ONE STEP FORWARD, TWO STEPS BACK: WOMEN ASYLUM-SEEKERS IN THE UNITED STATES AND CANADA STAND TO LOSE HUMAN RIGHTS UNDER THE SAFE THIRD COUNTRY AGREEMENT

by
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The United States and Canada share similar asylum adjudication processes rooted in international treaties. As contracting parties, each country should adhere to international legal standards in a united effort to protect bona fide refugees seeking asylum. This Comment explores the American approach to gender-based asylum claims, comparing it to Canada's, particularly when the claimant has been the victim of domestic violence. Because Canada conforms more closely to international criteria, it arguably provides more extensive relief to gender-based asylum claimants. To examine the extent of the differences between these two nations' approaches, this Comment will address a new treaty between the two countries—called the Safe Third Country Agreement—because enforcement of this agreement could create new struggles for gender-based asylum-seekers in the United States. Finally, this Comment will urge the United States to take action in conformity with its duty to uphold international human rights standards for women.

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I. INTRODUCTION

Women fleeing their home countries to escape gender persecution come to the United States and Canada seeking access to the developed asylum systems in those nations. While both countries have asylum determination systems rooted in international laws, differences in approach between the two countries can be significant for a woman asylum-seeker bringing a gender-based asylum claim, particularly if the claim is based on domestic violence. Women face more significant barriers to asylum protection in the United States than in Canada—most significantly, reluctance by decision makers to interpret gender-motivated harm as persecution deserving asylum protection.[1] Canada's asylum analysis is instructive because it consistently recognizes gender-based harm as persecution for purposes of conferring asylum status.[2] The American asylum system could benefit from adopting substantive and procedural aspects of the more generous Canadian approach to asylum adjudication.

Examination of a new United States-Canada treaty, the Safe Third Country Agreement, is a useful way to analyze the different approaches to gender asylum adjudication in the two countries. Unfortunately, the agreement threatens to emphasize differences in the countries' approaches to the detriment of women asylum-seekers in the American system. Under the Safe Third Country Agreement, women who bring gender-based asylum claims—particularly domestic violence claims—face new challenges that could decrease their chances of achieving asylum in either country. Because the Safe Third Country Agreement is likely to result in fewer women having access to the Canadian asylum system—a central problem of the agreement, according to

[1] Stephen M. Knight, *Seeking Asylum from Gender Persecution: Progress Amid Uncertainty*, 79 INTERPRETER RELEASES 689, 689 (2002).

[2] Stephen M. Knight, *Reflections on* Khawar*: Recognizing the Refugee from Family Violence*, 14 HASTINGS WOMEN'S L.J. 27, 28 (2003).

human rights advocates—it could potentially result in fewer women securing asylum status.[3]

This Comment will juxtapose the American approach to adjudication of gender-based asylum claims with the more progressive Canadian approach, which should serve as a model for the United States. By examining the basic goals and flaws of the Safe Third Country Agreement, this Comment will emphasize shortcomings in the American approach and positive developments in the Canadian approach, and will urge the United States to take corrective action. Until the United States extends comparable relief to women asylum-seekers, it should re-examine the implications of the Safe Third Country Agreement on women's human rights, question the agreement's conformity to international legal standards, and take steps to cancel the agreement.

As useful background, Part II of this Comment begins by exploring international legal criteria for asylum claims under the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees,[4] emphasizing the efforts of the international community to incorporate the protection of women into international human rights instruments. Part III will closely examine the American and Canadian approaches to gender-based asylum claims by comparing the countries' respective case law and guidelines. Part IV will address the goals of the Safe Third Country Agreement, its flaws, and harmful effects it is likely to have on women asylum-seekers.

II. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND GENDER-BASED ASYLUM

Two international treaties form the basis of much of the asylum law in the United States and Canada. The 1951 United Nations Convention Relating to the Status of Refugees ("Convention") and the 1967 Protocol Relating to the Status of Refugees ("Protocol") establish "that human beings shall enjoy fundamental rights and freedom without discrimination."[5] The rights of women asylum claimants are directly affected by these treaties and other international instruments.

A. International Requirements for Asylum Claims

"Gender" or "sex" is not a Convention ground for claiming refugee status. The Convention defines the term "refugee"[6] as someone who

[3] Letter from Ctr. for Gender and Refugee Studies to Dennis Coderre, Minister of Immigration and Citizenship, Canada (Apr. 2, 2002) (on file with author) [hereinafter Letter].

[4] Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259 [hereinafter Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 [hereinafter Protocol].

[5] Preamble, Convention, *supra* note 4.

[6] For purposes of this Comment, the term "refugee" will have the same meaning as "asylee" or "asylum-seeker" depending on context.

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who . . . is unwilling to return to it.[7]

Despite the predominantly gender-neutral language, the definition has traditionally been interpreted from a male perspective that does not acknowledge the unique persecution faced by women.[8] Seeking to amend this disparate treatment, in 1985 the United Nations High Commissioner for Refugees ("UNHCR") called for modifications to make international criteria more inclusive of women.[9]

B. International Measures Taken to Include More Women in Asylum Laws

Recognizing that women were not adequately protected by the Convention definition of refugee, the UNHCR created international guidelines aimed at addressing the human rights and specific needs of women refugees.[10] In 1985 the Executive Committee of the UNHCR indicated that countries party to the Convention (i.e., contracting countries) could extend protection to women for persecutory actions experienced primarily by women. The statement fell short of suggesting that sex or gender should become an independent ground for claiming asylum. However, it did open the door to the possibility that women could achieve asylum based upon gender persecution if the basis of their asylum claims was persecution because of membership in a "particular social group" under the Convention definition.[11] Thus, even though gender did not become an enumerated ground upon which to seek asylum, the Executive Committee essentially encouraged contracting countries to make it possible for women who have suffered from persecution on account of gender to claim persecution as a member of a particular social group.

Since 1985, the UNHCR has issued other guidelines to address the needs of women refugee applicants and to assist countries in adjudicating gender asylum claims.[12] The 1991 *Guidelines on the Protection of Refugee Women* is a comprehensive document addressing protection problems faced by refugee

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[7] Convention, *supra* note 4, at art. 1(A)(2).

[8] Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 780 (2003).

[9] UNHCR, Exec. Comm. Conclusions, Refugee Women and International Protection, No. 39 (XXXVI) (1985), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/excom/opendoc.htm?tbl=EXCOM&page=home&id=3ae68c43a8 [hereinafter Refugee Women].

[10] The Convention entrusted the UNHCR with the mission to promote documents for the protection of refugees. Preamble, Convention, *supra* note 4.

[11] Refugee Women, *supra* note 9.

[12] The terms "gender asylum claim" and "gender-based asylum claim" refer to those cases brought by women who claim a well-founded fear of persecution as a result of their gender.

women.[13] These guidelines identify special safety risks facing women refugees with the goal of providing better protections. Such risks include higher vulnerability to physical attack, sexual assault, and rape.[14] Additionally, the guidelines affirm that protection of refugee women is mandated not only under the Convention and its Protocol, but also pursuant to other international treaties, including the Universal Declaration of Human Rights and the Convention on the Elimination of All Forms of Discrimination Against Women.[15]

UNHCR guidelines issued in May 2002 provide contracting countries with legal guidance on examining and adjudicating gender-based refugee claims.[16] Importantly, these guidelines indicate that gender-related claims can include sexual violence, domestic violence, forced family planning, female genital mutilation ("FGM"), and punishment for breaking accepted social standards.[17] The guidelines address key substantive analysis pertaining to gender-based asylum claims.[18] Contracting countries are informed that where nations are aware of persecution against women yet tolerate it, the practice rises to the level of persecution for Convention purposes.[19] Specifically, the UNHCR affirms that harm can rise to the level of persecution even if committed by a non-state actor (e.g., a spouse or family member) if it is related to a Convention ground—whether or not the country fails to protect for reasons relating to the Convention ground.[20] The United States has inconsistently observed this standard, as will be discussed in greater detail in Part III.

UNHCR guidelines also address procedural issues that governments reviewing gender-based claims are encouraged to incorporate into their methodologies.[21] These procedural measures include establishing a supportive environment for claimants to relay their claims, assuring confidentiality, interviewing female claimants separately from male family members, and providing interviewers and interpreters of the same sex.[22] The numerous guidelines issued over the years by the UNHCR have expanded the rights afforded women under international asylum law and have been adopted to differing extents in the asylum laws and policies of the United States and Canada.

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[13] UNHCR, Guidelines on the Protection of Refugee Women (July, 1991), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3d4f915e4 [hereinafter Protection of Refugee Women].

