
**UNITED STATES DEPARTMENT OF JUSTICE
ATTORNEY GENERAL JOHN ASHCROFT**

**BRIEF ON BEHALF OF RODI ALVARADO PEÑA
TO THE ATTORNEY GENERAL OF THE UNITED STATES**

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I. Introduction and Procedural Background

Ms. Rodi Alvarado Peña [Ms. Alvarado or Respondent] was subjected to more than ten years of unspeakably brutal violence at the hands of her husband, Francisco Osorio. (Record (Rec.) at 4-6.)¹ The violence which Osorio inflicted upon her caused severe physical injury and extreme mental anguish. (Rec. at 693-705.) Ms. Alvarado could neither escape Osorio within Guatemala, nor secure any protection whatsoever from the official authorities. (Rec. at 241-43; 700-02.) None of these facts are in dispute.

On the basis of this record, on September 20, 1996, an Immigration Judge (IJ) granted Ms. Alvarado asylum in the United States. (Rec. at 197.) The IJ ruled that the harm she suffered constituted persecution, that the government of Guatemala was unwilling to protect her, and that the persecution was on account of two of the required statutory grounds—social group membership and political opinion. (Rec. at 190-97.) The social group was defined by nationality, gender, and marital status (Guatemalan women, who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination) (Rec. at 193), and the political opinion was that of opposition to male domination. (Rec. at 196.)

The former Immigration and Naturalization Service (INS) appealed the decision. On June 11, 1999, in a sharply divided 10-5 vote, the BIA reversed the IJ's grant of asylum to Ms. Alvarado. (Rec. at 27.) The Board accepted that the husband's violent abuses rose to the level of persecution, and that Ms. Alvarado had been unable to obtain state protection. (Rec. at 11.) However, the BIA majority rejected the IJ's ruling that the persecution was on account of social

¹ Note that all citations to the record are to the Certified Administrative Record produced for the appeal from the June 1999 BIA decision to the Ninth Circuit Court of Appeals, which appeal was later stayed.

group membership and political opinion. (Rec. at 11-27.)

Counsel for Ms. Alvarado filed a timely Petition for Review with the Ninth Circuit Court of Appeals on July 9, 1999, and simultaneously sought certification of the decision by then Attorney General Janet Reno. The Ninth Circuit Court of Appeals stayed proceedings pending a decision by Attorney General Reno on the request for certification. In December 2000 and January 2001, the Department of Justice (DOJ) and Attorney General Reno took two separate but related actions related to Ms. Alvarado's case. On December 7, 2000, the DOJ issued a Proposed Rule² which directly addresses the issues raised in Ms. Alvarado's case, and on January 19, 2001, the Attorney General accepted certification, vacated the BIA's decision, and directed the Board to decide the case pursuant to this rule, when issued in final form.³ The Commentary to the Proposed Rule explicitly states that it removes certain barriers that the *In re R-A*- decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group.⁴ The Proposed Rule, which is now under the jurisdiction of the

² Department of Justice, Immigration and Naturalization Service, *Asylum and Withholding Definitions*, 65 Fed. Reg. 76588 (Dec. 7, 2000) [hereinafter Proposed Regulation or Proposed Rule].

³ The order reads as follows:

Pursuant to 8 C.F.R. § 3.1(h)(1)(iii), the Acting Commissioner of the Immigration and Naturalization Service has referred to the Attorney General for review the June 11, 1999, decision of the Board of Immigration Appeals (Board) that overturned the Immigration Judge's decision dated September 20, 1996. The June 11, 1999 decision of the Board is hereby vacated and the matter is remanded to the Board for reconsideration. I direct the Board to stay reconsideration of the decision until after the proposed rule published at 65 Fed. Reg. 76588 (Dec. 7, 2000) is published in final form. The Board should then reconsider the decision in light of the final rule. Attorney General's Order No. 2379-2001 (January 19, 2001).

⁴ Supplementary Information to Proposed Regulation, *supra* note 2, at 76589 [hereinafter Commentary].

Department of Homeland Security (DHS), has not yet been published in final form; however, the government is on record as stating that the regulation represents its best interpretation of the refugee definition.⁵

On February 21, 2003, Attorney General John Ashcroft directed the Board of Immigration Appeals to certify to him the decision in *Matter of R-A-*. On March 24, 2003, Ms. Alvarado's counsel requested permission to brief the issues, and asked for clarification as to whether the Proposed Rule continued to represent the agency's best interpretation of the refugee definition. The request for clarification noted that meaningful briefing requires that counsel be put on notice of any departure from this position.⁶ The request to brief was denied by the Attorney General on September 5, 2003, and on November 4, 2003, 62 members of the House of Representatives made an appeal to the Attorney General that he allow briefing; their request was representative of sustained Congressional interest in the case and the issues it raises regarding the protection of women victims of gender violence.⁷ On December 8, 2003, Attorney General Ashcroft issued an

⁵ Among the forums in which this position has been stated for the record include before the BIA during the June 21, 2001, en banc argument of the case, *INS v. Vallabhaneni*, A76-724-694 (Transcript of June 21, 2001, BIA hearing en banc, at 45-46).

⁶ The letter stated:
[C]larification is necessary regarding the status of the Proposed Rule. The DOJ has publicly taken the position that the Proposed Rule represents its interpretation of the refugee definition. Counsel requests clarification as to whether this continues to be the DOJ's position, and whether it is the position of the Department of Homeland Security (DHS). Meaningful briefing requires that counsel be put on notice of any departure from this position.
Letter from Karen Musalo to Attorney General John Ashcroft, dated March 24, 2003.

⁷ In addition to the letters regarding the denial of briefing from members of Congress, *see* (1) Letter of May 2, 2003, to Attorney General John Ashcroft and Department of Homeland Security Secretary Thomas J. Ridge from 15 members of the Senate (in support of gender-based asylum and expressing concern about Rodi Alvarado's case); (2) Letter of February 27, 2003, to Attorney General Ashcroft from 49 members of the House of Representatives (in support of gender-based asylum and expressing concern about Rodi Alvarado's case); (3) Letter of September 29, 2000, to Attorney General Janet Reno from eight

order for both parties to submit briefs; this brief is submitted pursuant to that order. There have been no official statements by DOJ or DHS that the Proposed Rule no longer represents the government's position; thus it will be assumed that it continues to represent the government's best interpretation of the refugee definition.

