

2000

Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims

Barbara Cochrane Alexander

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CONVENTION AGAINST TORTURE: A VIABLE ALTERNATIVE LEGAL REMEDY FOR DOMESTIC VIOLENCE VICTIMS

BARBARA COCHRANE ALEXANDER*

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* J.D. Candidate, 2001, American University, Washington College of Law; M.Phil., Peace Studies, 1997, Trinity College Dublin; B.A., Communications and Political Science, 1995, Marist College. Special thanks to Irena Lieberman, Deputy Director of Legal Services, Tahirih Justice Center, for inspiring me to write on CAT and *In re R-A-*, and Edwin A. Perry, my editor, for championing the decision to publish this Comment. In addition, I would like to thank Professors Suzanne Jackson and Leti Volpp, Practitioner-in-Residence Beth Lyon, and BIA member Lory D. Rosenberg for reviewing earlier drafts of this Comment. Finally, as always, the greatest thanks belong to my husband, Jonathan, without whom everything would be less enjoyable and accomplishments would be that much more difficult to achieve.

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INTRODUCTION

On June 11, 1999, the Board of Immigration Appeals ("BIA")¹ decided *In re R-A*,² and reversed an immigration judge's grant of asylum to Rodi Alvarado-Peña ("Ms. Alvarado").³ Ms. Alvarado is a Guatemalan woman who fled to the United States after more than ten

1. See PUBLIC AFFAIRS STAFF, EXEC. OFF. IMMIGR. REV. (Dec. 1998) (on file with author) (providing an overview of the background, responsibilities, organization, and organization goals of the Executive Office for Immigration Review ("EOIR"), which includes the Board of Immigration Appeals ("BIA")). The BIA is the administrative body that reviews the decisions made by immigration judges. See *id.* The BIA's decisions are binding on all immigration judges throughout the United States, unless they are overruled or modified by a United States Court of Appeal or the United States Attorney General. See *id.*

2. Interim Decision 3403, 1999 WL 424364, at *1 (B.I.A. June 11, 1999) (publication page references not available for this document). The page numbers cited in this Comment are referenced to the hard copy printed from Westlaw.

3. See *In the Matter of Alvarado-Peña*, No. A73-753-922 (EXEC. OFF. IMMIGR. REV. Sept. 20, 1996) (finding that Ms. Alvarado established a well-founded fear of persecution on account of membership in a particular social group and actual or imputed political opinion). Immigration Judge Mimi Schooley Yam, sitting in an immigration court in San Francisco, California, granted asylum to Rodi Alvarado-Peña on September 20, 1996. See *id.*

years of egregious abuse at the hands of her husband.⁴ Although her flight was prompted by the unwillingness of Guatemalan government officials to respond to her pleas for help,⁵ ultimately Ms. Alvarado fled to the United States because she believed that her only chances of escaping her husband were to flee or die.⁶

In overturning Ms. Alvarado's grant of asylum, a ten-member majority of the BIA reversed the positive progress of gender-based persecution claims⁷ under United States asylum law and the United States Department of Justice's "Gender Guidelines."⁸ The BIA ma-

4. See *In re R-A-*, 1999 WL 424364, at *2-4 (recounting undisputed testimony and statements of abuse by Ms. Alvarado).

5. See *id.* at *8 (acknowledging that Ms. Alvarado established the Guatemalan government's failure to protect her); see also Brief of Amici Curiae, Refugee Law Center and International Human Rights/Migration Project In Support of Respondent's Response to Government's Appeal at 23-28; In the Matter of Alvarado-Peña, No. A73-753-922 (EXEC. OFF. IMMIGR. REV. Sept. 20, 1996) (arguing that the Guatemalan government's inability or unwillingness to protect Ms. Alvarado from her spouse created a well-founded fear of future persecution).

6. See In the Matter of Alvarado-Peña, No. A73-753-922, at 4 (explaining that Ms. Alvarado believed her only choices were to flee or die, in part because of her husband's military connections and knowledge of the Guatemalan countryside).

7. See Fredric N. Tulskey, *Asylum Denied for Abused Girl: Ruling of Appeals Panel is Assailed*, WASH. POST, July 4, 1999, at A3 [hereinafter Tulskey, *Asylum Denied for Abused Girl*] (quoting Wendy Young, staff attorney for the Women's Commission for Refugee Women and Children). "We now may be entering the dark ages for the adjudication of gender- and aged-based persecution cases." *Id.*

8. See Phyllis Coven, Office of International Affairs, Department of Justice, *Memorandum on Considerations For Asylum Officers Adjudicating Asylum Claims From Women*, May 26, 1995, reprinted in 72 INTERPRETER RELEASES 781 (June 5, 1995) [hereinafter United States Gender Guidelines] (promulgating a set of gender guidelines for the United States, in the wake of other significant gender guidelines issued by the United Nations High Commissioner for Refugees ("UNHCR") in 1991 and Canada in 1993); see also Immigration and Refugee Board, Canada *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: UPDATE*, Nov. 25, 1996 [hereinafter Canadian Gender Guidelines] (advocating that gender-related persecution fits within the definition of a refugee); UNHCR, *Guidelines on Protection of Refugee Women*, paras. 54, 71 (1991) [hereinafter UNHCR Gender Guidelines], reprinted in REFUGEE LAW AND POLICY: SELECTED STATUTES, REGULATIONS, AND INTERNATIONAL MATERIALS 394, 397 (Karen Musalo et al. eds., 1998) (recognizing that even though gender is not a separate grounds for establishing refugee status under the 1951 Convention Relating to the Status of Refugees, the social group category should include women who fear persecution on account of their gender).

jority determined that even though the abuse Ms. Alvarado suffered rose to the level of persecutive harm⁹ and the Guatemalan government offered her no protection,¹⁰ the immigration judge erred in ordering a grant of asylum. According to the BIA majority, the abuse Ms. Alvarado suffered did not satisfy at least one of the five statutorily mandated grounds¹¹ of the nexus requirement.¹² The nexus requirement, which obligates all individuals seeking asylum to prove that they were persecuted because of their race, religion, nationality, membership in a particular social group, or political opinion, often poses a barrier to domestic violence victims.¹³

9. See *In re R-A-*, 1999 WL 424364, at *8 (agreeing with the Immigration Judge's conclusion that the harm Ms. Alvarado suffered more than sufficiently met the threshold requirement of persecutive harm in determining eligibility for asylum under United States asylum law).

10. See *id.* (agreeing with the Immigration Judge's conclusion that the Guatemalan government ignored Ms. Alvarado's requests for assistance).

11. See Immigration and Nationality Act sec. 101(a)(42), 8 U.S.C.A. sec. 1101(a)(42) (West 1999) (codifying five "on account of" elements: race, religion, nationality, membership in a particular social group, or political opinion). Specifically, Ms. Alvarado argued persecutive harm "on account of either actual or imputed political opinion or membership in a particular social group." See *In re R-A-*, 1999 WL 424364, at *8.

12. See *In re R-A-*, 1999 WL 424364, at *13-16 (setting forth the nexus requirement). There must be a nexus between the persecutive harm alleged by the asylum seeker and one of the five statutorily-mandated elements of the definition of a refugee. See *id.*; see also *INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992) (interpreting "on account of" to mean the persecution suffered must be on account of the victim's political opinion and not his persecutors'); STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 845 (2d ed. 1997) (arguing that in standard English the phrase "on account of" means "because of" and immigration judges, the BIA, the United States Courts of Appeal, and the United States Supreme Court should interpret "on account of" as "because of"). Legomsky further noted that when Congress amended the Immigration and Nationality Act ("INA"), with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA") section 305(a), it changed "on account of" in INA section 241(b)(3) to "because of." See *id.* The wording was amended for "independent reasons," and the conference committee report made no mention of the change. See *id.*

13. See *infra* notes 92-94 and accompanying text (discussing the challenge the nexus requirement poses for domestic violence victims, which is absent in CAT). See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1239-40 (3d Cir. 1993) (upholding BIA's denial of asylum and withholding of removal to an Iranian woman who failed to establish her membership in a particular social group). Fatin successfully identified a particular social group—"Iranian women who refuse to conform to the government's specific laws and social norms"—but failed to establish her membership in

Currently, *In re R-A-* is on appeal to the Ninth Circuit,¹⁴ which will continue to adjudicate the nexus issue in determining whether to reinstate Ms. Alvarado's grant of asylum.¹⁵ While asylum remains an available legal remedy for domestic violence victims, there is also a new legal remedy available in the United States: withholding of removal under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").¹⁶ On October 21, 1998, President Clinton signed into law the Foreign Affairs Reform and Restructuring Act of 1998 ("F.A.R.R.A.").¹⁷ Section 2242(b) of F.A.R.R.A.¹⁸ requires the United States to implement its obligations under Article 3 of CAT.¹⁹

this particular social group or successfully prove that forced compliance would rise to the level of persecution. See *Fatin*, 12 F.3d at 1241-42. But see, e.g., *In re Kasinga*, Interim Decision 3278, 1996 WL 379826, at *8 (B.I.A. June 13, 1996) (granting asylum to a Togolese woman fleeing female genital mutilation whose particular social group was defined, at least in part, by gender).