[14] *Id*. at para. 71.

[15] *Id*. at para. 6.

[16] UNHCR, Guidelines on International Protection, U.N. Doc. No. HCR/GIP/02/01 (May 7, 2002), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3d58ddef4 [hereinafter International Protection].

[17] *Id*. at para. 3.

[18] *Id*. at pt. II.

[19] *Id*. at para. 11. This idea can be of central importance to gender-based asylum analysis.

[20] *Id*. at para. 21.

[21] *Id*. at pt. III.

[22] *Id*.

III. AMERICAN AND CANADIAN APPROACHES TO GENDER-BASED ASYLUM

Though the Convention and 1967 Protocol form the basis of much American and Canadian asylum law, differences in legal analysis and the extent of compliance with international criteria have resulted in divergent results in the two countries. This Part of the Comment will assess the differences in approach by examining the gender guidelines and relevant case law of each country. Section A will include an exploration of the American approach to the term "particular social group," a term that appears to have presented greater analytical challenges for asylum decision makers in the United States than it has in Canada. Between the United States and Canada, the country where a woman decides to apply for asylum on grounds of gender persecution can be crucial to the outcome of her claim.

A. The American Approach to Asylum Claims Based on Gender

American immigration law and policy is embodied primarily in the Immigration and Nationality Act ("INA"), first enacted in 1952.[23] While comprehensive, the INA originally contained no specific reference to the admission procedure for refugees. When the United States signed the Protocol on November 1, 1968,[24] it was required to implement United Nations laws relating to the protection of refugees.[25] However, the United States did not address the admission of refugees as immigrants until the enactment of the Refugee Act of 1980, an amendment to the INA.[26] The definition of refugee that the act adopted is virtually identical to the Convention definition and extends the same protections.[27] Consistent with the Convention, the INA states that an asylum-seeker must satisfy the following elements to be granted asylum: 1) "fear of persecution"; 2) that is "well-founded"; 3) the persecution feared must be "on account of race, religion, nationality, membership in a particular social group, or political opinion"; and 4) the claimant must be unwilling or unable to return to her country of nationality as a result.[28]

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[23] Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163 (1952) (current version at 8 U.S.C. § 1101 (2000)).

[24] UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol (as of July 15, 2005), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b73b0d63 [hereinafter State Parties].

[25] *See* Protocol, *supra* note 4, art. 1 (indicating that "[t]he State Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined").

[26] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. § 1101 (2000)).

[27] *Id.* § 201(a) (codified at 8 U.S.C. § 1101(a)(42) (2000)).

[28] Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2000) (as amended by the Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102).

1. INS Guidelines

The United States has incorporated some of the UNHCR guidelines into adjudication of gender-based asylum claims. Following a 1993 UNHCR document suggesting that contracting countries establish gender guidelines,[29] in 1995 the United States issued a memorandum addressed to Immigration and Naturalization Service[30] ("INS") asylum officers.[31]

The goals of the memorandum ("INS Guidelines") were threefold: to provide guidance to asylum officers adjudicating gender-based asylum claims, to keep pace with international efforts to ensure equity to women refugees, and to help "ensure uniformity and consistency" both procedurally and substantively.[32] In conformity to UNHCR guidelines, the INS Guidelines encourage procedural safeguards, including maintaining an open environment where women can discuss their claims candidly if possible, using female officers to interview claimants who may have suffered sexual abuse, providing the opportunity for women to be interviewed apart from family members, and taking into consideration that a woman may have a claim independent from her spouse's.[33]

The INS Guidelines also advise on forms of abuse suffered by women that can rise to the level of persecution under American asylum law.[34] Notably, the INS Guidelines indicate that "[t]he forms of harm that women suffer around the world, and that therefore will arise in asylum claims, are varied. Forms of harm that have arisen in asylum claims . . . have included sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence, and forced abortion."[35] Such language is expansive and encapsulates many forms of violence perpetrated against women primarily. If the United States truly follows the INS Guidelines and endorses asylum protection for women subjected to sexual abuse, domestic violence, and other abuse that may rise to the level of persecution, it is hard to understand the difficulty that women claimants encounter during the adjudication process when their asylum claims are based on these harms, are well-founded, and rise to the level of persecution.

One possible answer is that because the INS Guidelines are not binding, adjudicators can essentially choose to ignore them. Even though the INS

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[29] UNHCR, Exec. Comm. Conclusions, Refugee Protection and Sexual Violence, No. 73 (XLIV), (1993), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/excom/opendoc.htm?tbl=EXCOM&page=home&id=3ae68c6810 [hereinafter Refugee Protection].

[30] The INS has since dissolved and its functions became incorporated into the Department of Homeland Security and its sub-agencies in 2002 and 2003. *See* U.S. Citizenship and Immigration Serv., INS into DHS: Where is it now?, http://uscis.gov/graphics/othergov/roadmap.htm (last modified Mar. 18, 2005).

[31] Memorandum from Phyllis Coven, Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators, On Considerations For Asylum Officers Adjudicating Asylum Claims For Women (May 26, 1995), *reprinted in* 72 INTERPRETER RELEASES 781 (1995) [hereinafter Memorandum].

[32] *Id*. at 1.

[33] *Id*. at 5−7.

[34] *Id*. at 9.

[35] *Id*.

Guidelines conform in spirit to UNHCR standards, they are only guidelines in an agency memorandum.[36] The lack of binding legal effect arguably means that the United States is not conforming to international standards as set forth by UNHCR. Ten years after the issuance of the INS Guidelines, the United States still has not promulgated regulations for gender-based claims to be applied to asylum adjudicators, immigration judges, the Board of Immigration Appeals, and federal courts. The lack of clear and binding rules governing gender-based asylum claims has resulted in inconsistent case rulings and a lack of clear precedent. As a result, a woman bringing a gender claim has only a vague idea of how an adjudicator may decide her case, particularly if her claim is based on domestic violence. The guidelines foster uncertainty, yet the United States is reluctant to create regulations interpreting the term "membership in a social group" and reluctant to provide advice on how the persecution unique to women fits within this term. All this suggests that the United States does not value the human rights of all people equally. Women and girls are the victims of this inaction.

2. "Membership in a Particular Social Group" as a Basis for Asylum

Interpretation of the term "membership in a particular social group" presents one of the more challenging, albeit vexing, analytical issues in asylum law.[37] Immigration judges and federal appellate courts have long struggled to find a standard of legal analysis for this asylum ground.[38] The Board of Immigration Appeals ("BIA") contributed smartly to the analysis of this issue in *Matter of Acosta*.[39] In this 1985 case, the BIA used the interpretive doctrine of "ejusdem generis"[40] to conclude that for a claimant to fall within a particular

[36] *See* Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of the United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25 (1998) (noting that the INS Guidelines are not binding law and that "the United States Asylum Corps has been roundly criticized in the past for its apparent eagerness to align its decisions with American foreign policy of the day, to the detriment of victims of repression by regimes sponsored by the United States").

[37] Musalo, *supra* note 8, at 777. The INS Guidelines affirm that the persecution feared must be "on account of" membership in a particular social group and provides some insight into what membership in a particular social group entails as applied to gender and family.

[38] *See, e.g.*, Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986) (ruling that a voluntary associational relationship between group members which "impart[ed] some common characteristic that is fundamental to their identity as a member of that discrete social group" was required for a particular social group); Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000) (holding that either voluntary associational relationship or immutable characteristic was sufficient to form a particular social group); Ananeh-Firempong v. INS, 766 F.2d 621, 626−27 (1st Cir. 1985) (holding that family relations can be the basis of membership in a particular social group and that a "particular social group" entails "characteristics that are essentially beyond the petitioner's power to change"); and Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) (holding that members of a particular social group must possess a fundamental characteristic in common with one another that sets them apart and that is "recognizable and discrete" to the persecutor or public at large).

[39] 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

[40] Defined as "[a] canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed." BLACK'S LAW DICTIONARY 556 (8th ed. 2004).

social group, the persecution must be directed at an "immutable characteristic"[41] that the subject of the persecutory behavior could not or should not be required to alter.[42]

In *Matter of Acosta*, the claimant was a driver in a taxi cooperative in El Salvador who would not participate in work stoppages as demanded by a guerrilla group. He feared harm at the hands of the guerrillas because he was not willing to comply with their demands. The man claimed a well-founded fear of persecution on account of being a member of a particular social group of taxi drivers in San Salvador who would not participate in work stoppages. The court refused to recognize the claimant's proposed social group because the characteristics of his group were not immutable, since the claimant could either stop working as a taxi driver or participate in the work stoppages.[43] Even though this case does not deal with gender-based persecution specifically, it demonstrates the BIA's approach to the Convention concept of "particular social group" and how the term is to be legally assessed.