II. Facts of the Case

The facts of Ms. Alvarado's claim for asylum are undisputed; both the immigration judge and the BIA found Ms. Alvarado to be credible in all respects. Ms. Alvarado was sixteen years of age when she married her husband Francisco Osorio, a former soldier in the Guatemalan military. From the inception of their marriage Osorio subjected her to violent physical and sexual abuse. He would hit or kick Ms. Alvarado whenever he felt like it, wherever [they] happened to be: in the house, on the street, on the bus. (Rec. at 694.) He would mistreat her when he was drunk and when he was sober. (Rec. at 328.) Her husband dislocated her jaw when her menstrual period was 15 days late (Rec. at 694); kicked her violently in the spine when she failed to heed his demand that she abort her three to four month old fetus (Rec. at 694); kicked her in her genital

members of the Senate (urging immediate action to reverse the Board's denial in *Matter of R-A-*); (4) Letter of September 18, 2000, to Attorney General Janet Reno from 54 members of the House of Representatives (in support of gender-based asylum and requesting a meeting to discuss the issue); (5) Letter of February 14, 2000, to Attorney General Reno from seven members of the Senate (asking the Attorney General to reverse the BIA's decision in an honor killing case, referring to *Matter of R-A-* and expressing concern that the BIA lacks sufficient understanding of current standards in both United States asylum law and policy and international human rights law.); (6) Letter of December 2, 1999, to Attorney General Reno from five members of the Senate, asking the Attorney General to clarify the gender guidelines for asylum and reinstate the grant in *Matter of R-A-*); (7) Letter of September 16, 1999, to Attorney General Reno from 53 members of the House of Representatives (expressing concern about the denial of asylum to Rodi Alvarado and asking the Attorney General to reinstate the grant in *Matter of R-A-*); (8) Letter of July 22, 1999, to Attorney General Janet Reno from the Congressional Hispanic Caucus (supporting Ms. Alvarado's asylum claim and requesting certification of *Matter of R-A-*).

area so violently that she suffered internal hemorrhaging (Rec. at 695); and brutally raped her time and time again, both vaginally and anally, beating her before and during the unwanted sex. (Rec. at 694-95.) Osorio, who had guns and knives at his ready disposal, pistol-whipped Ms. Alvarado, broke windows and mirrors with her head, punched, and slapped her, threatened her with his machete, and dragged her down the street by her hair. (Rec. at 697-700.)

Ms. Alvarado's efforts to escape her husband within Guatemala were futile. She sought refuge at her brother's and parents' homes, but her husband was always able to track her down. (Rec. at 238.) On one occasion, in the hope of evading her husband, Ms. Alvarado took her older child out of school, and rented a room outside of the city. Although she told no one where she had gone, Osorio found her, and proceeded to beat and kick her into unconsciousness in front of their two children. (Rec. at 696-97.)

After more than ten years of this violent abuse, Ms. Alvarado decided that the only way to save her life was to flee Guatemala. (Rec. 702-03.) This was a very wrenching decision for her, because in leaving, she had to abandon the people she care[d] about most—her family and her two-year-old son, and seven-year-old daughter. (Rec. at 705.) Although the pain of separation was, and continues to be, tremendous, Ms. Alvarado believes it is for the best, because if her husband had succeeded in his efforts to kill her, her children would have no mother at all. (Rec. at 706.)

Osorio repeatedly expressed his opinion that he had the right to treat Ms. Alvarado as he did, because of her gender and their relationship; the abuse was accompanied by statements such as "You're my woman, you do what I say" (Rec. at 696), "You're my woman, and I can do whatever I want" (Rec. at 695), "You don't order me" (Rec. at 694), and "I can do it if I want

to. (Rec. at 697.)

As this record makes abundantly clear, Osorio was correct in his assertions that because Ms. Alvarado was his woman he could do to her whatever he wanted with complete impunity. Neither the police nor the courts of Guatemala intervened once over the entire course of this decade-long brutal marital relationship. The police did not come when called by a desperate Ms. Alvarado on the telephone, and they never took any steps to arrest Osorio or require him to appear in response to written complaints which Ms. Alvarado filed. (Rec. at 700-02.) Osorio enjoyed the same impunity within the court system; when Ms. Alvarado went before a judge, he told her that he would not interfere in domestic matters or disputes. (Rec. at 243.) The police had communicated essentially the same thing, telling Ms. Alvarado that they would not provide her any assistance because she should take care of it at home. (Rec. at 700.)

Extensive record evidence on country conditions in Guatemala demonstrates that the absolute failure of protection to Ms. Alvarado by law enforcement and judicial personnel is not an aberration. To the contrary, such failure of protection is the norm, and reflects deeply entrenched attitudes regarding the subordinate status of women in Guatemalan society. Women suffer *de jure* as well as the *de facto* discrimination. The Guatemalan Civil Code accords legal primacy to the husband in the marital relationship;⁸ such provisions have led international bodies to express

⁸ Rec. at 739:

Guatemalan women are even discriminated against legally. The Guatemalan civil code [sic] recognizes the male as a married couple's legal representative...A husband can legally forbid his wife to engage in activities outside the home. The husband also has the primary authority in disposing of joint property.

Jennifer Tisdale, Abuse of Women in Today's Guatemala, Guatemala Human Rights Commission/USA, *Guatemala Bulletin*, Fourth Quarter 1992.

concern over the discrimination institutionalized in law in Guatemala.⁹ Beyond the Guatemalan Civil Code, many other norms in Guatemalan law are discriminatory and contradict the principle of equality guaranteed in the Constitution. (Rec. at 737.) These *de jure* denials of equality are compounded by discrimination in the administration of justice and application of the law. (Rec. at 737.)

Gross gender inequality in Guatemala is not a recent phenomena; women historically have been oppressed, (Rec. at 739) and cultural norms persist that conceive of women as subordinate to men[.] (Rec. at 737.) All of this has led to a situation wherein the conditions women live in are among the worst in Latin America. (Rec. at 739.) The education of women is considered unimportant because [a woman s] place is [in] the home. (Rec. at 742.) More than 80% of the illiterate persons in Guatemala are female (Rec. at 742), and the country has the highest rate of females without formal education in all of Latin America. (Rec. at 742.)

The *de jure* and *de facto* subordinate status of women is inextricably related to the broad acceptance of violence against them; this violence is tolerated...and legitimized by laws and customs (Rec. at 736) and what is culturally taught and learned about what a woman is and the role she must play are significant factors sustaining...violence toward women[.] (Rec. at 744.)

⁹ Rec. at 398:

Members of the UN Committee on the Elimination of Discrimination against Women reported in April that Guatemala s report and presentation to the Committee increased their concern at the discrimination institutionalized in law. They also expressed alarm that Guatemala s Constitutional Court had ruled that none of the country s Civil Code required change, despite Guatemala s ratification of the Convention on the Elimination of Discrimination against Women, which was automatically incorporated into domestic law and requires that states not discriminate on the basis of gender.

Lawyers Committee for Human Rights, *Critique: Review of the U.S. Department of State s Country Reports on Human Rights Practices for 1994* (July 1995).

Domestic violence has reached epidemic proportions in Guatemala; a 1990 survey of 1,000 women reported that 48% had been battered by their partners, who used [f]ists, feet, knives, razor blades, sledge hammers and pieces of wood to attack them. (Rec. at 423.) Out of every ten women murdered, four are killed by their husbands. (Rec. at 740.) Other statistics are equally grim: an officer of a Fire Fighters Corps responsible for women and children...determined that in a six hour shift, 90 per cent of women treated for physical injuries had been attacked by their partners (Rec. at 423), and a doctor reported that 75 per cent of women admitted to his hospital with injuries were victims of spousal abuse. (Rec. at 423.)

