning in 1985, UNHCR and its Executive Committee (EXCOM) began to issue guidance that directly addressed the issue of refugee women and the interpretive barriers which stood in the way of protection.

2.2. Relevant UNHCR guidance

2.2.1. EXCOM Conclusion No. 39 (1985)

The first pronouncement emanated from EXCOM in the form of *Conclusion No. 39 on Refugee Women and International Protection*.[15] The key language stated that:

> [. . .] States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention.[16]

Through this language the Conclusion addressed two of the barriers to gender-related claims mentioned above – the characterization of cultural or social norms as persecution, and the causal relation to a Convention ground. It provided guidance on the former by implicitly accepting that "harsh or inhuman treatment" for transgressing social norms could constitute persecution and on the latter by explicitly stating that women in these circumstances could be considered to be members of a particular social group.

2.2.2. UNHCR Guidelines on the Protection of Refugee Women (1991)

Six years later, in 1991, UNHCR next spoke[17] on the issue in the form of *Guidelines on the Protection of Refugee Women*.[18] These Guidelines expressly acknowledged that "the grounds for establishing refugee status do not include gender". However, they referred to the 1985 EXCOM Conclusion, quoting its recommendation that women persecuted for violating societal laws or customs be considered as a "'social group' to ensure their coverage".[19] In this way, they

[15] EXCOM, *Conclusion on Refugee Women and International Protection*, EXCOM Conclusion No. 39 (XXXVI), 18 Oct. 1985.

[16] *Ibid.*, para. (k).

[17] The enumeration of UNHCR and EXCOM's Conclusions is not intended to be comprehensive; there are other UNHCR documents which speak generally to the issue of refugee women. The materials discussed herein are those most relevant to the interpretive issues. See, D. Buscher, "Refugee Women: Twenty Years On" and A. Edwards, "Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950–2010", contributions in this volume.

[18] UNHCR, *Guidelines on the Protection of Refugee Women*, Geneva, UNHCR, 1 Jul. 1991.

[19] *Ibid.*, para. 54.

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reinforced the analytical approach of using "particular social group" to encompass women's claims, where appropriate. The Guidelines went beyond the discussion of persecution linked to transgression of social mores, noting that women may also suffer "severe sexual discrimination",[20] or rape and other sexual assault during warfare[21] – and that these forms of harm can also be the basis of a legitimate claim to refugee status.

2.2.3. EXCOM Conclusion No. 73 (1993)

In 1993, UNHCR EXCOM issued a Conclusion[22] which became the catalyst for States to develop guidance on gender asylum for their refugee status determination procedures. EXCOM *Conclusion No. 73 on Refugee Protection and Sexual Violence* recommended "the development by States of appropriate guidelines on women asylum-seekers in recognition of the fact that women refugees often experience persecution differently from refugee men".[23] Canada was the first to do so, in 1993,[24] followed by the US in 1995.[25] As discussed below, the issuance of guidance in the US was admirable, but largely ineffective in influencing the outcomes in gender cases. It should be noted that many other countries have since followed the recommendation of EXCOM Conclusion No. 73, issuing national guidance on the adjudication of gender-related claims.[26]

2.2.4. UNHCR gender and social group Guidelines on international protection (2002)

In UNHCR's development of guidance, one of the most significant documents is its 2002 Gender Guidelines,[27] which incorporated the results of the Global Consultations on International Protection,[28] and were intended to replace

[20] *Ibid.*, para. 55.

[21] *Ibid.*, para. 56.

[22] EXCOM, *Conclusion on Refugee Protection and Sexual Violence*, EXCOM Conclusion No. 73 (XLIV), 8 Oct. 1993.

[23] *Ibid.*, para. (e).

[24] Immigration and Refugee Board of Canada (IRBC), *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*, Mar. 1993, updated version available at: www.irb-cisr.gc.ca/eng/brdcom/references/pol/guidir/Pages/women.aspx (last visited 20 May 2010).

[25] US Department of Justice (DOJ), *Considerations for Asylum Officers Adjudicating Asylum Claims From Women*, memorandum from Phyllis Coven, Office of International Affairs, 26 May 1995 (*Gender Considerations*), published by INS in: 72 NO. 22 Interpreter Releases 771 at 771 (Jun. 1995).

[26] The discussion of the national gender guidance of other States is beyond the scope of this article. For a list of countries and guidelines, see: http://cgrs.uchastings.edu/law/gender_guidelines.php (last visited 9 Jun. 2010).

[27] UNHCR, *Guidelines on International Protection No. 1: 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*, UN Doc. HCR/GIP/02/01, 7 May 2002.