A federal court adopted the BIA's characterization of "particular social group" in a famous 1993 case *Fatin v. INS*.[44] The claimant argued that she was a member of a particular group of "Iranian women who *refuse to conform* to the government's gender-specific laws and social norms."[45] The Third Circuit acknowledged that Fatin's definition of a particular social group could conform to the BIA's definition of the term, but ruled that she did not adequately demonstrate that she belonged to that social group.[46] The court ruled that Fatin's claim was flawed because she indicated only that she would *avoid* conforming to Iran's gender-specific laws but would not necessarily refuse.[47]

Accordingly, under a strict interpretation of the elements of asylum, Fatin did not satisfy the criteria because she was only *opposed* to practices she felt were hostile or discriminatory to women. Had she asserted that she would

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[41] The court noted that the other grounds of persecution under the Protocol—race, religion, nationality, and political opinion—are based on an immutable characteristic: one that "either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." *Matter of Acosta,* 19 I. & N. Dec. at 233. Therefore, to be "of the same type" as the other asylum grounds, "particular social group" required an immutable characteristic. *Id.*

[42] *Id*. Interestingly, the BIA also indicated that the shared characteristic of a particular social group would be satisfied by "an innate one such as sex." *Id*. Later cases would not espouse such a broad social group. The proposed rules on Asylum and Withholding Definitions defines a particular social group as "composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience . . . so fundamental to the identity . . . of the member that he or she should not be required to change it." Asylum and Withholding Definitions, 65 Fed. Reg. 76588−98 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. § 208).

[43] *Matter of Acosta*, 19 I. & N. Dec. at 234.

[44] 12 F.3d 1233, 1240 (3d Cir. 1993). The court accepted the BIA's interpretation of "particular social group," stating "[w]e have no doubt that this is a permissible construction of the relevant statutes, and we are consequently bound to accept it." *Id*.

[45] *Id*. at 1241.

[46] *Id*.

[47] *Id*.

refuse to conform to the gender-specific laws, presumably she would have been included in the particular social group under the Third Circuit's analysis. The Third Circuit seemed to suggest that unless a woman is willing to refuse to conform to gender-specific norms and suffer the terrible consequences, her unwillingness is not an immutable characteristic or fundamental to her identity under *Matter of Acosta*. Unfortunately, this case demonstrates that federal courts, at least the Third Circuit, have not been willing to accept progressive views by women who are from very traditional societies as worthy of being deemed an "immutable characteristic" or fundamental to one's core self.

Just a few years later in 1996, however, the BIA broadened the purview of "particular social group" to apply to circumstances distinctly involving females. In *In re Kasinga*, a young woman indicated she fled her home country of Togo because family members were going to force her to submit to female genital mutilation ("FGM") under tribal custom.[48] The BIA concluded that the claimant was a member of a particular social group under asylum law and affirmed the social group she belonged to as "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."[49] The BIA ruled that the claimant's proposed particular social group category accorded with *Matter of Acosta* because the group was defined by immutable characteristics so fundamental to an individual's identity that she should not have to change them.[50] The BIA also concluded that FGM amounted to persecution within the meaning of section 101 of the Immigration and Nationality Act.[51]

The ruling was also important because it recognized that persecution could be at the hands of a private as opposed to public actor. Such a conclusion was determinative because it demonstrated the BIA's efforts to conform to Convention guidelines which propose that a harm inflicted on someone by a non-state actor can rise to the level of persecution if a government cannot or will not control the persecutory practice.[52] Also, the ruling showed that the United States would acknowledge that serious harms inflicted on women by their families are public, not private, issues worthy of coverage by American asylum law. The BIA's ruling in *In re Kasinga* was important because it opened the door for gender-based claims in the United States.[53]

3. In re R-A-*: Domestic Violence Not a Ground for Asylum*

Violence against women by family members is no longer considered a private matter in the arena of public criminal prosecution in the United States.[54]

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[48] 21 I. & N. Dec. 357 (B.I.A. 1996).

[49] *Id*. at 365.

[50] *Id*. at 366.

[51] *Id*. at 365.

[52] International Protection, *supra* note 16, at para. 21; *In re Kasinga*, 21 I. & N. Dec. at 365.

[53] Musalo, *supra* note 8, at 778.

[54] *See, e.g.*, Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (1994). Part of Title IV of the Violent Crime Control and Law Enforcement Act, VAWA created federal criminal penalties for sex crimes and established grants to law

Indeed, the United Nations also recognizes the "universal phenomenon" of domestic violence and acknowledges it as a human rights violation deserving of state intervention.[55] As previously explored in this Comment, the UNHCR has taken steps to incorporate private persecution against women into international asylum criteria when the claimant's country cannot or will not protect her. A case such as *In re Kasinga* demonstrates that American courts also acknowledge that harms previously considered private can rise to the level of persecution, thereby deserving asylum relief.

While domestic violence is plainly a public crime in American criminal courts—and can be punishable under federal law—American courts seem reluctant to acknowledge that it can also be a tool of oppression and persecution. Domestic violence rising to the level of persecution has not consistently been characterized by asylum officers, immigration judges, and federal courts as meriting asylum protection. If the United States accepts domestic violence as a punishable crime on its own soil, why should it be a logical stretch to recognize that domestic violence and other violence committed against women abroad can be used as gender-based tools of oppression and are not just "personal problems?"

Some American courts have accepted that victims of domestic violence can comprise a particular social group for asylum purposes. In *Aguirre-Cervantes v. INS*, the applicant claimed she was a member of a particular social group comprised of members of her immediate family, all of whom were subjected to the abuse of her father.[56] The Ninth Circuit overturned the BIA decision, ruling that the abuse suffered by the claimant was "on account of" her membership in the particular social group as defined above, therefore meeting the nexus requirement as well.[57] The INS argued that even though the claimant was persecuted by her father, the persecution was not "on account of" being a member of her family. Disagreeing, the Ninth Circuit opined that the applicant presented sufficient evidence to show that her father persecuted her on account of, or because of, her membership in a particular social group.[58] The court elaborated by noting that the claimant's father used abuse as a means of dominating his family and controlling their actions, and that he targeted

enforcement agencies, shelters, criminal prosecutors, and other groups to curb violent crimes against women, improve prosecution strategies, and improve victim services, etc. *Id*. §§ 40001, 40121. *See also* Violence Against Women Act 2000, Pub. L. No. 106-386, 114 Stat. 1491 (2000) at §§ 1001, 1101, 1503−04. VAWA 2000 expanded on the original law and added additional provisions for battered immigrant women and enhanced the utility of protective orders across state lines. *Id*.

[55] U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, Report of the Special rapporteur on violence against women, its cause and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996), at 7−9.

[56] 242 F.3d 1169, 1172 (9th Cir. 2001) *vacated*, 273 F.3d 1220 (9th Cir. 2001).

[57] *Id*. at 1178. The nexus or "on account of" requirement under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42), requires a causal connection between the persecution suffered and a Convention ground. *See* discussion on nexus *infra* pages 963−64.

[58] *Id*. at 1177.

members of his family as opposed to other members of society.[59] Even though the case was subsequently remanded and vacated,[60] the Ninth Circuit's reasoning was instructive because it applied a broad definition of "particular social group" that included victims of domestic violence, and it found a sufficient nexus between membership in the particular group and the persecution suffered.

The same open-minded approach was not demonstrated by the BIA when it decided *In re R-A-*, one of the most well-known gender asylum cases dealing with domestic violence in the United States.[61] Rodi Alvarado's troubles began in her home country Guatemala, at the hands of her ex-soldier husband who subjected her to extreme physical and sexual abuse for years. Injuries suffered by Alvarado included a dislocated jaw bone, rape on an almost daily basis, being attacked with a knife, having her head smashed into windows and mirrors, being kicked in the genitalia causing bleeding, and being whipped with an electrical cord.[62] Alvarado fled with her children several times but her husband always found where she was hiding within Guatemala. She also sought help from the police on two occasions, but they did not respond to her pleas.[63] Her husband ignored summons and police did not follow-up on the matter. When Alvarado sought the help of a judge she was told that the court would not interfere in domestic problems.[64]

Alvarado claimed membership in a particular social group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."[65] The BIA had to decide whether her spouse's extreme and prolonged physical and sexual abuse qualified Alvarado for asylum as a member in a particular social group. Reversing the Immigration Court, the BIA denied Alvarado's request for asylum.[66] The BIA concluded that even though the particular social group proposed by Alvarado satisfied the basic requirement under *Matter of Acosta* of evidencing an immutable or fundamental personal characteristic, the group was not "viable for asylum purposes" because it was not independently recognized in the claimant's society.[67] Notably, neither the United States nor the Convention definitions of refugee requires that a particular social group be readily recognized in a claimant's society.