Although they are the victims of these brutal assaults, women are most often portrayed as the provocator[s] of the abuse (Rec. at 425), reinforcing the societal attitudes of discrimination and ignorance regarding the human rights of women[.] (Rec. at 425.) As was Ms. Alvarado's experience, women who turn to the police or the courts confront the attitude that domestic violence is not a real problem, or even a human rights violation. (Rec. at 429.) Both the police and the courts generally encourage women seeking their help to keep the problem to themselves. (Rec. at 429.) As of 1994, a year before Ms. Alvarado fled Guatemala, there were no shelters for battered women in the country. (Rec. at 431.)

III. Argument

1) Ms. Alvarado Has a Well-Founded Fear of Persecution on Account of her Social Group Membership and Political Opinion

In order to qualify for refugee status, an individual is required to show that she has suffered past persecution or has a well-founded fear of future persecution on account of race,

religion, nationality, political opinion or membership in a particular social group. Immigration & Nationality Act (INA) § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2003). The persecution must be by the government, or individuals that the government is unable or unwilling to control. *He v. Ashcroft*, 328 F.3d 593, 603 (9th Cir. 2003); *Navas v. INS*, 217 F.3d 646, 655-56 (9th Cir. 2000) . As the uncontroverted evidence in this case establishes, Ms. Alvarado meets the refugee definition because she has been persecuted, and reasonably fears future persecution, on account of her membership in a gender-defined particular social group, and on account of her political opinion of resistance to the brutal abuse meted out by her husband; this abuse occurred in a situation where the government of Guatemala failed to provide even the least measure of protection.

A. The Harm Ms. Alvarado Suffered Constitutes Persecution

Courts have long held that threats to life or freedom, or other egregious physical and psychological harms, inflicted by the government or by persons the government is unable or unwilling to control, constitute persecution. *See, e.g., He v. Ashcroft, supra; Rios v. Ashcroft*, 287 F.3d 895, 900 (9th Cir. 2002); *Agbuya v. INS*, 241 F.3d 1224 (9th Cir. 2001), *Shoaferra v. INS*, 228 F.3d 1070 (9th Cir. 2000), *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996), *Kovac v. INS*, 407 F.2d 102, 105-07 (9th Cir. 1969).

Because domestic abuse involves severe and repeated physical and psychological harm that poses an immediate threat to a woman s life and freedom, the Department of Justice has expressly recognized domestic violence as a type of mistreatment that constitutes persecution

under U.S. asylum laws.¹⁰ Indeed, because of its severe nature and intentional infliction by its perpetrator, the harm resulting from domestic violence has been found so abhorrent as to fit the definition of torture.¹¹

Throughout the litigation of this case, neither the government (previously the INS) nor the BIA has contested that the harm Ms. Alvarado suffered was more than sufficient (Rec. at 11) to constitute persecution. Likewise, neither the government nor the BIA contested that Ms. Alvarado was unable to avail herself of any assistance from the government. And they could not have reasonably done so: the utter failure of the Guatemalan government to respond is established through Ms. Alvarado's account of her repeated but futile attempts to obtain assistance from the police and courts, coupled with the documentary evidence that government officials do not view domestic violence as a real problem, or even a human rights violation. (Rec. at 429.) Given the severity of the physical and psychological abuse she suffered, and the extreme degree, intensity, duration and frequency of that harm, there can be no question that Ms. Alvarado was persecuted within the meaning of the statute.

¹⁰ See Phyllis Coven, Department of Justice, Immigration and Naturalization Service, Office of International Affairs, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women* 4 (1995); Rec. at 649-52 [DOJ Gender Guidelines]; Department of Justice, Immigration and Naturalization Service, *U.S. Law and INS Refugee/Asylum Adjudications: THE BASIC LAW MANUAL* (1994).

¹¹ See U.N. Commission On Human Rights, 52nd Sess., Item 9 (a) of the Provisional Agenda, *1996 Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, Resolution 1995/85, E/CN.4/1996/53 (1996), at 14, ¶ 50 (indicating that domestic violence should be understood and treated as a form of torture).

B. Ms. Alvarado was Persecuted on Account of her Membership in a Particular Social Group

The IJ who granted Ms. Alvarado protection ruled that the brutal domestic violence she suffered was causally linked to her membership in a social group defined by the characteristics of gender, marital status, and nationality. The judge's recognition of a gender-defined social group, and her finding of a nexus between the harm and the described group, is based on well-established precedent, and is fully supported by the record in this case. Furthermore, the recognition that claims of gender-persecution come within the protection of the refugee definition, is consistent with international trends,¹² and has been affirmed by the most recent guidance from the Office of the United Nations High Commissioner for Refugees.¹³

¹² Among the countries accepting gender claims are Australia, Austria, Canada, Germany, New Zealand, Spain, the United Kingdom, and the United States. See *infra* notes 16, 33; International Gender Asylum Decisions and Law, available at <<http://www.uchastings.edu/cgrs/law/intl.html>>. Countries with legislation specific to asylum claims based on gender-based persecution includes Ireland, Denmark and South Africa. See, e.g., Refugee Act 1996 ¶ 1 (Ireland) (defining social group to include a group of persons whose defining characteristic is their belonging to the female or the male sex....); Refugees Act 1998, Act No. 130 ¶ 1(xxi) (South Africa) (defining social group to include a group of persons of particular gender....); see also International Gender Asylum Decisions and Law, *supra*. Gender guidelines for asylum claims have been issued by a wide range of countries, led by the United States and Canada. See, e.g., DOJ Gender Guidelines, *supra* note 10; Immigration and Refugee Board of Canada, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Nov. 25, 1996); Immigration Appeal Authority, *Asylum Gender Guidelines* (November 2000) (United Kingdom), available at <<http://www.iaa.gov.uk/32.htm>>; Australian Department of Immigration 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/aust.pdf>>. Other countries with gender guidelines include the Netherlands, Norway, and Sweden. See Governmental Gender Guidelines for Asylum Adjudicators, available at <<http://www.uchastings.edu/cgrs/law/guidelines.html>>.

¹³ 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, 7 May 2002) (hereinafter UNHCR Gender Guidelines); UNHCR, Guidelines on International Protection: Membership in 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 , ¶ 19 (HCR/GIP/02/02, 7 May 2002) (hereinafter UNHCR Social Group Guidelines).