[28] UNHCR undertook the Global Consultations on International Protection from 2000 to 2002 with three primary objectives: "to reaffirm State's commitment to the Refugee Convention, to resolve interpretative inconsistencies [. . .] and to devise new tools and approaches to situations not fully covered by the Convention." N. Kelley, "International Refugee Protection Challenges and Opportunities", *International Journal of Refugee Law*, 19(3), 2007, 401–439. UNHCR addressed these objectives in three tracks. "The first

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UNHCR's 2000 Paper on Gender-Related Persecution.[29] The Gender Guidelines are distinct from prior UNHCR guidance in that they reflect on, and respond to a decade of developments in "case law, [. . .] State practice generally and [. . .] academic writing".[30] It appears that one objective of the Guidelines was to affirm those interpretive approaches consistent with UNHCR's position, and to serve as a corrective for problematic jurisprudential areas.

The Guidelines unequivocally state that a proper interpretation of the refugee definition "covers gender-related claims",[31] thus directly responding to the long-simmering controversy as to whether the protection of women from gendered harms properly falls within the 1951 Refugee Convention and its 1967 Protocol. Human rights norms serve as useful guides to defining persecution,[32] which may take the form of rape, sexual violence, dowry-related violence, FGC, domestic violence, or trafficking.[33] The implementation of a law or punishment for non-compliance can constitute persecution, as could discrimination,[34] especially when it results in the State failing to "accord certain rights or protection from serious abuse [. . .] which results in serious harm inflicted with impunity".[35] On the issue of Convention grounds and nexus, the Guidelines observe that "there is no need to add an additional ground"[36] because a "gender-sensitive interpretation"[37] of the existing five grounds is sufficient to extend protection; membership of a particular social group will often be the appropriate Convention ground in gender cases.

track incorporated a Ministerial Meeting of the State Parties to the 1951 Convention and/or 1967 Protocol that culminated in a Declaration of the State parties to these human rights instruments. [. . .]. The second track [. . .] involved a series of expert roundtables that were held in various locations in Europe [. . .] and addressed specific issues on the interpretation of the 1951 Convention. [. . .]. The third track brought together States and other actors, including refugees, to examine specific or thematic refugee protection concerns." J. Simeon, "Exclusion Under Article 1F(a) of the 1951 Convention in Canada", *International Journal of Refugee Law*, 21(2), 2009, 199–200.

29 UNHCR, *UNHCR Position Paper on Gender-Related Persecution*, 1 Jan. 2000, available at: www.unhcr.org/refworld/docid/3bd3f2b04.html (last visited 21 May 2010). The paper cautioned against "approaching refugee claims by women along the lines of the more traditional, and familiar, situation of refugee men." *Ibid.*, sec. II, "A Gender-Sensitive Approach to Interpreting and Applying the Refugee Definition". It enumerated a number of harms unique to, or disproportionately inflicted on women, which could rise to the level of persecution. Included among these harms were sexual violence, punishment for transgression of law or policy, and discrimination – including State discrimination which resulted in women being abused with impunity by non-state actors. The paper notes that nexus could be based on any of the five 1951 Refugee Convention grounds, but that gender claims "have most often been analyzed" within the social group ground. *Ibid.*, sec. C., "Membership of a Particular Social Group".

30 UNHCR, *Guidelines on International Protection No. 1: Gender-related Persecution*, para. 5.

31 *Ibid.*, para. 6.

32 *Ibid.*, para. 5.

33 *Ibid.*, para. 9.

34 *Ibid.*, paras. 10–15.

35 *Ibid.*, para. 15.

36 *Ibid.*, para. 6.

37 *Ibid.*, para. 22.

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UNHCR's Gender Guidelines were released simultaneously with its Social Group Guidelines.[38] The Social Group and Gender Guidelines are uniform in their approach to defining a particular social group and establishing nexus. Taken together they affirm that a particular social group may be established either by immutable/fundamental characteristics, or by the social perception that the individuals are a recognized group.[39]

The two sets of Guidelines also provided much needed guidance on establishing the causal connection between the harm and the Convention ground in cases involving non-state actors – who are frequently the persecutors in gender cases. The Guidelines recommend the required nexus to be found where the risk of being persecuted by the non-state actor is "related to one of the Convention grounds" or where the "inability or unwillingness of the State to offer protection" is related to a Convention ground, regardless of the non-state actor's reasons for inflicting the harm.[40] This approach, which is commonly referred to as a "bifurcated" nexus analysis, has been applied by tribunals in the United Kingdom, New Zealand, and Australia.[41]

3. Gender claims in the US

3.1. The issuance of gender guidelines in the US

Canada was the first country to issue formal guidelines in response to the call for State guidance set forth in the 1993 EXCOM Conclusion, para. (k), with the US following two years later.[42] The US guidance, entitled *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*,[43] were in the form of non-binding guidance directed to Asylum Officers, who form the first tier of decision-making in the US system.[44] Although IJs, the BIA, and the Circuit

[38] UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, UN Doc. HCR/GIP/02/02, 7 May 2002.