14. See Order at 1, *Rodi Alvarado Pena v. INS* (Sept. 30, 1999) (No. 99-70823) (staying the proceedings before the Court of Appeal for the Ninth Circuit, at petitioner Ms. Alvarado's request, until Jan. 28, 2000) (copy on file with author). But see *infra* note 15 (noting that co-counsel of *In re R-A-* requested another stay, pending a determination by Attorney General Janet Reno, as to whether she will certify and reverse the BIA's decision).

15. See E-mail from Karen Musalo, Esq., Co-counsel, Appeal of *In re R-A-*, to Barbara Alexander, Author, "Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims" (Jan. 23, 2000) (on file with author) (stating that Ms. Alvarado's counsel would request, and expected to receive, another stay with the Ninth Circuit, extending the Jan. 28, 2000 deadline to file briefs, while Attorney General Janet Reno considers whether or not to certify the case).

16. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, art. 3, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113, 114 [hereinafter Convention Against Torture].

17. See Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

18. See *id.* sec. 2242(b) (requiring implementation regulations no later than 120 days post-enactment). These implementing regulations are "subject to any reservations, understandings, declarations, and provisos contained in the United States resolution of ratification of the [CAT]." *Id.* sec. 2242(c).

19. See 136 CONG. REC. S17,486 (daily ed. Oct. 27, 1990) (declaring that Articles 1-16 of CAT are not self-executing). This means that CAT was not effective in United States domestic law until it was explicitly implemented by the United States Congress. See BLACK'S LAW DICTIONARY 1364 (6th ed. 1990) (defining

Significantly, Article 3 of CAT prohibits the expulsion, refoulement, or extradition of any "person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."²⁰ CAT does not provide, however, the legal permanent resident or citizenship benefits of asylum, and it does not allow family members to come to the United States to join their spouses or parents.²¹ CAT relief is significant because it prevents the United States from returning women, such as Ms. Alvarado, to husbands who will continue to torture them.²² Accordingly, CAT is an important and viable alternative legal remedy for domestic violence victims.²³

The consequent Immigration and Naturalization Service ("INS") Regulations Concerning the Convention Against Torture, which took effect on March 22, 1999, established formal procedures for filing and adjudicating claims under CAT.²⁴ In the wake of *In re R-A*,²⁵ withholding of removal under Article 3 of CAT²⁶ provides an alter-

"self-executing" as "anything which is effective immediately, without the need of any type of implementing action"). *Id.*

20. Convention Against Torture, *supra* note 16, art. 3, 1465 U.N.T.S. at 114.

21. See *infra* Part II.A (comparing asylum with CAT relief).

22. See *infra* notes 79-80 and accompanying text (discussing the scope of CAT's refoulement provision).

23. See *infra* Part III.B (analyzing how domestic violence victims, such as Ms. Alvarado, qualify for CAT relief).

24. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (1999) (codified in scattered sections of 8 C.F.R.).

25. See Fredric N. Tulskey, *Abused Woman Is Denied Asylum; Immigration Ruling Reflects Split Over Gender Persecution*, WASH. POST, June 20, 1999, at A1 [hereinafter Tulskey, *Abused Woman is Denied Asylum*] (stating that the BIA's decision in *R-A* reflects growing concern about a possible floodgates scenario if domestic violence is included as persecution on account of membership in a particular social group).

26. See Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8489 (1999) (codified in scattered sections of 8 C.F.R.) (establishing withholding of removal and deferral of removal under Article 3 of CAT); see also Joseph E. Langlois, Acting Director, Asylum Division, INS, Memorandum on Implementation of Amendments to Asylum and Withholding of Removal Regulations, Effective March 22, 1999 (Mar. 18, 1999) [hereinafter INS Implementation Memorandum] (providing general background of CAT, summary of changes, and procedural guidance for implementation for asylum officer directors, supervisory asylum officers, quality assurance and training coordinators, and asy-

native legal remedy for ensuring the non-refoulement of domestic violence victims.²⁷

This Comment addresses the importance and viability of withholding of removal under Article 3 of CAT as an alternative legal remedy for domestic violence victims fleeing egregious abuse at the hands of their spouses.²⁸ Part I provides an overview of CAT's purpose, its arrival on the international scene as well as its implementation in the domestic immigration law of the United States both before and after March 22, 1999. Part I further explains how egregious domestic violence²⁹ qualifies as both persecution and torture.³⁰

Part II compares the legal remedy of asylum with the newly available legal remedy of withholding of removal under Article 3 of CAT. In addition, Part II analyzes the ways in which withholding of removal under Article 3 of CAT both broadens and narrows the scope of relief available to domestic violence victims. Specifically, it addresses the absence of a nexus requirement in CAT relief, the different harms that asylum and CAT address, and the different burdens of proof that domestic violence victims must satisfy under asylum and withholding of removal under Article 3 of CAT.

Part III provides a case study of *In re R-A-*, analyzing the areas of CAT in which domestic violence victims, such as Ms. Alvarado, may encounter difficulties in qualifying for withholding of removal under Article 3 of CAT. After analyzing the severe physical and mental

lum officers).

27. See Immigration and Naturalization Service, U.S. Department of Justice, Supplemental Instructions to Form I-589 Application for Asylum and Withholding of Removal (Form I-589S), OMB No. 1115-0086 (1999) [hereinafter INS Supplemental Instructions] (indicating that the immigration judge first determines if the applicant qualifies for asylum or withholding of removal and then, if the person does not qualify, if the applicant qualifies for relief under CAT).

28. See *infra* Parts II.B, III.B (discussing the differences between proving eligibility for withholding of removal under Article 3 of CAT and proving eligibility for a grant of asylum under INA section 208(a) for domestic violence victims).

29. See generally General Recommendation No. 19, Committee on the Elimination of All Forms of Discrimination Against Women, para. 23, U.N. Doc. CEDAW/C/1992/L.1/Add. 1 (1992) [hereinafter General Recommendation No. 19] (defining family/domestic violence as physically, mentally, and sexually violent acts that family members commit against women).

30. See *infra* notes 35-74 and accompanying text (discussing the background and purpose of CAT and its relevancy to domestic violence).

pain and suffering that Ms. Alvarado endured, including numerous instances of rape and sodomy as well as continuous death threats, Part III demonstrates that the difficulties in qualifying for withholding of removal under Article 3 of CAT are surmountable. Finally, Part III argues that Ms. Alvarado satisfies the burden of proof for withholding of removal under Article 3 of CAT.

Part IV recommends four areas for improvement that the INS and the United States Congress should consider in order to ensure that domestic violence victims are not erroneously returned to their home countries. First, Part IV recommends that the INS amend its regulations under 8 C.F.R. sec. 208.16(c)(3) to recognize the difficulties that arise when trying to gather corroborating evidence of torture.³¹ Second, Part IV recommends that the INS amend its regulations under 8 C.F.R. sec. 208.18(a) to include Article 1(2) of CAT, which suggests that immigration advocates can rely on relevant provisions from other international treaties for support.³² Third, Part IV recommends that the INS amend its regulations under 8 C.F.R. sec. 208.18(a) to explain that the term “acquiescence” means public officials can play a passive rather than active role in torture.³³ Finally, Part IV recommends that the United States Congress should legislate an Immigration and Nationality Act (“INA”) provision, similar to the special rule for battered spouses or children under INA section 240A(b)(2), that would allow domestic violence victims who received withholding of removal under Article 3 of CAT to adjust to legal permanent resident status.³⁴ This Comment concludes that withholding of removal under Article 3 of CAT provides an important and viable alternative legal remedy for domestic violence victims seeking asylum. Nonetheless, improvements are needed to ensure that CAT relief is consistently reliable as an alternative legal remedy for all domestic violence victims whose egregious abuse

31. See *infra* notes 226-28 and accompanying text (discussing first recommendation to improve CAT relief for domestic violence victims).

32. See *infra* notes 229-33 and accompanying text (suggesting other improvements to CAT relief for domestic violence victims).

33. See *infra* notes 234-37 and accompanying text (considering one means of improving CAT relief for domestic violence victims).

34. See *infra* notes 238-45 and accompanying text (recommending to the United States Congress a legislative improvement to CAT relief for domestic violence victims).

constitutes torture.