1. Ms. Alvarado s Social Group is Cognizable under the Law

In its seminal *Acosta*¹⁴ decision, the BIA ruled that for the particular social group ground to be interpreted consistently with the other statutory grounds, the defining characteristics of the group must be either immutable or fundamental. The immutable/fundamental criteria test is widely accepted by federal courts across the United States,¹⁵ and has been frequently cited with approval by foreign tribunals.¹⁶ It has recently been adopted by the Ninth Circuit,¹⁷ as an alternative to its long-standing voluntary associational relationship¹⁸ test, and it has been incorporated into the Proposed Rule.¹⁹

The social group recognized by the IJ in Ms. Alvarado s case is defined by gender, marital status, and nationality, each of which meet the *Acosta* criteria. First, the BIA in *Acosta* explicitly identified sex as the type of immutable or fundamental characteristic by which a social group

¹⁴ *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

¹⁵ *See, e.g., Lwin v. INS*, 144 F.3d 505, 511-112 (7th Cir. 1998) (applying *Acosta* to find that Burmese students share common immutable characteristics); *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993) (gender could define a social group pursuant to *Acosta*); *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985) (individuals of a specific ethnic group associated with the former government constitute a particular social group).

¹⁶ *See, e.g., Islam (A.P.) v. Secretary of State for the Home Dept., and Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)*, [1999] 2 W.L.R. 1015 (House of Lords) (United Kingdom) (relying on and quoting *Acosta* s influential, important and seminal reasoning) (Opinions of Lord Steyn, Lord Hoffman and Lord Hope); Refugee Appeal No. 71427/99, ¶97 (Refugee Status Appeals Authority 2000) (New Zealand) (relying on the good working rule from *Acosta*); *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 736-37 (discussing and quoting from *Acosta* at length).

¹⁷ *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092-93 (9th Cir. 2000).

¹⁸ *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

¹⁹ Proposed Regulations, *supra* note 2, at 76598.

could be defined. In 1996 the BIA applied that principle in its landmark *Kasinga* ruling, where it held that a social group defined by gender in combination with other characteristics is cognizable. *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996). The social group in *Kasinga* was defined by gender, ethnicity, bodily integrity, and opposition to female genital mutilation ([y]oung women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by the tribe, and who oppose the practice. *Id.* at 365.

The federal courts have also recognized that gender could appropriately define a particular social group under U.S. asylum laws. *See Fatin v. INS*, 12 F.3d 1233, 1240-41 (3rd Cir. 1993); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) (We agree with the Third Circuit that a group of women, who refuse to conform... may well satisfy the definition.). Notably, prior to the Board's decision in *Kasinga*, the DOJ itself observed that the *Acosta* social group formulation supported the cognizability of a social group based on gender, either alone or as part of a combination.²⁰ The Commentary to the Proposed Rule affirms the viability of gender-defined social groups, stating that to be immutable, the common trait must be unchangeable, or truly fundamental to an applicant's identity. Gender is clearly such an immutable trait.²¹

Second, although marital status is not inherently immutable, there are circumstances such as prevail in Ms. Alvarado's case where marital status constitutes an immutable trait.²² Ms. Alvarado's brutal and domineering husband simply would not permit her to leave the

²⁰ DOJ Gender Guidelines, *supra* note 10, at 13-15; Rec. at 649-52.

²¹ Commentary, *supra* note 4, at 76593.

²² The Commentary to the Proposed Rule recognizes this principle, stating that there may be circumstances in which an applicant's marital status could be considered immutable. *Id.*

relationship, and there was no one in Guatemala who would intervene on her behalf. Osorio transformed what should have been a consensual relationship into one that was immutable, and he could do this because the authorities of Guatemala abdicated their responsibility to protect Ms. Alvarado. Osorio hunted her down every time she attempted to leave him, and told her on numerous occasions that she could neither escape him in life²³ or in death.²⁴ His threats continued even after she fled Guatemala; Ms. Alvarado's sister recounted in a letter that Osorio had said if she comes back, I will not let her live. (Rec. at 686.)

Osorio could both make and carry through on his threats with impunity because of the institutionalized discrimination against women in Guatemala, and the absolute failure of governmental protection. (Rec. at 429-30, 736-37, 739, 742, 744.) It is in this respect that nationality becomes a defining characteristic of the social group: it acts as a limiting and contextualizing factor to the characteristics of gender and marital status, an explicit recognition that social group cognizability is not determined in the abstract, but in the context of particular countries, societies and cultures.

²³ On one occasion Ms. Alvarado told Osorio she wanted to get far away from him so he could not find her. He replied:

[Y]ou will suffer much worse than what I have done to you so far..If you ever try to leave, I will come find you. And when I find you, I could kill you, but I m not going to do that. I will break your legs. I will cripple you so that you will be in a wheelchair for the rest of your life. I will mark your face so it will be scarred forever, it will be twisted and deformed.

(Rec. at 704.)

On another occasion Osorio pulled out a machete in the middle of the night, and taunted her, saying:

Just you wait, you can t hide, even if you are buried underground, you can t hide from me...you can t get away...I will cut off your legs so you can t get away any more.

(Rec. at 698.)

²⁴ Once when Ms. Alvarado was so desperate about her circumstances that she attempted to take her own life, through an overdose, Osorio said, If you want to die, go ahead. But from here, you are not going to leave. (Rec. at 699-700.)

The inclusion of nationality as a characteristic of Ms. Alvarado's social group is analogous to the inclusion of tribal affiliation (*e.g.*, women of the Tchamba-Kunsuntu Tribe) as a social group characteristic in the *Kasinga* decision. In each case the characteristic limits the social group from the potentially larger group; in *Kasinga*, the characteristic of tribal affiliation limited the social group from a larger group defined solely by gender, intact genitalia and opposition to female genital mutilation. In Ms. Alvarado's case, the characteristic of nationality limits the group from one defined exclusively by gender and marital status without reference to geographical limits. Characteristics that reference country or region can be found as a matter of routine in refugee cases involving the particular social group ground. *See, e.g., Lukwago v. Ashcroft*, 329 F.3d 157, 171 (3rd Cir. 2003) (social group of children from Northern Uganda who are abducted and enslaved ...) (emphasis added); *Lwin*, 144 F.3d at 512 (social group of parents of Burmese student dissidents) (emphasis added); *Fatin*, 12 F.3d at 1241 (social group of Iranian women who refuse to conform) (emphasis added).

The Proposed Rule explicitly adopts an approach which incorporates the evaluation of societal conditions, norms and attitudes into the determination of social group cognizability. Included in its list of factors that may be considered... in deciding whether a particular social group exists²⁵ are whether the group is recognized to be a societal faction or is otherwise a recognized segment of the population *in the country in question* or whether *the society in which the group exists* distinguishes members of the group for different treatment or status than is accorded to other members of the society.²⁶

²⁵ Proposed Regulations, *supra* note 2, at 76594.

²⁶ *Id.* at 76598 (emphasis added).