Perhaps anticipating outcry from both human and women's rights advocates, the BIA attempted to distinguish *In re R-A-* from its earlier ruling in *In re Kasinga*. The BIA indicated that Alvarado's case was flawed because it failed to demonstrate that domestic abuse was an important part of Guatemalan

[59] *Id*.
[60] *Aguirre-Cervantes*, 273 F.3d at 1220.
[61] 22 I. & N. Dec. 906 (B.I.A. 1999).
[62] *Id*. at 908−09.
[63] *Id*.
[64] *Id*. at 909.
[65] *Id*. at 911.
[66] *Id*. at 906.
[67] *Id*. at 918.

culture and society.[68] The BIA claimed Kasinga satisfied the "membership in a particular social group" element because she proved the widespread and accepted tradition of FGM in her society whereas Alvarado did not prove the cultural relevance and practice of domestic violence in Guatemala.[69] Again, neither international nor American asylum law requires that a claimant prove the cultural relevance of a particular harm or form of persecution.

Following the BIA's landmark ruling in *In re R-A-*, then Attorney General Janet Reno vacated the ruling and remanded the case to the BIA to reconsider after publication of regulations governing particular social group asylum claims.[70] Although the regulations were proposed in 2000, they have yet to be finalized.[71] John Ashcroft, Reno's successor, personally re-certified the case to himself but did not issue a decision before leaving office. Alvarado's case has been remanded to the BIA.[72]

In re R-A- demonstrates that the United States is still not ready to accept domestic violence as a valid claim for asylum. Adjudicators struggle in domestic violence cases to find the nexus between the particular social group defined by gender and the persecution feared.[73] Assuming Alvarado's proposed particular social group was valid for asylum purposes, the BIA was not convinced that she established that her spouse persecuted her because she was a member of the particular social group that she proposed. Under the BIA's reasoning, the persecutor harmed his wife because she was his wife and not because she was a member of a specific group of women that he believed should be abused.[74] That is, the BIA concluded that Alvarado's problem was personal and not on account of her gender. The outcome suggests that the BIA does not recognize a connection between domestic violence and its possible gender-based nature.[75] However, evidence of a link between gender and domestic violence does exist. One expert on domestic violence has argued that statistics provide compelling proof that gender is a core contributing factor to the abuse. She opines that:

> [t]he socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to women as distinct from those assigned to men are at the root of domestic violence. Evidence that gender, as understood in this sense, plays an integral role in motivating domestic violence can be gleaned from statistics on domestic violence,

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[68] *Id*. at 919; *In re Kasinga*, 21 I. & N. Dec. at 358.

[69] *In re R-A-*, 22 I. & N. Dec. at 924.

[70] *Id*. at 906.

[71] Asylum and Withholding Definitions, Fed. Reg. 76588−98 (Dec. 7, 2000) (to be codified at 8 C.F.R. § 208).

[72] John Files, *Ashcroft Won't Aid Asylum Seeker*, N.Y. TIMES, Jan. 22, 2005, at A13.

[73] Musalo, *supra* note 8, at 785.

[74] *In re R-A-*, 22 I. & N. Dec. at 921.

[75] *See* Musalo *supra* note 8, at 786 (noting that "[t]he nexus requirement has posed a substantial barrier to gender claims because adjudicators have been slow to accept a causal connection between an applicant's gender and the harm inflicted upon her. The difficulty is exacerbated where the persecutor is a non-State actor, and it is presumed that the motivation for the harm is 'personal' rather than related to gender").

> studies comparing the existence of domestic violence across cultures, and the behaviors exhibited by male batterers.[76]

Because the BIA did not view Alvarado's gender as the source of the extreme domestic violence, it was unable to establish the nexus or causal connection between the persecution feared and the particular social group.

Regardless of the outcome in *In re R-A-*, the idea that violence committed against women by private actors is a public problem meriting asylum protection is well-established in international asylum law.[77] The UNHCR guidelines affirm that the causal link between a particular social group and a feared persecution is satisfied when a non-State actor is the perpetrator if the victim's government is unable or unwilling to protect her.[78] This approach has been termed the "bifurcated analysis" by refugee scholar Karen Musalo because it recognizes broader societal and state factors within the nexus analysis.[79] The central idea is that the harm is not limited to the private actor's conduct, but also to the State, which contributes to such harm by failing to intervene.[80]

The BIA's conclusion that Alvarado failed to establish a nexus between domestic violence and her membership in a particular social group of women is contrary to UNHCR guidelines. Notwithstanding the seeming step backward for women's human rights evidenced in *In re-R-A-*, *In re Kasinga*, which incorporated bifurcated analysis, is still good law and provides a basis for advancing the American court's gender asylum jurisprudence.[81]

To end the legal limbo faced by adjudicators analyzing gender asylum claims, the United States should uphold its commitment to human rights by finalizing regulations for the analyses of the term "particular social group" and gender persecution. The Canadian approach provides an appropriate model for gender-based asylum claims that is more aligned with international law.

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[76] Affidavit of Nancy K.D. Lemon, Lecturer at Boalt Hall Sch. of Law (May 12, 2004) (on file with Ctr. for Gender and Refugee Studies). She further states that "[i]f domestic violence were not gender based, we would see girls who had been exposed to it grow up to become abusers as often as boys do." *Id*. In its first report on global violence, the World Health Organization found—not surprisingly—that in traditional societies, "wife beating" is regarded as a husband's right and that it is typically justified by traditional notions of the proper roles for women. WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH, 94−95 (2002), *available at* http://www.who.int/violence_injury_prevention/violence/world_report/en/. *See also* Musalo, *supra* note 8, at 790 n.70 (providing references to support the growing recognition of a link between domestic violence and gender).

[77] *See* discussion *supra* pages 955−56.

[78] International Protection, *supra* note 16, at para. 21.

[79] Musalo *supra* note 8, at 779.

[80] *Id*. at 786−89. Significantly, this approach has been adopted by the United Kingdom, New Zealand, and Australia in cases involving domestic violence. *Id*. at 786. *See also* section B of Part III for a discussion of Canada's analysis of gender-based claims.

[81] Musalo, *supra* note 8, at 786 and 799.

B. The Canadian Approach to Asylum Claims Based on Gender

Also a party to the Convention,[82] Canada's definition of refugee is based on the Convention definition.[83] Canadian asylum claims are determined by an administrative tribunal known as the Immigration and Refugee Board ("IRB").[84] Pursuant to its Immigration Act, Canada issued guidelines ("Canadian Guidelines") in 1993 for women claimants applying for asylum based on gender persecution.[85] Canada was the first country to adopt gender-based guidelines after the UNHCR encouraged contracting countries to adopt them.[86]

1. Canadian Guidelines

The Canadian Guidelines are expansive regarding the types of gender-specific harms acknowledged as a basis for asylum. Forms of discrimination giving rise to an asylum claim can include gender discrimination by non-State actors, including "violence inflicted in situations of domestic violence."[87] Inclusion of domestic violence in the Canadian Guidelines is a positive step toward providing relief for severe forms of domestic violence when a woman's home country will not or is not able to protect her.[88] Similarly, women who fear persecution for not following gender discriminatory laws or customs in their home countries may be eligible for relief.[89] When considering whether a claimant's fear of persecution is well-founded, a Canadian adjudicator is explicitly permitted to consult international documents such as the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[90] While the INS

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[82] State Parties, *supra* note 24.

[83] *See* Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 96 (Can.):

> A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside each of their countries of nationality and . . . by reason of that fear unwilling to avail themselves of the protection of each of those countries.

[84] *Id*. § 95.

[85] Immigration and Refugee Board, Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution (Nov. 1996), *available at* http://www.irb-cisr.gc.ca/en/about/guidelines/women_e.htm [hereinafter Canadian Guidelines]. The Canadian Guidelines were originally issued in 1993; current statutory authority for the Chairperson to issues guidelines is found in Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 159(1)(h) (Can.).

[86] *See* Refugee Protection, *supra* note 29.

[87] Canadian Guidelines, *supra* note 85, at pt. A, § 1, para. 3.

[88] This is not to suggest that the Canadian Guidelines would not benefit from some revision. For a comprehensive comparison of gender guidelines in the United States, Canada, and Australia, see Macklin, *supra* note 36, at 33−34. Macklin opines that Canada's guidelines "are permissive and inclusive, with the unfortunate result that they provide little direction and invite inconsistency." *Id*. at 62.