I. THE CONVENTION AGAINST TORTURE

Between 1977 and 1984, the United States participated in drafting CAT, an instrument designed to strengthen the prohibition against torture already in existence in international law.³⁵ The impetus to draft and adopt CAT arose from the recognition that prohibiting torture is a part of customary international law and the desire to reinforce this prohibition in a treaty dedicated solely to torture and other cruel, inhuman or degrading treatment or punishment.³⁶ In addition, this impetus arose in reaction to an international outcry that States were not taking their obligations to prohibit torture seriously.³⁷ Until March 22, 1999, the United States did not implement its obligation under CAT in its domestic law.³⁸ With implementing legislation now in place, and contingent upon the successful recognition of egregious domestic violence as a form of torture, CAT can provide a viable alternative legal remedy for domestic violence victims who fail to qualify for asylum.³⁹

A. PROHIBITION AGAINST TORTURE

Customary international law obligates all States to prohibit torture.⁴⁰ This obligation exists regardless of whether a State has signed

35. See *infra* notes 50-51 and accompanying text (discussing United States' involvement in the arrival of CAT on the international scene).

36. See *infra* notes 40-46 and accompanying text (discussing the prohibition against torture).

37. See *infra* notes 47-51 and accompanying text (providing a brief overview of the international dimension of CAT).

38. See *infra* notes 52-55 and accompanying text (explaining past and present implementation in United States domestic law).

39. See *infra* notes 61-74 (discussing the status of domestic violence as a form of torture).

40. See *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, submitted by Sir Nigel Rodley, Special Rapporteur of the Commission on Human Rights, in accordance with General Assembly Resolution 53/139, U.N. Comm'n H.R., Agenda Item 116(a), para. 9, U.N. Doc. A/54/426 (1999) [hereinafter 1998 UN Torture Report] (noting that CAT, the International Covenant on Civil and Political Rights ("ICCPR"), and the Universal Declaration of Human Rights ("UDHR") affirm the non-derogable right to be free from torture).

CAT or attached any reservations, declarations, and understandings to the instrument of ratification.⁴¹ Currently, the Committee Against Torture monitors State compliance with CAT.⁴² Other regional human rights instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights") and the American Convention on Human Rights also enforce the international customary law prohibition against torture.⁴³ The implementing bodies for each of these Conventions, including the European Commission of Human Rights ("ECHR"), the European Court of Human Rights ("ECtHR"),⁴⁴ the Inter-American Commission on Human Rights ("IACHR"), and the

The prohibition against torture, as articulated in the ICCPR and the UDHR, is now a norm of customary international law. *See id.*; *see also* International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (reaffirming in Article 7 that the prohibition against torture is a fundamental human right); Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR 3d Sess., U.N. Doc. A/811 (Dec. 10, 1948) [hereinafter UDHR] (establishing in Article 5 a universal right to be free from torture or cruel, inhuman or degrading treatment or punishment). *See generally* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 512-17 (4th ed. 1990) (discussing the concept of *jus cogens*); LOUIS HENKIN, *THE AGE OF RIGHTS* 19 (1990) (arguing that torture is widely accepted as a matter of customary international law). There are also other regional instruments that recognize the prohibition against torture and serve as useful bodies of law to help interpret CAT. *See infra* notes 43-46 and accompanying text.

41. *See* JOSE MARIA RUDA, *THE FINAL ACCEPTANCE OF INTERNATIONAL CONVENTIONS* 8 (The Stanley Foundation, 1976) (explaining ratification in a constitutional system such as the United States). Ratification is "the full approval of the legislative branch." *Id.* Specifically, the United States Senate must give its consent to every treaty and convention the President of the United States signs. *See id.*

42. *See* Convention Against Torture, *supra* note 16, arts. 17-24, 1465 U.N.T.S. at 116-21 (establishing a Committee Against Torture and defining its scope and power).

43. *See* American Convention on Human Rights, Nov. 22, 1969, art. 5(2), 9 I.L.M. 673, 676 (1970) (looking to the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man, and the UDHR); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221, 224 (1953) [hereinafter European Convention on Human Rights] (incorporating the UDHR's prohibition against torture).

44. *See* European Convention on Human Rights, *supra* note 43, arts. 19-56, 213 U.N.T.S. at 234-48 (establishing the ECHR and the ECtHR and their jurisdiction and rules of procedure).

Inter-American Court of Human Rights ("IACtHR"),⁴⁵ could provide useful guidance for interpreting the obligation to prohibit torture under CAT, as each of these implementing bodies has functioned longer than the Committee Against Torture.⁴⁶

B. CONVENTION AGAINST TORTURE: INTERNATIONAL & DOMESTIC

CAT originated in a discussion of torture in the United Nations General Assembly in 1973, in response to the international outcry concerning the alarming spread of torture as a tool of repression in autocratic regimes throughout the world.⁴⁷ CAT is a multilateral treaty whose principal aim is to reinforce the prohibition of torture under customary international law.⁴⁸ Although the United States supported the idea of drafting a convention against torture and other cruel, inhuman or degrading treatment or punishment, and participated in the Working Group sessions,⁴⁹ it did not deposit its instrument of ratification for CAT until October 21, 1994.⁵⁰ Furthermore, its instrument of ratification included several reservations, declara-

45. See American Convention on Human Rights, *supra* note 43, arts. 34-73, 9 I.L.M. at 685-94 (establishing the IACHR and the IACtHR and their jurisdiction and rules of procedure).

46. See, e.g., Andrew Dutton, *The Year of the CAT: The Importance of CAT's European cousin* (visited Sept. 30, 1999) <http://www.asylumlaw.org/legal_tools/united_states/legal_standards/us_CAT/us_CAT2.htm> (maintaining that article 1(2) of CAT makes ECHR and ECtHR decisions relevant and useful for the BIA and United States federal courts interpreting and applying CAT).

47. See J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 13 (1988) (reviewing the background to the 1973 and 1974 UN General Assembly discussions on the question of torture).

48. See *id.* at 12 (discussing the inclusion of torture prohibition in international standards); see also *supra* note 40 and accompanying text (discussing the right to be free from torture as customary international law).

49. See BURGERS & DANIELIUS, *supra* note 47, at 40 (including the United States in the list of countries that supported drafting a convention against torture and participated in the February 1979 pre-sessional Working Group deliberations).

50. See The United Nations Treaty Collection (visited Sept. 25, 1999) <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html> (noting that the United States instrument of ratification for CAT took effect on Nov. 20, 1994).

tions, and understandings, which undermined the effectiveness of ratification without further congressional legislation enforcing it.⁵¹

Prior to March 22, 1999, in compliance with the United States' treaty obligations under Article 3 of CAT,⁵² the INS informally processed requests.⁵³ These requests, however, were not considered until the applicant exhausted his or her legal remedies before an immigration judge and the BIA.⁵⁴ On March 22, 1999, however, in response to the October 21, 1998 legislation implementing CAT in United States domestic law, the INS issued the Regulations Concerning the Convention Against Torture, which replaced the informal process with formal procedures and legal remedies.⁵⁵

51. See 136 CONG. REC. S17,486 (daily ed. Oct. 27, 1990) (setting forth United States reservations, declarations, and understandings to CAT for ratification). Specifically, the United States Senate gave its advice and consent subject to the declaration that "Articles 1 through 16 of the Convention [Against Torture] are not self-executing." *Id.* pt. III (1). For further discussion on the impact of the United States Senate's understandings on withholding of removal under Article 3 of CAT on domestic violence victims, see Part III.B *infra*.

52. See INS Implementation Memorandum, *supra* note 26 (summarizing, *inter alia*, the procedural and substantive changes as a result of CAT implementing legislation). The United States' obligation to comply with CAT existed even before Nov. 20, 1994 (thirty days after depositing its ratification with the Secretary-General), but not until Oct. 21, 1998 was there any implementing the United States' obligations. See *id.*

53. See DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 570-72 (Paul T. Lufkin ed., 3d ed. 1999) (discussing informal procedures for CAT relief). The asylum-seeker could make the request at any point during the asylum process, but the INS was unable to address the claim until the asylum-seeker had exhausted all other legal remedies. An asylum officer conducted an interview and made an assessment, which was then referred to a supervisory asylum officer. If the supervisory asylum officer determined the assessment contained sufficient information to resolve the claim, the supervisory asylum officer referred the claim to the INS Central Office Asylum Division. The INS Central Office Asylum Division, upon determining the record was complete, then forwarded the claim to the INS Office of the General Counsel, which made the final decision as to whether to grant withholding of removal under Article 3 of CAT. See *id.* (noting that the procedures were rudimentary).

54. See *id.* (explaining the procedure for processing CAT claims prior to Mar. 22, 1999).

55. See Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8478 (1999) (codified in scattered sections of 8 C.F.R.) (amending INS informal procedures and replacing them with formal procedures required by section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998).