[39] UNHCR, *Guidelines on International Protection No. 1: Gender-related Persecution*, paras. 28–29; UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group"*, paras. 12, 13.

[40] UNHCR, *Guidelines on International Protection No. 1: Gender-related Persecution*, para. 21; UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group"*, paras. 21–23.

[41] *Islam v. Secretary of State for the Home Department* [1999] 2 WLR 1015 (HL (1999)). Refugee Appeal No. 71427/99 (2000), available at: www.refugee.org.nz/Fulltext/71427-99.htm (last visited 21 May 2010); *Minister for Immigration and Multicultural Affairs v. Khawar* [2002] 76 ALJR 667, available at: www.austlii.edu.au/au/cases/cth/HCA/2002/14.html (last visited 21 May 2010).

[42] The Canadian Guidelines attempted to address the full range of issues implicated in gender claims – when is a harm persecution; how is nexus to be analysed; what evidentiary issues are intrinsically related to gender-related claims; and what are the special issues that may arise in refugee determination hearings. IRBC, *Guidelines on Women Refugee Claimants*, 6.

[43] US DOJ, *Gender Considerations*, 6.

[44] In the US, asylum-seekers who are not in removal proceedings can affirmatively apply for asylum, and have their cases adjudicated in a non-adversarial forum before an Asylum Officer. Once they are in removal proceedings, claims for asylum are adjudicated by IJs, and may then be appealed to the BIA, and then to the federal circuit courts of appeal.

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Courts could take note of them, the Considerations were not directed to those adjudicatory bodies.

The US Considerations are generally positive in their approach and content. They referred to the significant developments which preceded their issuance – citing the UNHCR documents as well as the Canadian Guidelines. They noted the importance of analysing gender claims within "the framework provided by existing international human rights instruments"[45] and provided examples of gendered harms which could constitute persecution, including "sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence and forced abortion".[46] They noted that "[s]erious physical harm consistently has been held to constitute persecution"[47]; that discrimination can "accumulate over time or increase in intensity"[48] so that it rises to the level of persecution. The Considerations also acknowledged that being forced to violate one's fundamental beliefs – for example, by having to comply with religious dictates that one does not adhere to – could also be persecution.[49] Nexus is also addressed in the Considerations and is identified as one of the most "difficult issues" arising in gender claims.[50] The Considerations focused on political opinion and social group as possible grounds upon which gender claims would be based and noted some conflict among the circuit courts as to whether a social group can be based on gender alone.

3.2. Matter of Kasinga – the first landmark gender case

The US Considerations were issued on 26 May 1995. In December of that year a young woman, Fauziya Kassindja (the immigration authorities improperly recorded her name as "Kasinga" which is how it appears in the BIA's decision and commentary on it) fleeing FGC and forced marriage, arrived in the US seeking asylum. She travelled with false documents, and therefore was detained and put in deportation (now called "removal") proceedings. Because she was in deportation, her case was adjudicated by an IJ rather than an Asylum Officer. As mentioned above, the US Considerations are directed to Asylum Officers and not IJs – and indeed – the IJ before whom she appeared let it be known that the Considerations would not affect how he would decide the case.

Ms Kassindja presented a classic gender asylum claim. She was a native of Togo, and a member of the Tchamba–Kunsuntu tribe; social customs required FGC and forced polygamous marriages were widespread. Women were not expected to pursue higher education, and few attended secondary school or

[45] US DOJ, *Gender Considerations*, 2.

[46] *Ibid.*, 9.

[47] *Ibid.*

[48] *Ibid.*

[49] *Ibid.*, 9–10.

[50] *Ibid.*, 10.

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university. Violence against women, including wife-beating, was pervasive, and the authorities did little to protect women from such treatment.

Ms Kassindja's father did not agree with the prevailing social norms, protecting his daughters from FGC and encouraging them to enter into monogamous marriages of their own choosing. When Ms Kassindja was 16 years old, her father died suddenly. Because of the patriarchal nature of the society, it was Ms Kassindja's paternal aunt, rather than her mother, who assumed authority. The aunt ordered Ms Kassindja's mother to leave the family home, and told Ms Kassindja that she was to abandon her studies. The aunt subsequently informed Ms Kassindja that she was to become the fourth wife to Ibrahim Isaka, a 45-year-old former politician, and that as a condition of the marriage she was to undergo FGC. Notwithstanding her objections, Ms Kassindja was married to Ibrahim Isaka and her aunt informed her that she was to undergo FGC four days following the marriage. With the help of her mother and sister, Ms Kassindja escaped before she could be subjected to FGC, travelling first to Germany and then to the US where she sought asylum.[51]

The IJ she appeared before denied Ms Kassindja's request for asylum, finding her not credible,[52] and ruling that even if she were to be believed she did not qualify for relief, because she was "not being singled out for circumcision [. . .] [since] all members of her ethnic tribal group"[53] were forced to undergo the FGC. Although the IJ did not spell out his reasoning in more detail than that, it may be inferred that he found FGC not to be persecutory since it was a cultural practice endemic to Ms Kassindja's ethnic group.