[89] Canadian Guidelines, *supra* note 85, at pt. A, § 1, para. 4.

[90] *Id*. at pt. D.

Guidelines refer to similar international instruments as useful background, it does not encourage adjudicators to consider such documents.[91]

Recognizing that harms unique to women are not generally understood as giving rise to asylum status under the Convention definition of refugee, the Canadian Guidelines specifically allow for them.[92] The guidelines also explicitly draw attention to difficulties international women may face during asylum determination hearings that may cause adjudicators to incorrectly doubt the credibility and trustworthiness of the claimant. Examples include recognizing that women may be reluctant to discuss sexual violence because of cultural norms promoting virginity and marital chastity and recognizing special asylum processing needs of women who are traumatized as a result of rape and domestic violence.[93] To ameliorate these evidentiary problems, the Canadian Guidelines allow for testimony outside the hearing room by affidavit, videotape, or by officers specially trained to handle violence against women claims.[94] The INS Guidelines allow for similar procedural considerations.[95] Canada's gender guidelines demonstrate its efforts to abide by the Convention and incorporate the unique experiences of women into international asylum law.

The Canadian guidelines and *Canada v. Ward* provide the method of analysis for the "particular social group" ground.[96] *Ward* was a landmark decision by the Supreme Court of Canada because of its analysis of the "particular social group" Convention ground.[97] The case provided three possible definitions of the term. The definition most relevant to gender-based asylum claims is essentially the same "immutable characteristic" trait that was defined in *Matter of Acosta*.[98] In *Ward*, the Canadian Supreme Court explicitly referred to gender as an example of an unchangeable or innate characteristic.[99] The case did much to further asylum law in Canada for parties bringing gender-based asylum claims. The Canadian Guidelines explicitly rely on *Ward* for interpretation of "particular social group."[100]

Noting that gender is an innate characteristic, Canada demonstrates openness to gender-based claims in its guidelines. The guidelines indicate that "women" can comprise a particular social group without requiring a further immutable characteristic.[101] The guidelines further note that "[t]he fact that the particular social group consists of large numbers of the female population in the

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[91] Memorandum, *supra* note 31, at 1−4.

[92] *See* Canadian Guidelines *supra* note 85, at pt. B.

[93] *Id*. at pt. D.

[94] *Id*.

[95] Memorandum, *supra* note 31, at 4−7.

[96] Canadian Guidelines, *supra* note 85, at pt. A, § III; Canada v. Ward [1993] 2 S.C.R. 689 (Can.).

[97] Musalo, *supra* note 8, at 783−84.

[98] Canadian Guidelines, *supra* note 85, at pt. A, § III; *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

[99] *Ward*, [1993], 2 S.C.R. at 739.

[100] Canadian Guidelines, *supra* note 85, at pt. A, § III.

[101] *Id*. at pt. A, § III, para. 2.

country concerned is irrelevant—race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people."[102] While critics might suggest that "women" as a particular social group is overly broad, the "relevant assessment," as indicated in the guidelines, is whether a woman has a well-founded fear of persecution that she can demonstrate in her asylum application.[103] It is not known how many particular social groups defined as such have been successful in Canada.[104] At the very least, acknowledging "women" as a particular group shows an effort to include women in a relief effort that has been largely defined from a male perspective for decades.

Also, references to the Convention throughout the Canadian Guidelines attest to Canada's seriousness as a contracting party about conforming to Convention standards for gender-related adjudication. The Canadian Guidelines specifically refer to language in *UNHCR Conclusion number 39* that encourages countries party to the Convention and the 1967 Protocol to recognize women asylum-seekers who face severe and inhumane treatment as members of a particular social group.[105]

2. Narvaez v. Canada*: Domestic Violence as a Viable Ground for Asylum*

In a case factually similar to *In re R-A-*, the Federal Court of Canada reversed an IRB ruling and held that the claimant qualified for asylum status because of gender-based persecution she faced in her home country of Ecuador.[106] The claimant, Ms. Narvaez, suffered severe and consistent verbal and physical abuse, including rape, by her spouse for several years during their marriage and following their separation.[107] When she sought police help, the authorities showed up several hours later and did not investigate the complaint upon arrival. Her husband subsequently bribed police officials to erase Narvaez's complaint from the official record.[108]

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[102] *Id*.

[103] *Id*. Indeed other nations have permitted similarly defined particular social groups. *See, e.g.*, Islam v. Sec'y of State for the Home Dep't, [1999] 2 A.C. 629 (H.L.) (U.K.) (three of four members of the majority defining the particular social group as Pakistani women); Minister for Immigration and Multicultural Affairs v. Khawar, (2001) 210 C.L.R. 1, paras. 35, 81−83, 127−29 (Austl.) (four justices in the majority supporting the idea of a particular social group made up of "women"); and Refugee Appeal No. 71427/99, [2000] N.Z.A.R. 545 (N.Z.) (Refugee Status Appeals Authority of New Zealand holding that "women" is a particular social group).

[104] For examples of at least two such cases, see CRDD U92-06982 (IRB, 1992) (Can.) abstract, *available at* http://www.irb-cisr.gc.ca/en/decisions/reflex/index_e.htm?action =issue.view&id=19 (Refugee Division holding that claimant belonged to a group of "Radhaswamy-Sikh" women in India); and CRDD MA0-00006 at 1, 3, 6 (IRB, 2001) (Can.), *available at* http://www.irb.cisr.gc.ca/rtf/reflex/fulltext/180c/crdd/MA000006S_e.rtf (Refugee Division holding that an African woman forced into marriage as a girl in a country that generally undervalues girls was a Convention refugee based on her proposed particular social group of "women").

[105] Canadian Guidelines, *supra* note 85, at pt. A, § III, para. 1.

[106] Narvaez v. Canada, [1995] 2 F.C. 55, 72 (Can.).

[107] *Id*. at 58.

[108] *Id*. at 59.

The IRB denied Narvaez's application, concluding that she was a victim of personal violence and not a member of a particular social group.[109] It opined that "any fear arising from [the rape] can be characterized as a fear of private violence committed by her estranged husband . . . [and] [s]uch fear does not amount to persecution."[110] These conclusions are reminiscent of the BIA's conclusions in *In re R-A-* because they do not acknowledge that an individual harm, specifically harms suffered by women out of the public view, can be persecutory within the Convention standard. Such a position does not acknowledge that domestic violence against one person by another can be a violation of human rights just as harming a person for his political or religious beliefs can be.

The Federal Court of Canada reversed the IRB's decision and granted Narvaez asylum.[111] The issues addressed by the court were the same thorny issues examined in *In re R-A-*, namely, whether women subject to domestic abuse can be considered members of a particular social group for asylum purposes and whether nexus to that Convention ground can be established when violence is perpetrated by a private actor.[112] As with the Canadian Guidelines, the opinion's numerous references to Convention standards highlights Canada's seriousness about conforming to UNHCR Conventions when adjudicating gender-related asylum claims.[113] The court noted that "[u]nderlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination" and quoted language from the Convention Preamble.[114]

The Federal Court of Canada referenced *Matter of Acosta* in defining "particular social group" to include groups defined by innate characteristics. Narvaez was declared a member of a group of "women subject to domestic violence in Ecuador."[115] The court dismissed the IRB's conclusion that Narvaez did not establish a nexus between the severe domestic violence she suffered and any membership in a particular social group. As the court stated, "[i]f this is the group, a person who suffers personal abuse at the hands of her husband is not suffering random violence perpetrated against her as an individual but is suffering violence perpetrated against her as a woman with an abusive husband."[116] The court seems to draw a distinction between a person who privately experiences abuse or violence—with no affiliation to others—and those who suffer abuse because of a common characteristic: gender.

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[109] *Id*. at 59−60.
[110] *Id*. at 60.
[111] *Id*. at 72.
[112] *Id*. at 57, 60.
[113] *Id*. at 60.
[114] *Id*.
[115] *Id*. at 62, 64.
[116] *Id*. at 68.

Further, the court seemed to use a bifurcated approach to establish nexus.[117] The court essentially ruled that because the claimant sought but did not receive help from the police, the state arguably condoned the claimant's abuse.[118] The idea advanced is that where a country does not intervene to protect a domestically-abused woman after her request for help, or in a case where it would be nearly impossible for the claimant to solicit government help, the woman faces persecution meriting asylum relief under the Convention.

Again drawing its position from international human rights instruments, the Federal Court of Canada concluded that the term "particular social group" should "take into account the general underlying themes of defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative."[119] It is precisely this deference to international law and international human rights standards that the United States compromises by failing to recognize that domestic violence, if tolerated or ignored by an applicant's home country, should give rise to asylum relief.