Consequently, there are currently four categories of legal remedies available to immigrant domestic violence victims: (1) asylum; (2) withholding of removal under INA section 241(b)(3); (3) withholding of removal under Article 3 of CAT; and (4) deferral of removal under CAT.⁵⁶ The first two categories, asylum and withholding of removal under INA section 241(b)(3)⁵⁷ remain unchanged by the adoption of CAT. The Convention provides two additional legal remedies: withholding of removal under Article 3 of CAT and deferral of removal under Article 3 of CAT.⁵⁸ Withholding of removal under both asylum law and CAT prevents the United States from extraditing, returning, or expelling any individual to a country where he or she would face a "more likely than not" risk of torture.⁵⁹ As withholding of removal only provides for non-return, and not permission to remain in the United States indefinitely, it is an alternative legal remedy to pursuing a grant of asylum.⁶⁰

C. DOMESTIC VIOLENCE AS TORTURE: AN OVERVIEW

The threshold issue in determining whether CAT is a viable alternative legal remedy for domestic violence victims is the United States government's willingness to recognize that particularly egregious domestic violence⁶¹ constitutes torture.⁶² Currently, there is a

56. *See id.* at 8478-81 (discussing withholding of removal under INA section 241(b)(3), withholding of removal under CAT, and deferral of removal under CAT). These remedies are not exclusive to domestic violence victims. This Comment does not focus on the fourth legal remedy, deferral of removal under CAT, because the traditional domestic violence victim does not fall within the category of persons that the deferral of removal remedy is designed to protect. *See id.* at 8481.

57. 8 U.S.C.A. sec. 1231(b)(3) (West 1999).

58. *See Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8480 (1999) (codified in scattered sections of 8 C.F.R.) (outlining the structure of the rule).

59. *See infra* notes 78-80 (providing codified law provisions of withholding of removal).

60. *See Part II.A infra* (comparing asylum with CAT relief).

61. *See Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85*, U.N. Comm'n H.R., para. 23, U.N. Doc. E/CN.4/1996/53 (1996) [hereinafter 1995 Report of the Special Rapporteur on Violence Against Women] (defining domestic violence as

dearth of United States case law examining domestic violence under the Article 1 torture definition in CAT.⁶³ While the dissent in *In re R-*

“violence that occurs within the private sphere, generally between individuals who are related through intimacy, blood, or law”); *see also Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85: A Framework for Model Legislation on Domestic Violence*, U.N. Comm’n H.R., para. 11, U.N. Doc. E/CN.4/1996/53/Add.2 (1996) [hereinafter *Special Rapporteur on Violence Against Women: Framework for Model Legislation on Domestic Violence*] (identifying several acts, among others, that constitute domestic violence). Those acts include:

simple assault, aggravated physical battery, kidnapping, threats, intimidation, coercion, stalking, humiliating verbal abuse, forcible or unlawful entry, arson, destruction of property, sexual violence, marital rape, dowry or bride-price related violence, female genital mutilation, violence related to exploitation through prostitution, violence against household workers and attempts to commit such acts

Id.

62. *See* discussion *infra* Part III.B (analyzing CAT relief for domestic violence victims); *see also Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission resolution 1997/44*, U.N. Comm’n H.R., 54th Sess., Provisional Agenda Item 9(a), pt. III.B.1, U.N. Doc. E/CN.4/1998/54 (1998) [hereinafter 1997 Report of the Special Rapporteur on Violence Against Women] (recognizing that gender-based violence violates the right to be free from torture and other cruel, inhuman or degrading treatment). Domestic violence is recognized, however, as a form of persecution. *See In re R-A-*, 1999 WL 424364, at *8 (agreeing with immigration judge that domestic violence suffered by Ms. Alvarado rose to the level of persecutive harm); *see also* Bemma Donkoh, Deputy Regional Representative, UNHCR, Regional Office Washington, Remarks at the Carnegie Endowment for International Peace briefing on *In re R-A-* (July 28, 1999) (stating that domestic violence can be a form of persecution) (transcript on file with author). *See generally* Vienna Declaration and Programme of Action, para. 18, U.N. Doc. A/CONF.157/23 (1993) (emphasizing that gender-based violence constitutes a human rights violation).

63. *See* Convention Against Torture, *supra* note 16, art. 1, para. 1, 1465 U.N.T.S. at 113-14 (defining torture); *see also* Center for Gender and Refugee Studies, *Case Summaries, Listed by Claimed Asylum Ground* (last modified Nov. 12, 1999) <<http://www.uchastings.edu/cgrs/summaries/ground.html#torture>> (providing case summaries of seven cases in which asylum applicants sought alternative CAT relief). One case summary involving domestic violence is *In re R-A-*; Ms. Alvarado’s counsel have filed a motion to reopen her case with the BIA, pursuant to CAT. *See* Memorandum in Support of Motion to Reopen and Remand Pursuant to the Convention Against Torture at 9, *In re R-A-*, Interim Decision 3403, 1999 WL 424364 (B.I.A. June 11, 1999) [hereinafter CAT Support Memorandum] (arguing that Ms. Alvarado is entitled to CAT relief); *see also* Center for Gender and Refugee Studies, *Case Summary 76; Gender Asylum Case Summary*

A- implied that egregious domestic violence may constitute a form of torture, it did not provide extensive legal analysis on this issue.⁶⁴ The United States government must recognize, however, that some forms of gender-based torture, such as egregious domestic violence, are less readily apparent than others, such as the systematic rape of women by soldiers during war.⁶⁵

At one time, an analogous situation existed under United States asylum law. Neither the 1951 Convention Relating to the Status of Refugees⁶⁶ ("1951 Convention") nor the 1967 Protocol Relating to the Status of Refugees ("1967 Protocol")⁶⁷ conceptualized the domestic violence victim as someone in need of international protection.⁶⁸ Yet, by 1975, the BIA had begun to adjudicate domestic violence asylum claims.⁶⁹ Since then, a body of case law involving domestic violence has developed, analyzing the domestic violence nexus issue in the context of the membership in a particular social group framework.⁷⁰ Although CAT does not explicitly conceptualize the domestic violence victim as a torture victim, other international human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women⁷¹ ("CEDAW"), the Universal Declaration of Human Rights⁷² ("UDHR"), and the International Covenant on Civil and Political Rights⁷³ ("ICCPR"), include principles of international law relevant to domestic violence victims.⁷⁴

(last modified Nov. 12, 1999) <http://www.uchastings.edu/cgrs/summaries_summary76.html> (noting a case that includes a CAT claim that was not in the decision where on Feb. 23, 1999 an immigration judge granted asylum to a woman who opposed the practice of female genital mutilation and as a result suffered domestic abuse at the hands of her husband).

64. See *In re R-A-*, 1999 WL 424364, at *29 (Guendelsberger, Board Member, dissenting), citing Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 303-06 (1994) (noting that domestic violence is a powerful tool by which men oppress and "systematically destroy the power of women"). See *id.*

65. See generally Torture and other cruel, inhuman or degrading treatment or punishment (draft resolution), U.N. GAOR 3d Comm., 54th Sess., Agenda Item 116(a), para. 13, U.N. Doc. A/RES/C.3/54/L.50 (1999) (inviting the Special Rapporteur on Torture to continue examining the torture of women and the circumstances under which it occurs). The draft mentions gender-specific torture such as rape, but not domestic violence. See *id.*

66. See United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 629, 189 U.N.T.S. 137 (1954) [hereinafter

1951 Convention] (setting forth the definition of a refugee and State Parties' obligations under international law).

67. *See* United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol] (amending and expanding the 1951 Convention).

68. *But see* Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (1981) [hereinafter CEDAW] (conveying agreement of State Parties to provide legal protection against discrimination for women by both private and public actors); Declaration on the Elimination of Violence Against Women, G.A. Res. 104, U.N. GAOR 3d Comm., 48th Sess., Agenda Item 111, at 1, U.N. Doc. A/RES/48/104 (1994) (affirming that violence against women is a human rights violation which States should take all appropriate measures to eliminate). For further support affirming domestic violence victims as individuals in need of international protection, see generally UNHCR, Executive Committee Conclusion No. 73 (XLIV): Refugee Protection and Sexual Violence (1993) (recognizing that persecution suffered by women is different than that suffered by men); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 306-52 (1994) (analyzing domestic violence through the lens of torture); Donkoh, *supra* note 62 (discussing domestic violence in the context of the refugee definition and concluding that "certain victims of domestic violence can be included in the refugee definition") (transcript on file with author).

69. *See* Matter of Pierre, Interim Decision 2433, 15 I. & N. Dec. 461, 462-63 (B.I.A. 1975) (denying withholding of deportation under INA section 243(h) to a Haitian woman for failure to establish the "on account of" element as well as the Haitian government's inability or unwillingness to control her husband). Respondent fled to the United States after her husband, a Haitian government official, tried to kill her by burning her house down. *See id.*

70. *See, e.g.,* Rusovan v. INS, No. 97-2819, 1998 WL 78999, at *1 (7th Cir. Feb. 19, 1998) (denying asylum to a Serbian woman because she failed to show the government condoned her husband's abuse on account of her membership in a particular social group); Alcantara v. INS, No. 92-70286, 1993 WL 43869, at *1 (9th Cir. Feb. 22, 1993) (distinguishing domestic violence arising from personal motivation, which does not qualify as persecution under United States asylum law, from persecution on account of one of five statutorily-mandated grounds); Matter of A and Z, Executive Office for Immigration Review, Office of the Immigration Judge, Arlington, VA (Dec. 20, 1994) (granting asylum to a Jordanian woman fleeing 30 years of domestic violence suffered on account of her political opinion and her membership in the particular social group of women espousing Western values and refusing to live under male domination).