Ms Kassindja appealed the IJ's decision to the BIA. The then INS[54] initially was going to forgo the submission of a brief to the BIA, filing a notice with the court in October 1995 that it was declining to brief the case because the "decision of the IJ correctly states the facts and law of the case".[55] However, the national media took an interest in the case[56] and as publicity mounted the BIA

[51] Ms Kassindja arrived in the US at Newark International Airport on 17 Dec. 1994 and was immediately placed in detention. She spent more than 16 months in detention while her case was being decided.

[52] In finding Ms Kassindja not credible, the IJ held that her testimony lacked "rationality", "internal consistency", and "inherent persuasiveness". *Matter of Kasinga*, 364. The IJ's ruling was not based on generally accepted criteria in the determination of credibility, but arose from his disbelief regarding prevailing cultural norms in Togo. For instance, he found a contradiction in Ms Kassindja's testimony that FGC was pervasive, yet she had managed to avoid it until her father's death, and he found it not believable that Ms Kassindja did not know her mother's whereabouts after her aunt banished the mother. *Ibid.*

[53] *In re Kasinga*, No. A73 476 695 at 12 (Immigr. Ct. 25 Aug. 1995).

[54] At the time Ms Kassindja's case was decided, the Government was represented in immigration proceedings by the INS, which was housed within the DOJ. In 2002, Congress enacted the Homeland Security Act which reorganized many federal agencies, and created the DHS. DHS, *Brief Documentary History of the Department of Homeland Security 2001–2008*, available at: www.dhs.gov/xlibrary/assets/brief_documentary_history_of_dhs_2001_2008.pdf (last visited 21 May 2010). Pursuant to the Homeland Security Act, the DHS attorneys within the Immigration and Customs Enforcement branch now represent the Government in adversarial immigration proceedings.

[55] Government's Brief In Response to Applicant's Appeal From Decision of IJ in *Matter of Kasinga*, 16–17 (on file with the author).

[56] J. Mann, "When Judges Fail", *Washington Post*, 19 Jan. 1996; C.W. Dugger, "Woman's Plea for Asylum Puts Tribal Ritual on Trial", *New York Times*, 15 Apr. 1996, A1; C.W. Dugger, "U.S. Frees African Fleeing

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ordered the then INS to file a brief. The INS complied, even requesting an extension because of the "complex" and "important" issues raised by the case.

On appeal, the INS did not argue that Ms Kassindja was not credible and it did not defend the IJ's adverse credibility finding. On the question of substantive eligibility, the INS agreed with Ms Kassindja that a well-founded fear of FGC could be the basis for a viable claim to asylum based on membership in a particular social group. However, while Ms Kassindja's counsel argued that traditional principles of asylum jurisprudence supported such a result, the INS maintained that the case required a new framework and definition of persecution.[57]

In its landmark decision, the BIA rejected the INS's argument that a new framework was required. It found that FGC is a severe enough harm to constitute persecution. Furthermore, it applied the holding of its seminal social group decision, *Matter of Acosta*,[58] to find that Ms Kassindja was the member of a particular social group defined by gender in combination with other immutable and fundamental characteristics.[59] The BIA ruled that the persecution she feared was on account of her social group membership.

The *Kasinga* decision implicitly overcame the interpretive barriers which had so often stood in the way of relief in these claims. It found FGC to be persecution, notwithstanding the fact that it is a widely condoned cultural practice. It recognized that social groups could be defined in reference to gender and it did so in a case involving non-state actors – namely the family and community which sought to impose genital cutting. In addition, it had no difficulty finding a nexus between the persecution and the social group membership. The finding of nexus was particularly significant because in the US, ever since the Supreme Court's decision *INS v. Zacarias*,[60] nexus requires proof of the persecutor's motivation, which is often difficult to establish. In the *Kasinga* case, the BIA

Ritual Mutilation", *New York Times*, 25 Apr. 1996, A1; C. Shiner, "Persecution by Circumcision: Woman Who Fled Togo Convinced U.S. Court but Not Town Elders", *Washington Post*, 3 Jul. 1996, A1.