The United States should look to the Canadian approach to inform its analysis of gender claims, particularly Canada's approach to nexus analysis where the woman claims the persecution feared is domestic violence.[120] Canadian courts are more flexible in their approach to nexus, in part because the country recognizes a broader scope of human rights violations.[121] Whereas the BIA claimed insufficient nexus in Rodi Alvarado's claim because she could not show that her spouse abused other Guatemalan women, the Federal Court of Canada ruled that Narvaez established nexus even though she did not prove that her spouse abused other Ecuadorian women. The Canadian approach allows for a finding of persecution where a country fails to protect a woman from gender-induced abuse when she can submit convincing evidence of the failure.[122] The United States has not consistently demonstrated that it will protect the same women.

American agencies should also finalize regulations to assist adjudicators. Notably, the Canadian Guidelines are not binding law, as the Federal Court of Canada acknowledged in *Narvaez v. Canada*.[123] However, that court also noted that Canadian courts are supposed to follow those guidelines unless "circumstances are such that a different analysis is appropriate."[124]

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[117] *Id*. at 69−71. The court opined that "[t]he law should not sit idly by while those who seek relief lose hope, and those who abuse it are emboldened by its failure to provide sanctions." *Id*. at 71.

[118] *Id*. at 63−64, 70.

[119] *Id.* at 62.

[120] This approach is also followed in other countries and in the UNHCR guidelines. *See* footnote 103 in this Comment.

[121] Letter, *supra* note 3.

[122] *Narvaez*, [1995] 2 F.C. at 66 (quoting Canada v. Ward).

[123] *Id*. at 62.

[124] *Id*.

Domestic or family violence as a ground for asylum is well-established in Canadian case law.[125] Women refugees with a solid case for gender asylum because of domestic violence will probably have a greater chance of securing asylum status in Canada than the United States. However, new agreements and policies between the two nations threaten to undermine the access of women refugees to the Canadian refugee determination system. The United States should adopt gender-asylum jurisprudence similar to Canada's. Until such time, it should at least question the negative implications of the new Safe Third Country Agreement on human rights and seek to void the agreement.

IV. SAFE THIRD COUNTRY AGREEMENT

Understandable efforts to prevent terrorists from entering the United States have potentially impacted all non-citizens, including asylum applicants. The Safe Third Country Agreement ("STCA") presents a unique barrier to asylum relief for women wishing to bring an asylum claim based on domestic violence since it will make entry into Canada—where gender-based forms of persecution are viewed more broadly—from the United States more difficult.

The STCA is part of a larger security legislation between the United States and Canada called the Smart Border Action Plan.[126] Canada actively sought the agreement to help curb the large number of asylum cases filed there every year.[127] It claims that about one-third of its asylum applicants arrive in Canada via the United States. [128] If such statistics are accurate, the STCA will significantly increase the number of asylum applications filed in the United States and add stress to a system that is already backlogged.[129] The United States may have agreed to the STCA in exchange for other agreements with Canada and to improve homeland security and border protection as outlined in the Smart Border Action Plan.[130] Proponents of the STCA in the United States

[125] Knight, *supra* note 2, at 30.

[126] *See* U.S. Dept. of State, U.S.-Canada Smart Border/30 Point Action Plan Update (Dec. 6, 2002), http://www.state.gov/p/wha/rls/fs/18128.htm (last visited July 17, 2005).

[127] AUDREY MACKLIN, THE VALUE(S) OF THE CANADA-US SAFE THIRD COUNTRY AGREEMENT 1, 13 (Caledon Institute of Social Policy, 2003), *available at* http://www.caledoninst.org/Publications/PDF/558320703%2Epdf.

[128] Deborah Anker, et al., *Towards the Lowest Common Denominator: Canada Guts Post-9/11 Refugee Protection* 9 BENDER'S IMMIGR. BULL. 1028, 1029 (2004).

[129] *See* UNHCR, POPULATION AND GEOGRAPHICAL DATA SECTION, DIVISION OF OPERATIONAL SUPPORT, 2004 GLOBAL REFUGEE TRENDS, *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/statistics/opendoc.pdf?tbl=STATISTICS&id=42b283744 [hereinafter GLOBAL TRENDS]. According to this report, at the end of 2004 the United States had a backlog of undecided asylum cases totaling approximately 263,700, more than any other country. *Id*. at 6. The same report also indicates that the United States and Canada were among the highest recipients of new asylum claims last year, totaling approximately 27,900 and 25,800 respectively. *Id*.

[130] MACKLIN, *supra* note 127, at 18. Notably, none of the individuals who perpetrated the September 11 attacks were asylum applicants. HUMAN RIGHTS FIRST, REFUGEE WOMEN AT RISK: UNFAIR U.S. LAWS HURT ASYLUM SEEKERS 3 (Lawyers Committee for Human Rights, 2002), *available at* http://www.humanrightsfirst.org/refugees/reports/

have argued that the United States needs the added protection because Canadian immigration law is too lenient and therefore a threat to American national security.[131] Opponents have argued that the agreement is ill-conceived and will negatively affect the protection of asylum-seekers.[132]

A. Overview of the Safe Third Country Agreement

The STCA went into effect on December 29, 2004, after the United States adopted regulations for the law.[133] It requires asylum-seekers who arrive at a port of entry along the United States-Canada border to apply for asylum in the first country of entrance.[134] That is, an asylum claimant attempting to enter Canada from the United States to file for asylum in Canada will most likely be returned to the United States, and vice versa. The idea behind the legislation is that both the United States and Canada are considered a "safe third country" because both are parties to the Convention and as such presumably adhere to the Convention and 1967 Protocol by providing fair asylum adjudication.[135]

The STCA provides four exceptions to directing asylum-seekers to the originating country. Those who can prove they meet one of these enumerated conditions will not be returned to the country of first arrival. The four exceptions are: 1) the refugee claimant has a family member[136] in the destination country who has already been granted refugee status; 2) the claimant has a family member in the destination country who has an asylum application pending; 3) the claimant is an unaccompanied minor; or, 4) the claimant has the appropriate visa or travel document or is not required to obtain a visa.[137] Article 6 provides for a "public interest" exception, though it is too early to know how this provision will be used.[138]

Proponents of the STCA argue that the requirement to apply in the country of entrance is not unfair to asylum-seekers because people genuinely fleeing persecution should request asylum in the first safe country they reach. They

refugee_women.pdf [hereinafter REFUGEE WOMEN AT RISK].

[131] *See United States and Canada Safe Third Country Agreement: Hearing Before the Subcomm. on Immigration, Border Sec. and Claims of the Comm. on the Judiciary H.R.*, 107th Cong. 15 (2002) (statement of Mark Krikorian, Exec. Dir., Ctr. for Immigration Studies); *see also* Audrey Macklin, *Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement*, 36 COLUM. HUM. RTS. L. REV. 365, 412 (2005).

[132] Anker et al., *supra* note 128, at 1029.

[133] Implementation of the Agreement Between the Gov't of the United States of America and the Gov't of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 69480 (Nov. 29, 2004) (codified at 8 C.F.R. 208, 212, and 235 (2000)).

[134] Safe Third Country Agreement, U.S.-Can., Dec. 29, 2004, *available at* www.cic.gc.ca/english/policy/safe-third.html. The agreement does not apply to individuals who arrive by airport or seaport, nor would it apply to those who transit illegally between the United States and Canada. *Id*. at art. 4.

[135] MACKLIN, *supra* note 127, at 1.

[136] Family member is defined *infra* note 147.

[137] Safe Third Country Agreement, *supra* note 134, at art. 4(2)(a)−(d).

[138] *Id*. at art. 6.

argue that allowing asylum-seekers to select their destination country amounts to forum-shopping.[139] But the issue is more complicated and merits additional consideration, especially given some of the flaws of the STCA. Even if there is some merit to the STCA's goal of preventing asylum-seekers who have already entered the United States or Canada from traveling to the other country and applying for asylum there instead of the country of last presence,[140] the adverse effects on asylum-seekers are outweighed by any benefits to the United States and Canada.

B. Why the United States is not a Safe Third Country and What the STCA Means for Women with Gender-Based Asylum Claims[141]

A fundamental flaw of the STCA is its failure to acknowledge or account for significant differences between the American and Canadian legal approaches to gender-based asylum claims.[142] To be sure, the STCA should be amended to afford some protections to women with gender-related asylum claims. The major deleterious effects that the new law is likely to have will be largely attributable to shortcomings in American asylum jurisprudence, as will be discussed below in further detail.