71. *See* CEDAW, *supra* note 67, 1249 U.N.T.S. at 13.

72. *See* UDHR, *supra* note 40, at art. 5 (declaring the right to be free from torture).

73. *See* ICCPR, *supra* note 40, 999 U.N.T.S. at 171 (supporting the customary international law norm of prohibiting torture); *see also infra* note 74.

74. *See* ICCPR, *supra* note 40, 999 U.N.T.S. at arts. 7, 23(2), (4), 26 (recog-

II. EVALUATING AVAILABLE LEGAL REMEDIES

Although there are currently four legal remedies available for persons hoping to enter and remain in the United States,⁷⁵ asylum is always the preferred form of relief.⁷⁶ This is because asylum constitutes permission to remain in the United States permanently, rather than only on a temporary basis.⁷⁷ Conversely, withholding of removal, which is available under both asylum law⁷⁸ and CAT,⁷⁹ only prevents the United States from extraditing, expelling, or returning an alien to a country where he or she would face a "more likely than not" risk of torture.⁸⁰ Although asylum provides benefits that CAT relief does not, the latter is still an important and viable alternative legal remedy.⁸¹ Withholding of removal under CAT provides domes-

nizing rights similar to those provided by UDHR articles 5, 16(1) and (3), and 7); UDHR, *supra* note 40, 999 U.N.T.S. at arts. 2, 3, 5 (recognizing the "right to life, liberty, and security of person . . ." and the right to be free from "torture or other cruel, inhuman or degrading treatment or punishment", without distinction of any kind, such as . . . sex"). Moreover, the ICCPR specifically recognizes the right to marry and the obligations of State Parties "to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution . . ." ICCPR, *supra* note 40, at arts. 23(2), (4); *see also* CEDAW, *supra* note 67, 1249 U.N.T.S. at 1 (defining discrimination against women).

75. *See supra* notes 56-60 and accompanying text (discussing the four legal remedies currently available to aliens seeking residency in the United States).

76. *See generally* 8 U.S.C.A. sec. 1158 (West 1999) (codifying United States asylum procedure). Asylum is a discretionary form of relief. *See* 8 U.S.C.A. sec. 1158(b)(1). Asylum allows an alien present in the United States, who qualifies as a refugee under 8 U.S.C.A. sec. 1101(a)(42)(A), to remain in and work in the United States. *See* 8 U.S.C.A. sec. 1158(a)(1), (c)(1)(B). If granted asylum, the asylee may apply to adjust to legal permanent resident status after having been physically present in the United States for one year. *See* 8 U.S.C.A. sec. 1159(a)(1)(B) (West 1999). After five years, if the asylee becomes a legal permanent resident, he or she can apply to become a United States citizen. *See* 8 U.S.C.A. sec. 1427(a) (West 1999).

77. *See generally* LEGOMSKY, *supra* note 12, at 768-71 (providing a brief overview of asylum and non-return).

78. *See* 8 U.S.C.A. sec. 1231(b)(3) (West 1999) (codifying INA section 241(b)(3), which establishes the legal remedy of withholding of removal).

79. *See* 8 C.F.R. sec. 208.16(c) (1999) (codifying withholding of removal as a legal remedy under CAT).

80. *See* 8 C.F.R. sec. 208.16(f) (1999) (establishing that withholding of removal under CAT does not prevent return to a "safe" third country).

81. *See infra* notes 83-89 and accompanying text (discussing the benefits of

tic violence victims an additional opportunity, using different criteria, to demonstrate the compelling reasons why the United States should not expel them.⁸²

A. COMPARING ASYLUM WITH CONVENTION AGAINST TORTURE RELIEF

Currently, asylum provides three significant benefits for domestic violence victims that CAT relief does not.⁸³ First, asylum is a basis for adjustment of status to become a legal permanent resident ("LPR").⁸⁴ Legal permanent residence is not an option for domestic violence victims who meet the definition of torture and qualify for

asylum not provided by the withholding of removal under CAT).

82. See *infra* notes 98-133 and accompanying text (discussing the absence of a nexus requirement and the definition of torture under CAT). The burden of proof of withholding of removal under both asylum law and CAT is "more likely than not." See 8 C.F.R. sec. 208.16(b), (c) (1999). Immigration reform advocates, however, believe that the United States should also limit humanitarian immigration, in addition to other types of immigration. See, e.g., STEVEN A. CAMAROTA, CENTER FOR IMMIGRATION STUDIES, IMPORTING POVERTY: IMMIGRATION'S IMPACT ON THE SIZE AND GROWTH OF THE POOR POPULATION IN THE UNITED STATES 6 (Sept. 2, 1999) (arguing that the United States should only resettle those genuinely in need because of persecution). Camarota argues that immigration is a major factor in poverty growth in the United States. See *id.* at 1. Camarota further argues that immigrants are "almost without exception, a net drain on public coffers." *Id.* Immigration restrictionists also put forward other arguments for stemming what they perceive as the unabated and harmful flow of immigrants into the United States. One argument is that immigrants are out-breeding Americans. See George J. Borjas, *The Top Ten Symptoms of Immigration*, in BACKGROUND 2 (Center for Immigration Studies Series, Nov. 1999) (arguing that immigration costs outweigh benefits). According to immigration restrictionists, such as the Federation for American Immigration Reform ("FAIR"), population growth fueled by immigration is threatening the ecological stability of the United States. See Peter H. Schuck, *The Treatment of Aliens in the United States*, in PATHS TO INCLUSION: THE INTEGRATION OF MIGRANTS IN THE UNITED STATES AND GERMANY 208-09 (Peter H. Schuck & Rainer Münz eds., 1998) (stating that principled restrictionism rather than xenophobia and nativism predominates in the United States today). Other arguments include: immigrants are unskilled and their earnings lag behind those of Americans for very long periods of time; immigrants take jobs from lower skilled Americans; immigrants are more likely to receive welfare; and immigrants harm the economy by dragging down wages. See *id.*

83. See *infra* notes 84-88 and accompanying text (discussing three of the major differences between asylum and CAT relief).

84. See 8 C.F.R. sec. 208.16(f) (1999) (establishing that withholding of removal under CAT does not prevent return to a "safe" third country).

withholding of removal under CAT.⁸⁵ Therefore, while the INS cannot remove a domestic violence victim who qualifies for CAT relief to a country of risk, a grant of withholding of removal under CAT does not automatically allow a domestic violence victim to remain in the United States indefinitely.⁸⁶ Second, asylum provides family members of the asylee, located outside of the United States, an opportunity to join their spouses and/or parents in the United States.⁸⁷ Third, asylum allows family members already in the United States, such as children who fled with the domestic violence victim, to remain.⁸⁸ Withholding of removal under CAT does not provide any of these benefits.⁸⁹

B. BROADENING AND NARROWING: THE SEE-SAW EFFECT

In order for a domestic violence victim to receive CAT relief as an alternative legal remedy to asylum, she must prove: (1) that the harm she would face, if she is returned to the country from which she fled, qualifies as torture under Article 1 of CAT,⁹⁰ and (2) that she faces a “more likely than not” risk of torture if she is returned.⁹¹ The fol-

85. See generally ANKER, *supra* note 53, at 470 (reiterating that relief under Article 3 of CAT is non-refoulement relief only).

86. See 8 C.F.R. sec. 208.16(f) (1999) (including removal to third country provisions in CAT and INA section 241(b)(3)(B) withholding of removal implementing regulations).

87. Cf. 8 C.F.R. sec. 208.16(e) (1999) (noting that withholding of removal under CAT prevents a spouse and minor children from joining the asylee, but providing reconsideration for those individuals whose request for asylum was denied “solely in the exercise of discretion”).

88. See 8 C.F.R. sec. 208.20(c) (establishing that a person receiving a grant of asylum, who has a spouse or minor children in the United States, but did not include the spouse or children in the asylum application, can file an I-730 to adjust statuses of spouse and minor children).