57 The INS argued that in order for a harm to constitute "persecution" it must be inflicted on the victim with malignant or punitive intent. (Brief of the INS to the BIA in *Matter of Kasinga*.) Following from its own premise, the INS posited that FGC cases are difficult because "[i]f malignant or punitive intent on the part of the actor were always required before persecution is found, then FGM would rarely be considered persecution. Presumably most of its practitioners believe that they are simply performing an important cultural rite that bonds the individual to society." (*Ibid*., 16). The INS then suggested that the requirement of malignant or punitive intent be waived where the type of harm "is so extreme as to shock the conscience of the society from which asylum is sought." (*Ibid*., 17). According to the INS, in order to "shock the conscience", (1) the harm must be extreme; (2) the harm must be inflicted on an "unconsenting or resisting" individual; and (3) the individual must actually be "seized and subjected" to the conscience-shocking violation, and not "merely" suffer the consequences, "albeit burdensome," for refusal. (*Ibid*., 17–18). In what is a disturbing proposition to many human rights and children's rights advocates, the INS asserted that FGC victims who were mutilated as children are presumed to have consented to it. (*Ibid*., 18).

58 *Matter of Acosta* 19 I. & N. Dec. 211 (BIA 1985).

59 The particular social group was defined as "[y]oung women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by the tribe, and who oppose the practice." *Matter of Kasinga*, 365.

60 *INS v. Zacarias* 302 U.S. 478 (1992).

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appeared to take the societal context[61] into consideration in determining nexus. For all of these reasons, the decision was hailed as constituting a step forward, in line with the recommendations of UNHCR and the position of countries such as Canada.

Unfortunately, the principles established in 1996 in the *Kasinga* case were brought into question by the BIA's decision three years later in *Matter of R-A-*.[62]

3.3. Matter of R-A-, the case of Rody Alvarado

3.3.1. The IJ's decision

At the age of 16, Ms Alvarado, a native of Guatemala, married Francisco Osorio, a former soldier who was five years her senior. Her husband's threats and violent assaults upon her began almost immediately after they were married. Ms Alvarado's attempts to secure the protection of the authorities were consistently rebuffed. The police told her they would not get involved and a judge before whom she appeared told her that he "would not interfere in domestic disputes".[63] Ms Alvarado also unsuccessfully sought refuge from her husband within Guatemala. She went to the homes of her brother and parents but Osorio pursued her there. Shortly before making the decision to leave Guatemala, she attempted to escape her husband by renting a room and taking her daughter out of school. Osorio tracked her down there, and when he found her, beat her unconscious in front of their two children.

Rody Alvarado's claim for asylum came before an IJ shortly after the BIA's decision in *Matter of Kasinga*. The IJ granted asylum, ruling that Ms Alvarado had suffered past persecution and established a well-founded fear of future persecution at the hands of her husband, who the Government of Guatemala was unwilling to control "because domestic abuse [. . .] is considered a family matter in which outside intervention is inappropriate".[64] The IJ ruled that Ms Alvarado's persecution was inflicted on account of social group membership as well as actual and imputed political opinion.[65] Citing the BIA's decision in *Matter of Acosta*, the IJ defined the social group as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination". The IJ ruled that the applicant's gender and prior association with her husband were characteristics that she could

[61] The BIA did not analyse the individual motivation of the individual or individuals who would inflict the FGC. Instead, it looked to the evidence showing that FGC is practiced "to overcome sexual characteristics of young women" of the described social group, and on that basis concluded that it was "on account of" status in that group. *Matter of Kasinga*, 367.

[62] *Matter of R-A-* (BIA 1999).

[63] *Ibid.*, 909.

[64] *In re Alvarado*, No. A73753922 at 8 (Immigr. Ct. 20 Sep. 1996).

[65] The IJ found that Ms Alvarado had resisted her husband's brutal "acts of domination." This resistance constituted the expression of a political opinion against male domination, or could be interpreted as such by her husband. Mr Osorio's increasingly violent behaviour toward his wife was meant to punish her for the actual or imputed political opinion that men have no right to treat women in the manner in which he treated her. *Ibid.*, 12.

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not or should not be expected to change. Relying upon *Matter of Kasinga*, the IJ ruled that Ms Alvarado, "and others like her, are targeted for persecution specifically because they are women who have been involved intimately with their male companions, who believe in male domination".[66]

3.3.2. The BIA decision

The then INS appealed the IJ's decision to the BIA, which – in a divided decision – reversed the grant of asylum in 1999. The BIA majority did not contest that the abuse Rody Alvarado suffered was egregious, commenting that, "[w]e struggle to describe how deplorable we find the husband's conduct to have been",[67] and finding that "the severe injuries [she] sustained [were] [. . .] sufficient (and more than sufficient) to constitute 'persecution' ".[68] It also did not dispute that she had established a failure of State protection, holding that Ms Alvarado "was unable to avail herself of the protection of the Government of Guatemala in connection with the abuse inflicted by her husband".[69] According to the majority, the claim failed because Ms Alvarado had failed to establish that the harm she suffered was on account of either membership in a particular social group or political opinion.