These factors from the Proposed Rule lend further support to the cognizability of Ms. Alvarado's social group. The record in this case establishes that in Guatemala, women as a recognized segment of the population are singled out for different (*i.e.*, discriminatory) treatment. Women who are married are subject to discrimination on the basis of both their gender and their marital status. The bias is enshrined in the laws, where women have lesser rights than men. (Rec. at 739.) It is evidenced in the discrimination in the administration of justice and application of the law (Rec. at 737) which allow the police and the courts to respond dismissively to their serious complaints of maimings and death threats by their husbands. And it is evident in the pervasive and persistent attitudes that women [are] subordinate to men. (Rec. at 737.) The Commentary to the Proposed Rule specifically notes the relevance of evidence that the institutions of the society at hand offer fewer protections or benefits to members of the group than to other members of society.²⁷ This is certainly the case for women in Guatemala.

2. Ms. Alvarado was Persecuted on Account of her Social Group Membership

The statutory language on account of requires that there be a causal relationship, or nexus, between the persecution and one of the enumerated grounds. Nexus is established when the persecutor is motivated by a cognizable ground in inflicting the harm, or the harm is directed at the applicant because of the protected characteristic. *INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992); *Kasinga*, 21 I. & N. Dec. 357; *Matter of S-P-*, 21 I. & N. Dec. 486 (BIA 1996).

[A]n applicant does not bear the unreasonable burden of establishing the exact motivation of a persecutor where different reasons for actions are possible. *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988). Rather, an asylum applicant bear[s] the burden of

²⁷ *Id.* at 76594.

establishing facts on which a reasonable person would fear that the danger arises on account of his race, religion, nationality, membership in a particular social group, or political opinion.

Id. at 489-90. Further, it is well-established that nexus may be established by either direct or circumstantial evidence. *Elias-Zacarias*, 502 U.S. at 482-83; *Baballah v. Ashcroft*, 335 F.3d 981, 990 (9th Cir. 2003); *Rios v. Ashcroft*, 287 F.3d at 900. Significantly, in *Kasinga*, the Board ruled that societal and cultural factors are also to be taken into account in determining nexus. 21 I. & N. Dec. at 366-67. The Proposed Rule also adopts this approach.²⁸

At issue in this case is whether Osorio tormented and abused Ms. Alvarado because she was his *wife*, a status which incorporates gender and marital status. Osorio's comments and actions throughout the course of the relationship leave no doubt on this point. Time and time again in the midst of the vicious abuse, and in response to Ms. Alvarado's protestations Osorio affirmed his right to do as he did because she was his wife: "You're my woman, you do what I say" (Rec. at 696); "You're my woman, and I can do whatever I want" (Rec. at 695); "You don't order me" (Rec. at 694), and "I can do it if I want to." (Rec. at 697.) It was clear to Ms. Alvarado that her husband's animus was not personal to her as an *individual*, but directed towards her as his *wife*; when directly questioned on this point, she testified that her husband would batter any woman to whom he was married. (Rec. at 325.)

Persecutors are often not as vocal about their motives as was Osorio. *See, e.g., Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) ("Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution."). However, even if he had remained silent, the record would have been more than sufficient to establish the nexus

²⁸ *Id.* at 76593.

between his brutal persecution of Ms. Alvarado and her status as his wife. The extensive body of literature on domestic violence directly address its purposes and motivations, and make quite clear the gender and marital status link. The following is but a small sample of excerpts from scholarly literature on the issue which was *admitted into the record* in this case:

- " Wife-beating is, therefore, not an individual, isolated or aberrant act,... but a social license, a duty or sign of masculinity, deeply ingrained in culture, widely practiced, denied and completely or largely immune from sanction. *It is inflicted on women in the position of wives* for their actual or suspected failure to properly carry out their role, for their failure to produce, serve or be properly subservient[.]²⁹
- " [V]iolence against *wives* is a function of the belief ...that men are superior and that *the women they live with* are their possessions or chattels that they can treat as they wish and as they consider appropriate.³⁰
- " Domestic violence has been revealed [to be] gender specific....[O]f all spousal violence crimes, ninety-one percent were victimizations of *women by their husbands or ex-husbands*.³¹
- " Domestic violence is not gender-neutral...severe, repeated domestic violence is overwhelmingly initiated by *men and inflicted upon women*.³²

Osorio s own words and actions, coupled with an understanding of domestic violence provides direct evidence that the persecution was motivated by gender and marital status.

However, there is still more evidence on this point. The BIA held in *Kasinga* that the nexus

²⁹ Copelon, Rhonda, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 335 (1994); (Exhibit 2-J) (emphasis added).

³⁰ *Id* at 304; (Exhibit 2-J) (emphasis added).

³¹ Thomas, Dorothy Q. and Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 58 ALBANY L. REV. 1119, 1128 (1995); (Exhibit 2-M) (emphasis added).

³² Copelon, *supra* note 29 at 303 (Exhibit 2-J)(emphasis added).

determination includes an analysis of societal and cultural norms;³³ this approach is reiterated in the Commentary to the Proposed Rule:

[E]vidence about patterns of violence in the society against individuals similarly situated to the applicant may also be relevant to the on account of determination. For example, in the domestic violence context, an adjudicator would consider any evidence that the abuser uses violence to enforce power and control over the applicant because of the social status that a woman may acquire when she enters into a domestic relationship. This would include any direct evidence about the abuser's own actions, 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....*³⁴ [Emphasis added.]

The evidence is clear on these points. The legal system in Guatemala supports the patterns of violence by abdicating its responsibility to intervene to protect victims of domestic battering. The prevalent beliefs within society, which support and perpetuate the violence, include the beliefs that women are subordinate to men (Rec. at 737), that domestic violence as a social problem is unimportant (Rec. at 429), and that the woman is to blame when familial violence takes place.

³³ The approach to determining nexus which considers the abuser's actions within the societal / country context has been widely accepted; it is commonly referred to as a bifurcated nexus analysis. See, e.g., *Minister for Immigration and Multicultural Affairs v. Khawar* [2002] HCA 14 (Australian High Court), available at <<http://scaleplus.law.gov.au/html/highcourt/0/2002/0/2002041114.htm>>; *Islam, supra* note 16; Refugee Appeal No. 71427/99, *supra* note 16, ¶106 (New Zealand); UNHCR Social Group Guidelines, *supra* note 13. The British House of Lords illustrated its rationale by reference to the persecution of Jews prior to the Second World War:

Suppose oneself in Germany in 1935. ... [S]uppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but *they would not have done what they did unless they knew that the authorities would allow them to act with impunity.* And the ground upon which they enjoyed impunity was that the victim was a Jew.... An essential element in the persecution, the failure of the authorities to provide protection, is based upon race.

Islam, supra, ¶133 (Lord Hoffman) (emphasis added).

³⁴ Commentary, *supra* note 4, at 76593.

(Rec. at 425.) The social norms and beliefs include such a broad acceptance of domestic violence that a man can batter his wife in public or drag her by the hair down the street, as Osorio did to Ms. Alvarado and no one will lift a finger to stop the violence.