89. See *supra* notes 84-88 and accompanying text (discussing benefits exclusive to asylum).

90. See *infra* note 104 (defining torture for the purposes of CAT relief).

91. See 8 C.F.R. sec. 208.16(c) (1999) (codifying withholding of removal under Article 3 of CAT). Withholding of removal under CAT utilizes the same standard of proof (“more likely than not”), the same removal prohibitions, and the same mandatory bars as withholding of removal under INA section 241(b)(3)(B). See 8 C.F.R. sec. 208.16(b), (d). One difference between the two forms of with-

lowing subsections will analyze three integral components of CAT to demonstrate how domestic violence victims can qualify for CAT relief.⁹²

First, CAT contains no nexus requirement.⁹³ This means domestic violence victims need not prove that the torture suffered was “on account of race, religion, nationality, membership in a particular social group or political opinion.”⁹⁴ This is significant because the nexus requirement is a very challenging hurdle that domestic violence victims face when trying to qualify for asylum.⁹⁵ Second, the definition of torture in Article 1 of CAT differs from the working definition of persecution, which is the harm with which asylum law is concerned.⁹⁶ Third, the burden of proof CAT establishes, although it does not differ from withholding of removal under asylum law, differs from a

holding of removal is the types of harm from which the person is protected—torture as defined in Article 1 of CAT and persecution as interpreted by the UNHCR and construed in United States case law. *Cf.* 136 CONG. REC. S17,491-92 (daily ed. Oct. 27, 1990) (adopting an understanding that, “where there are substantial grounds that he would be in danger of being subjected to torture” in Article 3 of CAT, the test is whether it is “more likely than not that he would be tortured”).

92. *See infra* Part II.B.1-3 (analyzing three integral components of CAT). *See generally* ANKER, *supra* note 53, at 469-70, 479-81, 509-10 (analyzing asylum and CAT comparatively in terms of the scopes of each being broader or narrower in certain areas than the other). This author has coined the term “see-saw effect” to emphasize how CAT requirements interact with one another, and also to highlight the role that the United States government plays, as a type of fulcrum, in determining the scope of CAT relief. *See id.*

93. *See infra* note 100 and accompanying text (explaining why there is no nexus requirement in CAT).

94. *Compare infra* note 104 (providing the definition of torture under CAT), with 8 U.S.C.A. sec. 1158(a)(2)(A) (West 1999) (codifying the “on account of” language).

95. *See, e.g., supra* notes 9-12 (explaining that in *In re R-A-*, even though Ms. Alvarado was persecuted and the Guatemalan government offered no assistance, Ms. Alvarado did not qualify for asylum because she could not satisfy the “on account of” nexus requirement).

96. *Compare infra* note 104 (providing the verbatim text of the CAT torture definition), with United Nations, Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2d ed. 1992) [hereinafter UNHCR Handbook] (providing interpretation of persecution); *see also infra* note 111, paras. 51-53 (citing the text of paragraph 51).

grant of asylum.⁹⁷

1. Absence of Nexus Requirement Broadens Scope of Relief

First, CAT does not have a nexus requirement.⁹⁸ Specifically, CAT does not include the “on account of race, religion, nationality, membership in a social group or political opinion” language, which is included in the refugee definition in Article 1(A)(2) of the 1951 Convention and Article 1(2) of the 1967 Protocol.⁹⁹ Consequently, individuals seeking relief under CAT do not need to prove the underlying reasons for the torture they suffered.¹⁰⁰

Paragraph 1 of Article 3¹⁰¹ of CAT draws in part on Article 33 of

97. See *infra* notes 98-140 and accompanying text (discussing the absence of a nexus requirement, the definitions of torture and the “public official”, interpreting the terms consent and acquiescence, and the burden of proof in CAT relief). I have applied the term the “see-saw” effect to emphasize that the United States government represents the fulcrum on which the balance between broadening and narrowing the scope of CAT relief is determined. See *supra* note 92 (explaining the term “see-saw” effect). The principles already exist to ensure that CAT relief is not erroneously narrowed in the case of domestic violence victims. See *infra* notes 98-108 and accompanying text (showing the absence of a nexus requirement under CAT, which broadens the scope of the relief). The United States government must now provide its agencies with the support upon which they can act as levers to secure the internationally-recognized right of non-return for those at risk of torture. See discussion *infra* Part IV. A-D (recommending certain changes to ensure CAT relief as a viable remedy for domestic violence victims).

98. See BURGERS & DANIELIUS, *supra* note 47, at 118 (maintaining that the words “such purposes as” in Article 1 of CAT mean the purposes listed are not exhaustive).

99. Compare Convention Against Torture, *supra* note 16, arts. 1, 3, 146 U.N.T.S. at 113-14 (providing a non-exhaustive list of possible purposes for which torture is inflicted and establishing State Parties’ obligations not to expel, return, or extradite persons at substantial risk of being tortured), with 1951 Convention, *supra* note 66, art. 1(A)(2), 189 U.N.T.S. at 152 (establishing that to qualify as a refugee, persecution must be on account of race, religion, nationality, membership of a particular social group or political opinion). The 1967 Protocol amended the refugee definition in the 1951 Convention, removing the words “[a]s a result of events occurring before 1 January 1951” and “as a result of such events.” 1967 Protocol, *supra* note 67, art. 1(2), 606 U.N.T.S. at 268 (retaining the “on account of” component of the definition of a refugee).

100. Cf. BURGERS & DANIELIUS, *supra* note 47, at 118 (noting that Article 1 of CAT makes no mention of any particulars concerning torture victims).

101. See Convention Against Torture, *supra* note 16, art. 3, para. 1, 1465 U.N.T.S. at 114 (stating that “No State shall expel, return (refouler) or extradite a

the 1951 Convention,¹⁰² which the United States Congress codified in the Refugee Act of 1980.¹⁰³ Article 33, Paragraph 1 absolutely prohibits States from expelling, returning, or extraditing any individual to a country where it is more likely than not that they would face a risk of torture.¹⁰⁴ Article 3 of CAT does not require the individual to prove that the torture suffered was “on account of his race, religion, nationality, membership in a particular social group or political opinion.”¹⁰⁵ Instead, the definition of torture under Article 1 of CAT recognizes that torture is intentionally inflicted for any number of reasons.¹⁰⁶ Hence, domestic violence victims do not have to prove the harm they suffered was on account of one of only five reasons.¹⁰⁷ As

person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”).

102. See 1951 Convention, *supra* note 66, art. 33, para. 1, 189 U.N.T.S. at 176 (stating that “No contracting State shall expel or return (refouler) a refugee in any manner whatsoever 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.”).

103. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

104. See Convention Against Torture, *supra* note 16, art. 1, para. 1, 1465 U.N.T.S. at 113-14 (defining torture). Article 1, Paragraph 1 defines torture as follows:

[T]he term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person *for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind*, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id. (emphasis added) [hereinafter Article 1 Torture Definition]. The CAT Handbook confirms the intent of the drafters that Article 3 constitutes an absolute prohibition against expelling, returning, or extraditing a person to a country where he or she would more likely than not face a risk of torture. See BURGERS & DANIELIUS, *supra* note 47, at 125-28 (providing annotations on the provisions of CAT).

105. See BURGERS & DANIELIUS, *supra* note 47, at 125 (comparing Article 33 of 1951 Convention with Article 3 of CAT).

106. See Article 1 Torture Definition, *supra* note 104 (broadening the acceptable definition of torture).

107. Cf. *In re R-A-*, 1999 WL 424364, at *13-16 (analyzing the nexus requirement that Ms. Alvarado needed to meet to qualify for asylum).

a result, CAT relief is broader than that provided under the 1951 Convention and United States asylum law.¹⁰⁸

2. Definition of Torture Narrows Scope of Relief

Second, CAT and United States asylum law are concerned with different harms: torture and persecution, respectively.¹⁰⁹ While Article 1 of CAT defines the term "torture,"¹¹⁰ the term "persecution," used in asylum law does not have a universally accepted definition.¹¹¹ Furthermore, Article 3 of CAT deals only with torture; it does not include other cruel, inhuman, or degrading treatment or punishment within its scope.¹¹² As a result, physical, emotional, and mental abuse that might qualify as cruel, inhuman, or degrading treatment or punishment does not satisfy Article 3 of CAT.¹¹³ Additionally, Article 1 of CAT does not explicitly recognize non-state actors as agents of

108. See *supra* note 102 (providing the text of Article 33, paragraph 1 of the 1951 Convention, establishing who qualifies as a refugee, and the scope of the relief provided under international refugee law and United States asylum law).

109. Compare Convention Against Torture, *supra* note 16, arts. 1, 3, 1465 U.N.T.S. at 113-14 (limiting the scope of the non-return principle of CAT as "torture" and not other cruel, inhuman or degrading treatment or punishment), with 1951 Convention, *supra* note 66, art. 1(A)(2), 189 U.N.T.S., at 152 (correlating the term "refugee" to the harm of persecution). See *infra* notes 110-111 and accompanying text (highlighting the differences between the terms "torture" and "persecution").

110. See Article 1 Torture Definition, *supra* note 104 (providing verbatim text of the definition of torture in Article 1, Paragraph 1 of CAT).

111. See UNHCR Handbook, *supra* note 96, para. 51. Paragraph 51 reads:

There is no universally accepted definition of "persecution," and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.