In rejecting the social group basis of the claim, the BIA departed from its controlling *Acosta* precedent, which had recognized social groups defined by immutable or fundamental requirements. The BIA majority ruled that immutable/fundamental were only threshold requirements and, in addition, an applicant had to establish that the proposed social group was "recognized and understood to be a societal faction" and that Ms Alvarado had failed to make that showing.[70] This language regarding the recognition of a group as a societal faction was the forerunner to the BIA's ruling that not all groups that share an immutable or fundamental characteristic are cognizable. In addition to the *Acosta* factors, the "social visibility" and "particularity" of the groups must be established.[71]

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[66] The IJ's nexus analysis analogized FGC to domestic violence, and ruled that both are forms of oppression imposed upon women to maintain male domination; therefore the persecution is for reasons of a gender-defined social group. Specifically, the IJ's decision stated: "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.' [...] 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." *Ibid.*, 12.

[67] *Matter of R-A-* (BIA 1999), 910.

[68] *Ibid.*, 914.

[69] *Ibid.*

[70] *Ibid.*, 918.

[71] *Matter of C-A-* 23 I. & N. Dec. 951 (BIA 2006) affirmed *Castillo-Arias v. U.S. Attorney Gen.* 446 F.3d 1190 (11th Cir. 2006). Social visibility requires that the members of the group be visible to the society at large, while particularity requires that the group not be large or diffuse.

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The BIA further held that even if Ms Alvarado's proposed social group was cognizable, she had failed to show that her husband persecuted her because of her membership in it. In so ruling, the BIA distanced itself from its earlier *Kasinga* decision by largely rejecting the relevance of societal context in determining nexus. It also expressly rejected the bifurcated analysis approach discussed in Section 2.2.4. The IJ in Ms Alvarado's case had ruled that failure of State protection resulted from bias and discrimination against women and that nexus had to be determined in that context. The BIA stated that the motivation of the Government in failing to protect cannot be used to establish the motivation of the actual persecutor. According to the majority, even if the Guatemalan Government's failure to protect was on account of bias towards women, it would not affect its analysis regarding her husband's motivation.[72]

3.3.3. Matter of R-A- developments from 1999 to 2009

The BIA's decision was criticized from many corners. Although *Matter of R-A-* was a case involving domestic violence, the BIA's rationale negatively impacted a whole range of gender asylum cases, which often rely upon the social group ground, and involve persecution committed in a context of State impunity. The critical response to the BIA's opinion resulted in a decision of then AG, Janet Reno, to become directly involved in the case. AG Reno and her Department of Justice undertook two significant actions. First, the DOJ proposed regulations[73] to address cases such as Ms Alvarado's. Although the actual regulation itself is very short, it is preceded by a lengthy preamble, which includes a substantial amount of guidance favourable to gender claims based on domestic violence. Most notable is the preamble's statement that the proposed regulation's purpose is to remove "certain barriers that the *In re R-A-* decision seems to pose" to domestic violence claims.[74] On 19 January 2001, approximately a month after issuing these proposed regulations, AG Reno certified[75] the case to herself, and vacated the BIA's decision denying relief.[76] She remanded the case to the BIA with instructions to stay the case until the proposed regulations were issued as final.

The proposed regulations were not finalized, but that did not signal the end of action in the case. In February 2003, AG John Ashcroft decided to certify the case to himself. His certification of the case to himself resulted in the submission of new legal briefs by both Ms Alvarado and the Government. In an unanticipated development, the Government – which had appealed the original grant of

[72] *Matter of R-A-* (BIA 1999), 923.

[73] Asylum and Withholding Definitions.

[74] *Ibid.*

[75] 8 CFR 1003.1(h)(1)(i) (2009).

[76] *Matter of R-A-* 22 I. & N. Dec 906 (A.G. 2001; BIA 1999).

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asylum to Ms Alvarado – now filed a brief arguing that she had "established statutory eligibility for asylum".[77]

The DHS brief was a significant legal document because it constituted its official position on the issue. The brief reaffirmed *Matter of Acosta* as the touchstone for defining social groups. It did not require either social visibility or particularity, and it suggested that a cognizable social group in Ms Alvarado's case could be "married women in Guatemala who are unable to leave the relationship," and argued that such a group would meet *Acosta*'s immutable and fundamental requirements.