C. Ms. Alvarado was Persecuted on Account of Her Political Opinion

The IJ who granted Ms. Alvarado's claim for asylum made the finding that she had resisted her husband's brutal acts of domination. (Rec. at 196.) The IJ ruled that her resistance was the expression of a political opinion against male domination, and constituted a challenge to [Osorio's] opinion that women are to be subordinate to men. (Rec. at 196.) Osorio's violent behavior towards his wife was meant to punish her for the actual opinion she held, or the opinion he attributed to her that men have no right to treat women in the manner in which he treated her.

Asylum claims often involve overlapping grounds of persecution. *See, e.g., Baballah v. Ashcroft*, 335 F.3d 981 (ethnicity and religion); *Gafoor v. INS*, 231 F.3d 645 (9th Cir. 2000) (race and imputed political opinion); *Lal v. INS*, 255 F.3d 998, *as amended*, 268 F.3d 1148 (9th Cir. 2001) (religion and political opinion). The IJ's ruling that Osorio was motivated *both* by Ms. Alvarado's status as his wife and her political opinion of resistance is supported by the record as well as by scholarly literature regarding the phenomenon of domestic violence. Most experts recognize that domestic violence is a tool aimed at gaining power in order to control the intimate partner,³⁵ that it is part of a broad-scale system of domination of women,³⁶ and that it must be

³⁵ Karl Hempel, M.D., *Domestic Violence*, THE HEALTH GAZETTE (1998), available at <<http://www.tfn.net/HealthGazette/domestic.html>>.

³⁶ Kimberle Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF

understood in its social and cultural context as the extension of the domination and control of husbands over their wives.³⁷

That men use spousal abuse as a means by which to perpetuate male domination and patriarchal social systems has likewise been recognized by many international organizations. For example, in a special report on the causes and consequences of violence against women, the United Nations Special Rapporteur on Violence Against Women concluded that [i]n intimate violence, male supremacy, ideology and conditions & confer upon men the sense of entitlement, if not the duty, to chastise their wives.³⁸

This understanding of domestic violence explains why Osorio would escalate his abuse upon the least sign of resistance on Ms. Alvarado's part. Furthermore, because domestic violence is quintessentially about issues of power and subordination in intimate relationships, domestic violence is necessarily motivated by status (*i.e.* social group) as well as by resistance (*i.e.* insubordination). Osorio's rage at Ms. Alvarado's resistance is consonant with an understanding of domestic violence as purposeful behavior intended to exert power, to eradicate resistance and to perpetuate subordination.

1. Ms. Alvarado's Resistance Constitutes a Political Opinion

Ms. Alvarado did not agree with the prevailing social and cultural norms of male domination and abuse. Her disagreement was expressed within the context of her relationship

DOMESTIC ABUSE 93, 93 (1994).

³⁷ R. Emerson Dobash and Russell Dobash, *VIOLENCE AGAINST WIVES* 15 (1979).

³⁸ *1996 Report of the Special Rapporteur*, *supra* note 11, at 7, ¶ 3.

with Osorio. Although she was terrorized by him, she demonstrated her resistance through both her words and her actions. On a number of occasions, when he was in the throes of tormenting her, she spoke up and directly challenged him, protesting his right to force sex on her (Rec. at 695); to rape her anally (Rec. at 696); and to use her head as a battering ram against furniture. (Rec. at 697.) On other occasions she expressed her resistance by her actions: she reported his abuse to the police (Rec. at 700); she attempted to use the judicial system (Rec. at 701); contrary to his demands that she not leave him, she fled to her parents' and brother's home, and then to a rented room in an effort to resist his control. (Rec. at 696.) She went to seek medical treatment, even though she knew he would be enraged. (Rec. at 696.) And finally, when none of that was successful in vindicating her right to be free of abuse, she flouted his assertion of absolute authority over her by leaving his sphere of control, and fleeing to the United States. (Rec. at 702.)

Testimony by a psychotherapist who treated her in the United States affirms the depth of Ms. Alvarado's belief in her right not to be abused by her spouse. The psychotherapist, Dr. Linda Bersing, is an expert on women's issues and Latin America who has counseled women for more than two decades. She testified that Ms. Alvarado was quite different from other women with whom she had met over the years. (Rec. at 305) The difference, she testified, was that Ms. Alvarado had a will...to fight; she believed she had the right to do something and she was really determined, and unlike other women who might end up believing that they deserve the abuse, she did not accept her situation. (Rec. at 306.)

Courts have long held that the term "political opinion" extends to a range of beliefs and philosophies, and is not limited to notions regarding political parties and ideologies. *See, e.g.,*

Chang v. INS, 119 F.3d 1055, 1063 (3rd Cir. 1997) (an asylum seeker need not call herself a dissident or articulate resistance in terms of a particular ideology); *Osorio v. INS*, 18 F.3d 1017, 1030 (2nd Cir. 1994) (holding that refugee law does not require that [the asylum seeker] be a politician and ruling that to require an individual to state which political party he belongs to, which political philosophy he espouses or which political leaders he supports...betrays an impoverished view of what political opinions are...); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (*en banc*) (views of a poor domestic and washerwoman who does not participate in politics nonetheless political).

Feminism has been expressly recognized as a political opinion. *See, e.g., Fatin*, 12 F.3d at 1242 (In this case, if the petitioner s political opinion is defined simply as feminism, she would presumably satisfy the first element [establishing a political opinion], *for we have little doubt that feminism qualifies as a political opinion* within the meaning of the relevant statutes. (Emphasis added)). A woman s deeply held opinion that her husband does not have the right to violate her physical and psychological integrity is one of the most fundamental expressions of feminism, because freedom from domestic violence is a necessary condition for the attainment of all other societal equalities.³⁹ Ms. Alvarado believes in the right to this equality, and her words and actions

³⁹ The United Nations Declaration on the Elimination of Violence Against Women recognizes that violence against women is the essential and ultimate social mechanism by which women are forced into a subordinate position as compared to men. Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. GAOR Supp. (No. 49), at 217, U.N. Doc. A/48/49 (1993).

throughout her relationship were an expression of this belief, and were not simply the articulation of the common human desire not to be harmed or abused ⁴⁰

2. Ms. Alvarado was Persecuted on Account of her Political Opinion

As discussed above, the extensive literature establishes that the fundamental purpose of domestic violence is to punish, humiliate, and exercise power over the victim on account of her gender (Rec. at 39) and to extinguish any actual or perceived dissent. Osorio was motivated to batter Ms. Alvarado because of her status as his wife, and he was motivated to batter her because she resisted and challenged his right to exert absolute power and control over her.

There was not a single time when Ms. Alvarado resisted Osorio that he did not respond by even more brutal treatment. Osorio vowed to kill her for leaving him. (Rec. at 704.) When she tried to escape by renting a room, he beat her unconscious. (Rec. at 696.) When she refused his command to go to the hospital to abort their child, he battered her and attempted to induce a miscarriage. (Rec. at 694.) He pulled a machete on her when she refused to go for a walk in the middle of the night. (Rec. at 698.)