Id.

112. See Convention Against Torture, *supra* note 16, art. 3, para. 1, 1465 U.N.T.S. at 114 (including only the term "torture" and not "other cruel, inhuman or degrading treatment or punishment"). See generally ANKER, *supra* note 53, at 570-71 (summarizing procedures for CAT relief prior to Mar. 22, 1999).

113. See BURGERS & DANIELIUS, *supra* note 47, at 150 (noting that Article 3 of CAT, unlike Articles 10-13, does not apply to cruel, inhuman or degrading treatment or punishment).

torture,¹¹⁴ whereas the United Nations High Commissioner for Refugees ("UNHCR") has recognized non-state actors as agents of persecution under Article 33 of the 1951 Convention.¹¹⁵ In these respects, CAT relief is narrower than United States asylum law, which encompasses cruel, inhuman or degrading treatment and recognizes non-state actors as agents of persecution.¹¹⁶

a. Defining the "public official"

Part of the operative premise of the definition of torture in Article 1 of CAT is the identity of the offender.¹¹⁷ Article 3 of CAT focuses on torture where a public official bears some degree of responsibility.¹¹⁸ Although CAT does not define the term "public official,"¹¹⁹ the United States did propose, in the deliberations of the Working Group, that CAT should define the term "public official."¹²⁰ The United States further proposed that CAT should provide that a public official violates CAT: (1) when the public official is or should be aware of the commission of torture, and (2) where the public official

114. See Convention Against Torture, *supra* note 16, art. 1, para. 1, 1465 U.N.T.S. at 113-14 (defining torture as "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity").

115. See UNHCR Handbook, *supra* note 96, para. 65 (explaining that acts by private actors qualify as persecution where the State is unable or unwilling to protect against the harm suffered).

116. See generally ANKER, *supra* note 53, at 469-70 (contrasting CAT relief with United States asylum and withholding provisions); AHCENE BOULESBAA, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT 9-35 (1999) (providing a commentary on Article 1's scope of prohibited conduct, its operative premise, and the over-breadth of its definition of torture).

117. See BOULESBAA, *supra* note 116, at 23-28 (1999) (analyzing the identity of the offender component of Article 1 of CAT).

118. See BURGERS & DANIELIUS, *supra* note 47, at 1 (summarizing briefly the principal aim of CAT).

119. See BOULESBAA, *supra* note 116, at 28 (noting that proposals to define the term "public official" in Article 1 were not incorporated in CAT).

120. See BURGERS & DANIELIUS, *supra* note 47, at 39-42 (discussing the 1979 Working Group meeting, during which the UN Secretary-General invited governments to comment on the Swedish draft of CAT). Specifically, the United States proposed the following definition of the phrase "public official": "A public official is any person vested with exercise of some official power of the state, either civil or (sic) military." *Id.* at 42.

is in a position to prevent the commission of such torture but does not.¹²¹ Although the United States was unable to incorporate its “public official” definition into the final version of CAT, it was able to incorporate the phrase “or with the consent or acquiescence of” into the final version.¹²² This phrase provides flexibility to the torture definition by broadening the minimum level of public official involvement that satisfies the torture definition.¹²³

b. Interpreting “at the instigation of or with the consent or acquiescence of . . .”

While the State parties that drafted CAT considered and decided against explicitly including private individuals as possible agents of torture,¹²⁴ they did, nonetheless, recognize that the public officials’ responsibility extends beyond situations in which they directly cause or instigate torture.¹²⁵ Therefore, the State parties incorporated the phrase “consent or acquiescence”¹²⁶ into the definition of torture,

121. See *id.* at 42 (providing the written comments of the United States on its alternative proposal to the definition of torture in the Swedish draft text of CAT). Specifically, the United States proposed that CAT include the following text, in conjunction with the definition of “public official,” as Article 2:

Any public official who (a) consents to an act of torture, (b) assists, incites, solicits, commands, or conspires with others to commit torture, or (c) fails to take appropriate measures to prevent or suppress torture when such person has knowledge or should have knowledge that torture has or is being committed and has the authority or is in a position to take such measures, also commits the offence of torture within *the meaning of this Convention*.

Id. at 42 (emphasis added).

122. Compare Article 1 Torture Definition, *supra* note 104 (providing the verbatim text of Article 1, Paragraph 1 of CAT), with BURGERS & DANELIUS, *supra* note 47, at 41 (providing the text of the first draft of Article 1 of CAT, which only included “by or at the instigation of”).

123. See BURGERS & DANELIUS, *supra* note 47, at 45 (explaining how the United States’ recommendation to add the term “acquiescence” was accepted by the States because they recognized that public officials who may not have committed the acts but bear some responsibility are also accountable).

124. See BOULESBAA, *supra* note 116, at 26 (noting that in CAT’s *travaux préparatoires* the United States expressed its concern about the restrictiveness of “by or at the instigation of” on its own).

125. See *id.* (noting that the United States felt the term “instigation” alone restricted the application of the torture definition).

126. Convention Against Torture, *supra* note 16, art. 1, para. 1, 1465 U.N.T.S. at

thereby recognizing a more expansive interpretation of the role of the public official.¹²⁷ By expanding the original draft of the torture definition to include "consent or acquiescence," the State parties who drafted CAT recognized that public officials' omissions or failures to act also constitute governmental involvement in torture.¹²⁸

Moreover, an expansive interpretation must also recognize individuals with *de facto* enforcement power that a *de jure* government is unable or unwilling to control, such as leaders of rebel groups.¹²⁹ A truly expansive interpretation will note that the term "acquiescence" serves to capture the passive, yet potentially equally destructive, role that a government can play.¹³⁰ This expansive interpretation is not only consistent with the United States' role in drafting CAT, but also with its obligations under Article 7 of the ICCPR.¹³¹ Specifically, Article 7 of the ICCPR prohibits *refoulement*, irrespective of the identity of the agent of torture,¹³² as a matter of customary international

113-14.

127. Cf. UNHCR Handbook, *supra* note 96, para. 65 (explaining that certain actions of private actors can constitute persecution "if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection").

128. See Convention Against Torture, *supra* note 16, art. 2, para. 1, 1465 U.N.T.S. at 114 (setting forth basic obligations of states to prevent torture). Article 2, Paragraph 1 of CAT reads: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." *Id.*

129. See Karen Koning AbuZayd, Regional Representative, *UNHCR Comments on the Regulations Concerning the Convention Against Torture (Interim Rule)* (Apr. 20, 1999) 15 (recommending that the United States interpret "acquiescence of a public official" to include groups with *de facto* enforcement power).

130. See Copelon, *supra* note 68, at 342 (arguing that state involvement in domestic violence is both passive and active); see also Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 522 (1993) (arguing that failure to prosecute domestic violence is an international human rights violation).

131. See ICCPR, *supra* note 40, art. 7, 999 U.N.T.S. at 171 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

132. See generally *G.T. v. Australia*, Communication No. 706/1996, para. 8.2 (1997) (explaining that a State violates the ICCPR when it departs a person who faces a real risk that their rights under the ICCPR will be violated in the country to which they were deported).

law.¹³³

3. Burden of Proof

The final see-saw effect is the “substantial grounds” burden of proof established under Article 3 of CAT.¹³⁴ The United States interprets the phrase “substantial grounds” to mean “more likely than not.”¹³⁵ The “more likely than not” burden of proof for withholding of removal under CAT lacks the explicit subjective component that United States asylum law includes in the “reasonable possibility of persecution” burden of proof for a grant of asylum.¹³⁶ Similar to asylum law, however, Article 3, Paragraph 2 of CAT specifically provides that objective evidence, such as annual country reports on human rights practices, are relevant to determining a withholding of removal claim under CAT.¹³⁷ One explanation for this distinction is that United States asylum law provides relief for victims of past per-

133. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 702(d) cmt. n (1992) (commenting that the prohibition against torture is a matter of *jus cogens*, customary international law); see also MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 25-34 (6th ed. 1991) (discussing custom as a source of international law). Customary international law draws upon the behavior of states, both what they do and what they fail to do, why they behave the way they do and how other states react. See *id.* at 29-30.

134. See Convention Against Torture, *supra* note 16, art. 3, para. 1, 1465 U.N.T.S. at 114 (establishing the burden of proof necessary to demonstrate danger of future torture).

135. See 136 CONG. REC. S17,486 (daily ed. Oct. 27, 1990) (recording the United States’ understanding that “substantial grounds” means “more likely than not”).

136. Compare David A. Martin, Office of the General Counsel, INS, Memorandum on Compliance with Article 3 of CAT in the Cases of Removable Aliens, May 14, 1997 (noting that the “more likely than not” standard under CAT is the same as withholding of removal under INA section 241(b)(3)), with *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987) (dismissing as erroneous the Immigration Judge’s application of INA section 241(b)(3) [formerly INA section 243(h)] “more likely than not” standard of proof to Cardoza-Fonseca’s INA section 208(a) asylum claim and extending the Court’s reasoning in *INS v. Stevic*, 467 U.S. 407, 424-25 (1984)).