The brief also addressed nexus in a manner which incorporates evidence of the State's failure to protect – an approach endorsed by UNHCR in its 2002 Gender Guidelines, but which was rejected by the BIA majority in its *R-A-* decision. The brief analysed the issue as follows:

> [. . .] As in every asylum claim, of course, it is the applicant's burden to establish that the persecutor is motivated to act against her because of her possession or perceived possession of a protected characteristic. [Citations omitted] Proof of the persecutor's motive can be provided through direct or circumstantial evidence. [Citation omitted] In the domestic violence context, evidence that the abuser uses violence to enforce power and control over the applicant because of the social status that the applicant has within the family relationship is highly relevant to determining the persecutor's motive. This includes any direct or circumstantial evidence about the abuser's own actions and motives, as well as any circumstantial evidence that such patterns of violence are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society, that cannot be deduced simply by evidence of random acts within that society. Such circumstantial evidence, in addition to direct evidence regarding the abuser's statement or actions may support a determination that the abuser believes he has the authority to abuse and control the victim "on account of" the victim's status in the relationship.[78]

Notwithstanding the DHS's arguments in favour of a grant to Ms Alvarado, AG Ashcroft decided not to take any action on the case, and he sent it back to the BIA with the same order his predecessor had – for the BIA to decide the case once the proposed regulations were issued as final.[79] In September 2008, with the proposed regulations still not finalized, AG Michael Mukasey took jurisdiction over the case. He ruled that it was not necessary for the BIA to await finalized regulations and he sent the case back to the BIA for a decision.[80]

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[77] DHS's Position on Respondent's Eligibility for Relief at 43, *Matter of R-A-* 23 I. & N. Dec. 694 (A.G. 2005) (A 73 753 922), available at: http://cgrs.uchastings.edu/campaigns/alvarado.php (last visited 9 Jun. 2010).

[78] *Ibid.*, 35–36.

[79] *Matter of R-A-* 23 I. & N. Dec. 694 (A.G. 2005).

[80] *Matter of R-A-* 24 I. & N. Dec. 629 (A.G. 2008).

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Because of the length of time the case had been pending, Ms Alvarado and the DHS made a joint request to send the case back to an IJ for the submission of additional evidence and legal arguments. Shortly after the case was sent to an IJ, the DHS under the Obama Administration filed a brief in a similar case, known as the case of *L.R.* The DHS brief in *L.R.* ended up being instrumental in leading to a favourable outcome in Ms Alvarado's case and is seen by many as a harbinger of a more open position on gender asylum cases in the US.

3.4. The Obama Administration's position in the case of Ms L.R.

Ms L.R. is a native of Mexico. For nearly two decades, her common-law husband tormented her – keeping her a virtual prisoner in his home, and raping and battering her at will. Ms L.R. gave birth to three children during their relationship – each one of them the product of rape. The evidence demonstrated that in Mexico there is widespread acceptance of violence against women in general, as well as domestic violence in particular. Ms L.R.'s repeated attempts to seek protection were rebuffed by the police, and she received an ineffectual response from the courts.

Her asylum claim had been denied by an IJ in October 2007, who ruled that there was neither a cognizable gender-defined social group nor a nexus to an enumerated ground. In April 2008, the DHS filed a brief to the BIA fully defending the IJ's decision. However, in April 2009, under the new Obama Administration, the DHS filed a Supplemental Brief in which it accepted that, in some cases, women who are victims of domestic violence could qualify for asylum.

The DHS's approach in the *L.R.* brief built on the position it articulated in its 2004 brief in Rody Alvarado's case. The significant difference is that when DHS filed its brief in *Matter of R-A-*, the BIA had not yet issued clear precedent requiring proof of social visibility and particularity. It had stated that immutable and fundamental were only threshold requirements, but it was not until its decision in *Matter of C-A-* in 2006, that it set them forth as necessary criteria for establishing a cognizable social group.[81]

These additional requirements – especially that of social visibility – have been problematic in numerous respects. Decision-makers have been confounded by what is meant by "social visibility". Does it mean that members of the group are literally recognizable as being members of such group? Or does it mean that the group is recognized in the cultural or anthropological sense, but not literally visible? In *Matter of C-A-* the BIA seemed to imply the former interpretation when it ruled that informants against a drug cartel were not socially visible because they tried to keep their activities confidential. However, as Judge Posner, a respected federal court judge has written, the requirement that group members actually be visible makes no sense since women who have not

[81] *Matter of C-A-*.

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undergone FGC, or closeted homosexuals, are not literally visible, but they nonetheless have been recognized as members of a particular social group.[82]

Criticism of the social visibility requirement is not limited to issues regarding its meaning but also extend to its provenance. In *Matter of C-A-*, the BIA stated that the UNHCR Social Group Guidelines confirm that "visibility" is an important element in identifying the existence of a particular social group.[83] However, this is a misreading of its guidance. As discussed in Section 2.2.4., UNHCR's Social Group Guidelines provide for alternative approaches to defining a social group. The "protected characteristic" approach defines a social group by immutable or fundamental characteristics, while the "social perception" approach looks to societal recognition of the group. Both are not required; a group established on the basis of immutable/fundamental characteristics is not also required to meet the social perception test. Furthermore, as UNHCR pointed out in a recently filed amicus brief,[84] neither of its approaches require "social visibility" which is different from "social perception". As UNHCR explained:

> Under the "social perception" analysis, the focus is on whether members share a common attribute that is understood to exist in the society or that in some way sets them apart or distinguishes them from society at large. "Social perception" does not require that the common attribute be visible to the naked eye in a literal sense of the term nor that it be one that is easily recognizable to the general public.[85]

In a welcome development, the DHS brief in *L.R.* takes on the issue of social visibility – and to a lesser degree – particularity,[86] and sets forth its position as to how these requirements can be met. In doing so, the DHS is limited to setting forth a position in a particular case – which happens to involve domestic violence. It is also limited to articulating a position consistent with existing US jurisprudence; it cannot simply ignore BIA and federal court precedent requiring proof of visibility and particularity. However, notwithstanding these constraints, the DHS can – and it does – suggest an interpretation that brings the US position a bit closer to UNHCR's guidance.