1. Inadequate Exemptions to the STCA

The actual language of the STCA should be amended to provide greater protection for women. The Standing Committee on Citizenship and Immigration (Standing Committee) made suggestions to the Canadian government regarding Canada's proposed STCA regulations, to which the government responded in May 2003.[143] The Standing Committee recommended that "until such time as the American regulations regarding gender-based persecution are consistent with Canadian practice, women claiming refugee status on the basis that they are victims of domestic violence be listed as an exempt category under . . . the proposed regulations."[144] Such a recommendation is certainly warranted, for Canada will consider gender asylum claims where the applicant claims domestic violence, but, as evidenced by the plight of Rodi Alvarado, the United States may not. Unfortunately, the Canadian government did not incorporate the Standing Committee suggestion to exempt domestic violence claimants from the STCA, reasoning that "while

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[139] Anker et al., *supra* note 128, at 1029. Further, this argument does not consider other reasons an asylum-seeker might select one country over another; for example, a person might choose her destination country based on the location of friends and family or for linguistic or cultural reasons. *Id*. *See also* Macklin, *supra* note 131, at 382, 388−89.

[140] Safe Third Country Agreement, *supra* note 134, at art. 4.

[141] The focus of this analysis is limited to the specific effects the STCA could have on women claiming asylum based on gender persecution. The STCA has many other potentially harmful consequences that could affect all asylum applicants.

[142] Anker et al., *supra* note 128, at 1029−30.

[143] Citizenship and Immigration Canada, Government Response to the Report of the Standing Committee on Citizenship and Immigration (May 2003), http://www.cic.gc/english /pub/safe-third.html [hereinafter Government Response].

[144] *Id*. at Recommendation 2.

there may be some differences in approach [between the two nations] on individual cases . . . the approaches are substantively similar."[145] The Canadian government also indicated that such cases in question would be reviewed one year after the STCA had gone into effect and the data was analyzed.[146]

It is true that the Canadian and American asylum determination systems are similar in that both demonstrate a generous history toward asylum-seekers and both use the Convention definition of refugee. However, regarding domestic violence asylum claims, it is questionable whether the two approaches are "substantively similar" considering the different outcomes in such cases in the two countries.

The Standing Committee also recommended that the definition of family in Canada's STCA regulations be amended. Currently, the STCA permits an exemption for those who wish to travel to the second country so long as they have a family member[147] there who either has asylum or has an asylum application pending.[148] One possible problem with this definition is that it would allow an abusive spouse entry to the destination country, further endangering the spouse already there who may have applied for gender-based asylum. The Standing Committee recommended that the definition in the STCA regulations be changed as a precaution against such a possible scenario.[149] It suggested that a person not be allowed entrance to Canada even though he claims his spouse is there, if that spouse's asylum claim was on the basis of domestic violence. Again, the Canadian government did not incorporate the proposed change into its regulations, stating that domestic violence issues are best handled by law enforcement, the judiciary, and social groups.[150] The Canadian government also indicated that gender concerns would be a part of the continuous monitoring of the STCA.[151]

The Canadian government's unwillingness to adjust language in its STCA regulations to allow for the exceptions relating to concerns of domestic violence is perplexing considering Canada's historical acceptance of gender-based claims generally and domestic violence asylum claims specifically. It is also surprising given Canada's historical tendency to protect the human rights of women in conformity with international law. Where Canada has permitted other exemptions to the STCA, it would make sense and be humane to adopt the propositions of the Standing Committee.

While Canada should not be responsible for American laws that do not fully comply with Convention standards, it should question how its actions under the STCA undermine its own progressive gender asylum policy and

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[145] *Id*.

[146] *Id*.

[147] The STCA defines a "[f]amily [m]ember" as "spouse, sons, daughters, parents, legal guardians, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews." Safe Third Country Agreement, *supra* note 134, at art. 1(1)(b).

[148] *Id*. at art. 4(2).

[149] Government Response, *supra* note 143, at Recommendation 8.

[150] *Id*.

[151] *Id*.

compliance with international law.[152] Being a party to the agreement suggests compliance with a system that does not fully recognize human rights. After all, women with strong claims for asylum based on domestic violence who may have a good chance of being granted asylum if they apply in Canada may not have the same opportunity in the United States. For some women, the fortuity of their airplane landing in the United States rather than Canada could make a real difference in the outcome of a gender asylum claim. Women who are not permitted to enter Canada and apply for asylum are forced to face the uncertainty of a domestic violence claim in the American asylum system. The likely result is that fewer of these women will be granted asylum. Why is Canada prepared to accept such an outcome?

2. One-Year Filing Deadline

As part of the *Illegal Immigration Reform and Immigration Responsibility Act of 1996* ("IIRIRA"), the United States Congress imposed a time limit that requires asylum-seekers to file their applications within one year of arrival in the United States.[153] Asylum advocates argue that the one-year bar has prevented genuine refugees from securing asylum status and that women may be particularly affected by the time bar.[154] Women who must care for children may lack the time and resources to seek legal help while trying to provide basic security for their families.[155] In addition, seeking legal representation may be difficult for women who come from countries where they were denied an education or were not permitted to approach the government or legal authorities.[156] For the same reasons, many women may not even be aware that they are eligible for asylum.[157] Women who have been subject to rape and violence may also suffer psychological and physical trauma, making it difficult to discuss and explore these experiences within one year of arrival in the United States.[158]

Implementation of the one-year bar raises questions as to whether the United States is in violation of its obligations under the Convention and

[152] *See generally* Macklin, *supra* note 131. She suggests that the agreement may allow the Canadian government to circumvent its obligations under international law, allowing it to "do indirectly what it cannot do directly, namely deny refugees the rights to which they are entitled according to international and domestic law." *Id*. at 378−80. Some of these international obligations under the Convention will be discussed in the remaining sections of this Comment.

[153] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 604(a), 110 Stat. 3009-546 (codified at 8 U.S.C. § 1158 (2000)). The law provides for two narrow exceptions to the one-year deadline in § 208(a)(2)(D) (codified at 8 U.S.C. § 1158(a)(2)(D)).

[154] REFUGEE WOMEN AT RISK, *supra* note 130, at 15.

[155] *Id*. at 15−16.

[156] *Id*. at 15.

[157] *Id*. at 16.

[158] *Id*.

Protocol.[159] Article 33 of the Convention prohibits the return ("refouler") of a refugee to "the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[160] Under American law, a bona fide refugee able to establish all the elements necessary to achieve asylum may nevertheless be denied protection under international law if she misses the one-year deadline.[161] Refugee advocates have argued that the one-year bar is contrary to international law and congressional intent.[162]

Unlike the United States, Canada does not impose a filing deadline for asylum applicants. Thus, implementation of the STCA means that a person with a meritorious asylum claim who is barred from applying for asylum in the United States because of the one-year limit would also be barred from applying in Canada even though Canada imposes no deadline. Though the Standing Committee expressed concern that implementation of the STCA could result in the *refoulement* of asylum claimants in the United States, the Canadian government insisted that the one-year bar was "not inconsistent with the principle of non-refoulement."[163] However, the UNHCR has criticized such "unreasonable time-limits" as a threat of *refoulement*.[164] Because the United States arguably does not comply with its obligation to protect genuine refugees, implementation of the STCA raises doubt as to whether it conforms to the *nonrefoulement* provision in Article 33 of the Convention.[165]

3. Detention of Asylum-Seekers in the United States

The IIRIRA also makes asylum-seekers subject to expedited removal subject to "mandatory detention."[166] Those detained are placed in detention centers and jails.[167] Prolonged detention can be especially difficult for women seeking asylum because of cultural and gender-related factors, including lack of privacy and separation from children. In at least one detention center, women were subjected to sexual, physical, verbal, and emotional abuse by detention center staff.[168] Furthermore, Article 31 of the Convention prohibits contracting

[159] Leena Khandwala, et al., *The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, IMMIGR. BRIEFINGS, Aug. 2005, at 11. __

[160] Convention, *supra* note 4, at art. 33.

[161] Khandwala et al., *supra* note 159, at 11.

[162] *See id*.

[163] Government Response, *supra* note 143, at Recommendation 4.

[164] U.N. Exec. Comm. on the High Comm'r Programme, Note on International Protection, U.N. Doc. A/AC.96/898 (July 3, 1998), 4−5, *available at* www.unhcr.ch/cgi-bin/texis/vtx/excom/opendoc.pdf?tbl=EXCOM&id=3ae68d3d24 (last visited Aug. 24, 2005).

[165] Khandwala et al., *supra* note 159, at 11.

[166] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 302(a), 110 Stat. 3009-546 (codified at 8 U.S.C. § 1225(b)(1)(B) (2000)).