The least hint of resistance, or questioning of his authority resulted in escalated abuse: Osorio became enraged when she asked him not to drink so much (Rec. at 694); he threatened to kill her when she tried to resist forced sex: Just do it, or I ll finish you off. (Rec. at 695.) When Ms. Alvarado simply remarked that Osorio had arrived home late, he hit and punched her, saying that he didn t have to answer to her. (Rec. at 699.) Perhaps most telling of all are Osorio s

⁴⁰ The BIA made this characterization of Ms. Alvarado s opinions in its decision reversing the IJ. (Rec. at 13.)

threats to his wife as to what he would do should she ever leave him which would be the ultimate throwing off of his authority. He told her:

[Y]ou will suffer much worse than what I have done to you so far...If you ever try to leave, I will come find you. And when I find you, I could kill you, but I m not going to do that. I will break your legs. I wil cripple you so that you will be in a wheelchair for the rest of your life. I will mark your face so it will be scarred forever, it will be twisted and deformed. (Rec. at 704.)

The fact that Osorio was motivated to punish Ms. Alvarado for her resistance is evident in the sequence of events the repeated cycles of resistance, followed by violence and threats of violence. The conclusion that the battering was, in part, politically-motivated, is reinforced by the scholarly literature on domestic violence, which as detailed above recognizes it as purposeful conduct, intended to extinguish resistance, and to dominate and control.⁴¹

D. Ms. Alvarado has Suffered Atrocious Past Persecution and has Established a Well-founded fear of Future Persecution

A well-founded fear of persecution may be presumed if an asylum applicant establishes past persecution. The regulations in force when Ms. Alvarado s case was adjudicated provided that the presumption could be rebutted only upon a showing by a preponderance of the evidence that country conditions had changed to such an extent that the fear of persecution was no longer well-founded. 8 C.F.R. § 208.13(b)(1)(i). Current regulations provide for rebuttal upon proof by a preponderance 1) of a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution ; or 2) that the applicant could avoid persecution by

⁴¹ See V. Michael McKenzie, DOMESTIC VIOLENCE IN AMERICA 8 (1995) ([s]pousal battery is a choice men exercise intentionally and purposefully to resolve conflict and achieve their goals of dominance, and coercive control of women).

internal relocation within the country of origin if, under all the circumstances, it would be reasonable to expect her to do so. 8 C.F.R. §§ 1208.13(b)(1)(i)(A) & (B).

Even in cases where the presumption of a well-founded fear has been rebutted, asylum may be granted in the exercise of discretion when the applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution or there is the reasonable possibility that the applicant may suffer other serious harm upon removal to the home country. 8 C.F.R. §§ 1208.13(b)(1)(iii)(A) & (B).

It is undisputed that Ms. Alvarado has suffered past persecution, and there is no evidence in the record of changed country conditions, changed circumstances, or reasonable internal relocation, which could rebut the presumption in her favor of a well-founded fear. Even in the absence of the regulatory presumption, the record evidence establishes that a reasonable person in Ms. Alvarado's circumstances would fear persecution. *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). Moreover, given the duration and extreme severity of the abuse, and its ongoing physical and psychological effects, Ms. Alvarado qualifies for a grant of protection even in the absence of a well-founded fear of persecution.

1. Ms. Alvarado has Established a Well-Founded Fear of Persecution

The IJ ruled that Ms. Alvarado was entitled to the regulatory presumption of a well-founded fear on the basis of her past persecution, and that there was no evidence that conditions in Guatemala had changed to such an extent ... to obviate the Respondent's need for protection. (Rec. at 192.) There is no evidence to support a rebuttal even under the revised regulation's broader grounds; there have been no changed circumstances, and the record is clear on the futility

of Ms. Alvarado s attempts to escape her husband through internal relocation. (Rec. at 235, 238-240.)

Ms. Alvarado can establish a well-founded fear of persecution even in the absence of the regulatory presumption. An applicant s fear is well-founded if it is subjectively genuine and objectively reasonable, or if a reasonable person in the circumstances would fear persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-43 (1987); *Mogharrabi*, 19 I. & N. Dec. at 445. The particular facts of this case, considered in the context of scholarly research on domestic violence, can only lead one to the conclusion that any reasonable person in Ms. Alvarado s circumstances would fear persecution.

Osorio asserted on numerous occasions that Ms. Alvarado could never escape him. (Rec. at 699-700.) He tracked her down on every occasion that she did attempt to leave, and among the many threats that he made was that he would make her suffer worse than ever before should she attempt to leave him. (Rec. at 704.) His threats against her did not cease with her departure from Guatemala; Ms. Alvarado s sister recounted that Osorio has her under a death threat (Rec. at 679), and that if she comes back he will not let her live.⁴² (Rec. at 686.) The gravity of these threats is underscored by the literature on domestic violence, *see supra* at section B.2, and by observations made by the Violence Against Women Office (VAWO) of the Department of Justice, which were incorporated into the Commentary to the Proposed Regulation:

⁴² Ms. Alvarado has more than met the well-founded fear burden for a asylum; on these facts, she has also met the higher standard of clear probability required for restriction on removal. *INS v. Stevic*, 467 U.S. 407 (1984). A clear probability of persecution may be shown where a specific threat is made by a person with the will and ability to carry it out. *Bolanos-Hernandez*, 767 F.2d at 1285. As amply demonstrated by the record, Osorio has both the will and ability to carry out his threat that he will not let her live.

[I]n relationships involving domestic violence, past behavior is a strong predictor of future behavior by the abuser. *See, e.g.*, United States Department of Justice, Understanding Domestic Violence: A Handbook for Victims and Professionals. ... [D]omestically and internationally, domestic violence centers on power and control over the victim. Consequently, when victims attempt to flee the abusive relationship, or otherwise assert their independence, abusers often pursue them and escalate the violence to regain or reassert control. *See, e.g.*, United States Department of Justice, Stalking and Domestic Violence under the Violence Against Women Act (1998). *The risk to lethality to the victim is typically greatest when she attempts to escape the abuse, and in contrast to other persecution cases where the persecutor's desire to harm the victim may wane if the victim leaves, the victim's attempt to leave typically increases the abuser's motivation to locate and harm her.*⁴³

The VAWO also commented that because of the abuser's intimate relationship with the victim, he is likely to possess important information about where the victim could go or to whom she would turn for assistance.⁴⁴

Therefore, it is clear that Osorio's threats should be taken seriously, and that Ms. Alvarado may be assumed to be at higher risk now than she was at any point in her relationship with Osorio (*i.e.*, escape puts victim at the greatest risk to lethality). The VAWO's observations are also particularly relevant to the issue of internal relocation, as they recognize the ability intimate partners have to locate the victim. Osorio has demonstrated his ability through his past successes in tracking down Ms. Alvarado. The fact that they have children together is also a significant consideration; should Ms. Alvarado be forced to return to Guatemala, there is no doubt that she would want to see her children, who have been residing with Osorio's parents. (Rec. at 705.) This would certainly make it virtually a foregone conclusion that Osorio would be able to locate Ms. Alvarado.