The DHS brief states that social visibility could be established by demonstrating that once a woman enters into a domestic relationship, the abuser believes he has the right to treat her as he pleases.[87] This would be the case where the society – including government officials – expects and tolerates the abuse.[88]

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[82] *Gatimi v. Holder* 578 F.3d 611 at 615 (7th Cir. 2009).

[83] UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social Group"*, 960.

[84] See Brief of the UNHCR as Amicus Curiae in Support of the Petitioner, *Valdiviezo-Galdamez v. Att'y Gen.*, 14 Apr. 2009, available at: http:/unhcr.org/refworld/docid/49ef25102.htm (last visited 23 May 2010).

[85] *Ibid.*, 11.

[86] According to the DHS brief, a group based on a common-law relationship could also meet the "particularity" requirements, since such a relationship is quite susceptible to being defined "in a manner that entails considerable particularity." DHS L.R. Brief, 19.

[87] *Ibid.*, 17–18.

[88] *Ibid.*

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Notably, this approach does not require that the group members be literally visible to the broader society and is generally consistent with UNHCR's "social perception" approach.

The DHS brief also touches on the issue of nexus, observing that in situations where there is a failure of protection, there is often also no way the victim can escape the mistreatment. The persecutor's knowledge that the victim has no escape could "play a central role in that persecutor's choice" of her as his victim. Although it gets there by a different route, arguably the DHS approach could lead to the same outcome as UNHCR's bifurcated analysis. The bifurcated analysis allows nexus to be established when the State's failure to protect is for reason of a 1951 Refugee Convention ground, regardless of the individual persecutor's motivation. The DHS approach allows the State's failure to protect to serve as circumstantial evidence of the persecutor's motivation. Both approaches assure the consideration of societal context in determining nexus.

After laying out this analytical approach, the DHS suggested that the case of *L.R.* be sent back to an IJ to allow her to submit additional evidence to meet these requirements.[89] The case is currently being litigated in San Francisco Immigration Court. Evidence has been submitted and a date has been calendared for the DHS to state whether the evidence submitted has met what are now its stated requirements for proof of social group and nexus.

4. Conclusion

This article has examined developments in the US from 1995 to 2010 through the lens of three significant US cases – *Matter of Kasinga, Matter of R-A-*, and in *L.R.* Needless to say, in this 15-year time period many other gender cases have been adjudicated in the US. However, because the Government does not maintain statistics on gender claims, there is no way to reliably analyse how the touchstone decisions in *Matter of Kasinga* and *Matter of R-A-*, and the DHS position in *L.R.*, have affected – or continue to affect – the outcomes of the many other claims. The limited non-official tracking of cases that does exist[90] indicates that the shifting policy positions and absence of clear national guidance has resulted in contradictory and arbitrary outcomes and the failure of protection.

The most recent development – the DHS's brief in *L.R.* – provides a basis for some optimism. However, as positive a development as that may be, it still leaves the US out of sync with international guidance. International guidance – as exemplified by UNHCR Guidelines and directives – does not require that a group be socially visible, and it does recognize the validity of a bifurcated nexus

[89] The cognizability of the social group, and proof of nexus are not the only matters at issue, but they are the ones most germane to this article.

[90] The CGRS provides technical assistance to attorneys with gender cases and attempts to track outcomes. CGRS's database, which includes 4,900 cases, allows an analysis and comparison of outcomes, and reveals inconsistent and seemingly arbitrary decision-making.

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analysis. It is true that the recommendations in the DHS' brief as to how social visibility may be established and nexus analysed have the ultimate effect of considering factors relevant under UNHCR's approach.[91] However, because social visibility and the rejection of a bifurcated analysis are established precedent in US law, a brief by the DHS cannot dispense with them. It is only through legislation or regulations which roll back these requirements that the US could more fully embrace international norms on these issues. Doing so would remove significant barriers to protection in gender cases.

[91] Under the DHS' approach, proof that a group is not accorded protection equivalent to other members in society can establish social visibility and provide circumstantial evidence of nexus. UNHCR has long endorsed an analysis which looks to whether women are not provided protection from abuse in analysing social group and nexus.

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