[167] REFUGEE WOMEN AT RISK, *supra* note 130, at 9.

[168] *Id*. at 10−13. A study conducted in 2000 by the Women's Commission for Refugee Women and Children found extensive abuse of women, including verbal, physical, and sexual abuse. WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, BEHIND LOCKED

nations from imposing penalties on refugees because of illegal entry into the country.[169]

Though Canada also detains asylum-seekers,[170] it is probably less frequent than in the United States.[171] Implementation of the STCA means that fewer asylum-seeking women are likely to be admitted to Canada from the United States. These women will be subject to the harsher detention provisions in the United States, perhaps in violation of international law.

4. Expedited Removal

IIRIRA also incorporated an expedited removal provision into the INA. Essentially, this provision allows for the expedited removal of persons who arrive at U.S. borders without documentation or with documentation that appears fraudulent.[172] The provision permits an immigration officer, in certain situations, to issue a removal order that is not reviewable by the immigration court or a federal court.[173]

At least one study has concluded that more women than men have been removed under the expedited removal program.[174] Among other possible explanations, the study suggests that women may be adversely affected because they may be less likely to present themselves with appropriate travel documents and the removal procedures may be administered in a way that disfavors women.[175] One non-governmental organization suggests other reasons: women may be scared or ashamed to tell immigration officers in an adversarial environment about any gender-specific reasons for flight; women may feel intimidated by immigration inspectors and confused by the process; they may be unaware that they are eligible for asylum; and finally, they may be re-traumatized by shackling and strip-searches—particularly those who have been raped or sexually assaulted.[176]

Canada does not have a comparable program for the expedited removal of asylum-seekers. The Standing Committee requested that the Canadian government seek assurances that people returned to the United States under the STCA would not be subject to expedited removal proceedings.[177] The Canadian

DOORS: ABUSE OF REFUGEE WOMEN AT THE KROME DETENTION CENTER, 7−11, 15−16 (Oct. 2000), *available at* www.womenscommission.org/pdf/krome.pdf.

[169] Convention, *supra* note 4, at art. 31.

[170] *See* Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 55(2) (Can.).

[171] *See* Canadian Council for Refugees, Submission of the Canadian Council for Refugees on the occasion of the visit to Canada of the UN Working Group on Arbitrary Detention 11 (June 8, 2005), *available at* www.web.net/~ccr/WGAD.HTM (last visited Aug. 16, 2005).

[172] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 302(a), 110 Stat. 3009-546 (codified at 8 U.S.C. § 1225(b)(1)(B) (2000)).

[173] *Id*.

[174] *See* The Expedited Removal Study, *available at* http://w3.uchastings.edu/ers/.

[175] Karen Musalo et al., *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 50−51 (2001).

[176] REFUGEE WOMEN AT RISK, *supra* note 130, at 6−8.

[177] Government Response, *supra* note 143, at Recommendation 1.

government did not see the need for formal assurances, concluding that "both Canada and the United States meet international refugee protection standards."[178] As with mandatory detention, implementation of the STCA could result in increased expulsion by the United States of genuine asylum-seekers in violation of Article 33 of the Convention.

5. Domestic Violence Claims

Granting asylum for women fleeing domestic violence has been far more problematic in American than Canadian jurisprudence. The challenging interpretative issues surrounding nexus and defining "particular social group" have left this group of women less protected under American law. However, UNHCR standards indicate that domestic violence is worthy of asylum relief. The United States should follow Canada's lead and finally allow asylum relief for this human rights abuse.

The United States may claim that immigration levels are already too high and allowing asylum relief for domestically-abused women would open the floodgates. This concern is unfounded. First, not all women who experience domestic violence should be granted asylum in the United States. Only those who survive domestic violence so brutal as to rise to the level of persecution should be eligible for asylum. Claimants must also satisfy the nexus requirement by demonstrating an unwillingness or inability of the government to protect them. If an individual is unable to seek state protection because her abusive situation or country conditions make it difficult for women in general to seek state help, the United States should permit the claimant's testimony as evidence of persecution. The testimony of other women, possibly from the same geographical region as the claimant, should also be considered as proof of persecution.[179] Second, there is no evidence to suggest that victims of domestic violence flooded Canada's asylum adjudication system after the country began to allow relief on such claims.[180]

6. Lack of Clear Precedent

Because the INS Guidelines are not binding, adjudicators have a great deal of discretion when deciding gender-based asylum claims.[181] Though the Canadian Guidelines are not binding either, they are more likely to be followed. In fact, some parties in Canada have based their appeals on the lower court's failure to consider Canada's gender guidelines; the appellate courts have allowed review on this ground.[182]

Regulations proposed in the United States in 2000 to clarify the definitions of particular social group and nexus have not been finalized. The proposed

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[178] *Id*.

[179] The Canadian Guidelines endorse testimony as an alternate form of proof in such circumstances. Canadian Guidelines, *supra* note 85, at pt. C.

[180] Macklin, *supra* note 36, at 34−35.

[181] In fact, the guidelines are addressed to asylum officers—immigration judges, the BIA and federal courts need not address them at all. *See* Memorandum, *supra* note 31, at 1.

[182] Letter, *supra* note 3.

regulations make it clear that gender-based claims are valid asylum claims.[183] Though the proposed regulations might present problems regarding methods of analysis,[184] finalizing them will at least create more certainty for adjudicators and claimants alike (and there is time to address any troublesome aspects of the proposed regulations).

The discretion currently allowed to asylum adjudicators has led to mixed results. Each adjudicator may decide claims with a similar set of facts differently, and this lack of clear precedent causes uncertainty. Both adjudicators and women making gender-based claims in the United States are disadvantaged. Adjudicators who try to follow the law may have difficulty determining what the law is because of differing results in similar cases and no regulations to assist with analysis. The asylum-seekers suffer more because they cannot predict the likely outcome of their claims based on the facts of their situation as applied to the law.

Whereas Canadian case law has demonstrated time and again that gender-based claims, including those based on domestic violence, are worthy of granting asylum, the United States has not consistently demonstrated the same position. The United States can create certainty for its own employees and claimants by issuing final regulations that address gender claims and comply with international criteria. Until then, unclear case precedent means that women asylum-seekers in the United States will not have basic protections under international refugee treaties.

Sensible drafting of the regulations can ensure that not all women in oppressive or third world countries will secure asylum status in the United States. After all, even the U.N. International Guidelines say that "[a]dopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status."[185] Should the United States finally implement effective regulations, it will show that the nation regards persecution specific to women—too long seen as a private matter—as deserving of protection. The United States will finally show that it does not exclude victims of domestic violence, systematic rape, bride-burning, forced marriage, and female genital mutilation, among other possible forms of persecution, from protection deserved under international law.

7. Non-Conformity to United Nations Human Rights Standards

Finally, the United States has not fully complied with Convention guidelines to honor the human rights of all people. As a contracting party to the Convention and a country that holds itself out as respecting the basic human rights of all people, the United States should uphold its responsibility under the international treaty and abide by UNHCR standards.

UNHCR guidelines encourage participating states to extend asylum to women fleeing domestic violence when their home countries cannot or will not

[183] Asylum and Withholding Definitions, 65 Fed. Reg. 76588−98 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. § 208).

[184] Letter, *supra* note 3.

[185] International Protection, *supra* note 16, at pt. I, § 4.

protect them, yet the United States has not extended this relief. As a Convention party, the United States should uniformly apply rules dealing with the "particular social group" Convention ground, consistent with human rights standards. That is, the United States should not discriminate against women whose suffering has historically been classified as a private problem not worthy of asylum coverage, but instead acknowledge the unique harms faced by international women. Until that time, it is questionable as to whether the United States can truly be considered a "safe third country" for the purposes of the STCA.

V. CONCLUSION

Fundamental differences between the American and Canadian approaches to claims dealing with gender-based persecution are harmful to women, including those who are forced to apply for asylum in the United States when applying in Canada would increase their chances of success. Application of the STCA is likely to exacerbate differences between the two asylum determination systems.

This Comment has explored the marked differences between American and Canadian gender-based asylum jurisprudence by analyzing international guidelines, each country's case law, and the new Safe Third Country Agreement. In addition, this Comment has emphasized the added vulnerability of women who bring domestic violence based asylum claims in the United States as opposed to Canada. The STCA stands to impact many women who will no longer be able to travel from the United States to Canada to file for asylum with the hope of securing protection there. The United States should review its position on human rights and immediately take steps to cancel the agreement. The more enduring solution to these problems is for the United States to amend its approach to gender asylum jurisprudence and take action in conformity with United Nations human rights policy.