⁴³ Commentary, *supra* note 4, at 76595 (emphasis added; some citations omitted).

⁴⁴ *Id.* at 76596.

2. Ms. Alvarado Qualifies for a Grant of Asylum Even in the Absence of a Well-founded Fear

An applicant may obtain asylum even if she has no well-founded fear in the future, provided that she has compelling reasons arising out of the severity of the past persecution for being unwilling to return. 8 C.F.R. § 1208.13(b)(1)(ii). *See also Lal*, 255 F.3d at 1002; *Lopez-Galarza v. INS*, 99 F.3d 954, 960-63 (9th Cir. 1996); *Matter of Chen*, 20 I & N. Dec. 16 (BIA 1989). Assuming *arguendo* that Ms. Alvarado could not establish a well-founded fear of persecution, she would still qualify for asylum because the harm which she suffered was exceptionally severe and atrocious.

Persecution is stamped on every page of this record. Although this observation was made by Ninth Circuit jurist John T. Noonan upon reading the record in the *Lazo-Majano* case, *see* 813 F.2d at 1434, it could just as well have been said about the record in the instant case. It is impossible to read the record in Ms. Alvarado's case without reaching the conclusion that her home had become a virtual torture chamber, where her husband was at liberty to rape, sodomize, whip, kick, and beat her. Bones were dislocated, internal hemorrhaging occurred, flesh was cut and bruised, and sexually transmitted diseases were passed on.

The physical harm was extreme and long-lasting; in her affidavit, Ms. Alvarado testified that she suffers from severe, recurring headaches from being hit and kicked in the head, dragged by the hair, or her head used as a battering ram. (Rec. at 705.) She still suffers from severe abdominal pains and irregular menstrual periods from the rapes and blows to her abdomen and genital area, and has recurring pains in her arm and chest from being pulled across the bed when her husband would force sex upon her. (Rec. at 696, 705.)

But it is not only the physical harms which have ongoing consequences for Ms. Alvarado; she continues to suffer from the psychological and emotional repercussions of this exceptionally brutal abuse. She regularly has nightmares that she is back in Guatemala, and the thought of this makes her so desperate and fearful that she cannot get back to sleep. (Rec. at 704-05.)

There can be no doubt that Ms. Alvarado's abuse rises to the severity of harm necessary for a grant of asylum even in the absence of a well-founded fear of persecution. The physical and psychological harm she endured are equivalent to that present in cases where asylum was granted on the basis of severe past persecution. *See, e.g., Lopez-Galarza*, 99 F.3d 954 (female applicant imprisoned for 15 days, repeatedly raped and subjected to other physical abuse); *Matter of B-*, Int. Dec. 3251 (BIA 1995) (Afghan interrogated, physically abused, detained for 15 months, and forced to serve in the Army because of assistance to the mujahideen); *Chen*, 20 I. & N. Dec. 16 (Chinese applicant and his family suffered brutal physical and psychological mistreatment over more than a decade during the Cultural Revolution). In addition, although it is not a requirement, Ms. Alvarado not only endured atrocious forms of persecution in the past, but she continues to suffers from ongoing physical and emotional consequences arising from the ten years of battering and torment. *See Lal*, 255 F.3d at 1006 (although existence of lasting physical or emotional disability may sometimes be a factor in determining the severity of an applicant's past persecution, it has not been a requirement.).

IV. Conclusion

1) Ms. Alvarado Should be Granted Asylum

A. Ms. Alvarado Should Be Granted Asylum on the Existing Record

Ms. Alvarado has suffered tremendously for the last twenty years of her life. From 1984, the date of her marriage, until 1995, when she fled Guatemala, she was the victim of her husband's unrestrained brutality. And from 1995 to 2004, she has suffered what is now almost a decade of separation from her children. When she left Guatemala, her son was a toddler; he is now nearly twelve years old; her daughter, who was a young girl, is in her late teens. Because they live with Osorio's parents, she has had only the most minimal contact with them over the years.

As detailed in Part I, *supra*, Ms. Alvarado's claim for asylum has been pending for almost *ten years* since 1995, when she first appeared before an immigration judge. Each delay has increased her anguish over her separation from her children, as well as her feeling of insecurity regarding her ultimate fate.

The record in Ms. Alvarado's case is extremely well-developed. Her declaration is detailed, her testimony was extensive, and the documentary evidence regarding relevant conditions in Guatemala is comprehensive. Extensive briefing, including that of *amicus curiae*, has occurred at each step of adjudication, and has included in-depth discussion of the scholarly literature on domestic violence. Furthermore, current briefing has addressed Ms. Alvarado's eligibility for protection not only under existing caselaw, but pursuant to the Proposed Regulations as well. Factors relevant under the Proposed Regulations are well-developed in the existing record, and a remand is not required to further develop the record for these purposes.

Ms. Alvarado's case is ripe for decision. Justice and fairness require an adjudication on the existing record, and on the basis of the arguments that have been submitted throughout the past decade in this case. To further delay a decision in this case is to deny Ms. Alvarado the

opportunity to regain the peace of mind that comes with a resolution of her claim for protection, and more importantly the opportunity for family reunification at long last.

B. There are no Adverse Factors which Negatively Impact the Exercise of Discretion

Asylum is a discretionary remedy, and may be denied in the exercise of discretion by the Attorney General, or his delegates. However, where an individual has established a well-founded fear of persecution, asylum should only be denied in the exercise of discretion on the basis of genuine compelling factors factors important enough to warrant returning a *bona fide* refugee to a country where he may face a threat of imminent danger to his life or liberty. *Hernandez-Ortiz v. INS*, 777 F.2d 509, 519 (9th Cir. 1995). Not only are there no compelling factors which would justify a denial in this case there are simply no adverse factors *whatsoever*. Ms. Alvarado has established statutory eligibility, and in the total absence of negative factors, should be granted relief in the exercise of discretion.

Respectfully Submitted,

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DATED: February 18, 2004

DECLARATION OF SERVICE BY MAIL

Matter of Rodi Alvarado Peña

I, Stephen Knight, declare that I am at least 18 years of age, that I am not a party to the within cause, that my business address is Center for Gender & Refugee Studies, UC Hastings College of the Law, 200 McAllister Street, San Francisco, CA, 94102. On February 18, 2004, I served

**BRIEF ON BEHALF OF RODI ALVARADO PEÑA TO
THE ATTORNEY GENERAL OF THE UNITED STATES**

on the person listed below by placing a true copy thereof in a prepaid sealed envelope with first-class postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

George R. Martin
Acting Chief Appellate Counsel
U.S. I.C.E.
U.S. D.H.S.
5113 Leesburg Pike, Suite 200
Falls Church, VA 22041

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 18, 2004, at San Francisco, California.

Stephen Knight