137. See Convention Against Torture, *supra* note 16, art. 3, para. 2, 1465 U.N.T.S. at 114 (requiring that all relevant considerations be examined, including, but not limited to, “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”).

secution as well as those with a well-founded fear of future persecution, and CAT only provides relief for the "more likely than not" probability of future torture.¹³⁸ As a result, individuals who were tortured before fleeing to the United States, but whose risk of future torture does not satisfy the "more likely than not" burden of proof, will not qualify for withholding of removal under CAT.¹³⁹ Therefore, the scope of relief under Article 3 of CAT is narrower than under United States asylum law.¹⁴⁰

III. *IN RE R-A-*: A CASE STUDY

In re R-A- supports the argument that domestic violence victims can qualify for withholding of removal under Article 3 of CAT.¹⁴¹ By analyzing the facts of Ms. Alvarado's case in a CAT context, the nexus requirement issue, on which the BIA reversed her grant of asylum, becomes moot.¹⁴² Furthermore, Ms. Alvarado's horrific personal experiences are consistent with a comprehensive understanding

138. Compare 8 U.S.C.A. sec. 1101(a)(42) (West 1999) (codifying "refugee" as someone unable or unwilling to return to his or her country of nationality or last habitual residence "because of persecution or a well-founded fear of persecution") and 8 C.F.R. sec. 208.13(b)(1) (1999) (providing regulations instructing the INS that a person may qualify as a refugee "because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution"), with Convention Against Torture, *supra* note 16, art. 3, para. 1, 1465 U.N.T.S. at 114 (using only the future conditional tense of "would be") and ANKER, *supra* note 53, at 509 (explaining that Article 3 of CAT is designed only to prevent torture, not to redress past instances of it).

139. See, e.g., Kristen B. Rosati, *The United Nations Convention Against Torture: A Detailed Examination of the Convention Against Torture as an Alternative for Asylum Seekers*, IMMIGR. BRIEFINGS (Dec. 1997), at 5 (noting that CAT relief applies only to future torture).

140. See ANKER, *supra* note 53, at 509 (discussing the limited role of presumptive proof that past torture plays in CAT determination). The absolute bar against removal under the non-refoulement principle enshrined in Article 3 of CAT, however, provides, in a different respect, broader relief. Compare ANKER, *supra* note 53, at 467-69 (discussing CAT's absolute bar to removal), with 8 U.S.C.A. sec. 1158(b)(1) (West 1999) (providing that a grant of asylum is at the discretion of the Attorney General, even if an individual establishes he or she suffered persecution or has a well-founded fear of future persecution).

141. Interim Decision 3403, 1999 WL 424364, at *1 (B.I.A. June 11, 1999).

142. See *infra* notes 153-154 and accompanying text (addressing the nexus issue).

of the definition of torture and satisfy the requirements of Article 1 of CAT.¹⁴³ Finally, and significantly for other domestic violence victims pursuing CAT relief, Ms. Alvarado's case reveals the types of evidence that domestic violence victims can use to meet CAT's burden of proof.¹⁴⁴

A. FACTUAL BACKGROUND

In May 1995, Ms. Alvarado fled Guatemala, where she suffered more than ten years of extreme physical, emotional, and sexual abuse at the hands of her husband.¹⁴⁵ On September 20, 1996, an immigration judge granted Ms. Alvarado asylum, based on past abuse suffered and a well-founded fear of future persecution.¹⁴⁶ The INS subsequently appealed the decision to the BIA.¹⁴⁷ On appeal, the INS argued that the defined social group¹⁴⁸ was not a particular social group, that Ms. Alvarado was not persecuted because of her membership in this group, and that Ms. Alvarado's husband was not motivated to persecute her on account of his belief that her resistance constituted a political opinion.¹⁴⁹ The BIA split ten to five in favor of

143. See *infra* notes 159-219 and accompanying text (discussing how Ms. Alvarado qualifies for CAT relief).

144. See *infra* notes 204-219 and accompanying text (discussing CAT burden of proof requirements and how domestic violence victims, such as Ms. Alvarado, can satisfy these requirements).

145. See *In re R-A-*, 1999 WL 424364, at *2-4 (detailing the abuse suffered). Ms. Alvarado was beaten severely, raped, whipped, pistol-whipped, and threatened with dismemberment and death continuously over a period of ten years. See *id.*; see also Karen Musalo, *Matter of R-A-: An Analysis of the Decision and Its Implications*, 76 INTERPRETER RELEASES 1177 (Aug. 9, 1999) (providing a brief synopsis of facts by co-counsel on appeal to Ninth Circuit).

146. See *In re R-A-*, 1999 WL 424364, at *5 (summarizing the Immigration Judge's decision). The Immigration Judge found that "Guatemalan women who have been intimately involved with Guatemalan male companions, who believe that women are to live under male domination" constituted a particular social group of which Ms. Alvarado was a member. See *id.* The Immigration Judge also accepted Ms. Alvarado's argument of imputed political opinion. See *id.* at *2.

147. See *id.* at *2 (noting that INS appealed grant of asylum to Ms. Alvarado in a timely fashion).

148. See *supra* note 146 (discussing the definition of a particular social group accepted by the Immigration Judge in *In re R-A-*).

149. See *In re R-A-*, 1999 WL 424364, at *5-6 (outlining the government's arguments on appeal).

sustaining the INS' appeal.¹⁵⁰ The BIA dissent maintained that the failure to recognize that Ms. Alvarado was a member of a particular social group contravenes BIA and United States federal courts' precedent, the United States Department of Justice's Gender Guidelines, and international human rights development.¹⁵¹ On September 2, 1999, Ms. Alvarado's attorneys filed a motion to reopen her case before the BIA to seek CAT relief.¹⁵²

B. ANALYZING CONVENTION AGAINST TORTURE RELIEF FOR DOMESTIC VIOLENCE VICTIMS

One advantage CAT relief has over asylum is that it does not include a nexus requirement,¹⁵³ a major hurdle domestic violence victims face when seeking asylum.¹⁵⁴ Although the scope of the Article

150. *See id.* at *2 (listing ten Board members in the majority and five Board members in the dissent). In deciding whether Ms. Alvarado's persecution was on account of her membership in a particular social group, the BIA majority rejected the social group: "Guatemalan women who have been intimately involved with Guatemalan male companions, who believe that women are to live under male domination." *Id.* at *13.

151. *See id.* at *21-22 (providing an overview of the dissent's arguments in favor of upholding Ms. Alvarado's grant of asylum).

152. *See* CAT Support Memorandum, *supra* note 63, at 17 (requesting a stay of deportation until the BIA decides the CAT claim).

153. *See* discussion *supra* Part II.B.1 (arguing that the absence of a nexus requirement broadens the scope of relief available under CAT).

154. *See In re R-A-*, 1999 WL 424364, at *5, 12-16 (articulating three reasons as to why the social group, as defined, does not constitute a particular social group). First, Ms. Alvarado did not demonstrate that the social group was recognizable as a segment of Guatemalan society. *See id.* at *12. Second, Ms. Alvarado did not show that other spousal abuse victims saw themselves as part of this group and that their persecutors also saw them as part of the defined social group. *See id.* Third, Ms. Alvarado failed to establish that spousal abuse is an important characteristic within Guatemalan society. *See id.* Significantly, the BIA majority argued in the alternative that, even if it accepted the defined social group, Ms. Alvarado did not prove that her husband persecuted her on account of her membership in this social group. *See id.* at *13. In doing so, it articulated the following reasons: First, Ms. Alvarado's husband persecuted her because she was his wife and not because she was a member of a particular social group. *See id.* at *14. Second, the record of the case did not show that the Guatemalan government encouraged spousal abuse. *See In re R-A-*, 1999 WL 424364, at *14-15. Finally, the BIA cannot construe private acts of violence, such as spousal abuse, as government persecution without hindering Congressional intent in codifying the asylum statute. *See id.* at *16; *see also* Patricia Seith, Note, *Escaping Domestic Violence: Asylum as a Means of*

1 torture definition in CAT and the higher “more likely than not” burden of proof established under Article 3 are challenging to satisfy,¹⁵⁵ they do not preclude domestic violence victims from successfully qualifying for CAT relief.¹⁵⁶ Specifically, this section will analyze CAT’s Article 1 torture definition and burden of proof requirement to demonstrate how domestic violence victims, such as Ms. Alvarado, may successfully qualify for CAT relief.¹⁵⁷

1. Establishing that Domestic Violence Meets the Definition of Torture

There are three main elements of the definition of torture that are relevant to immigrant domestic violence victims: (1) severe physical or mental pain or suffering; (2) intentional infliction for purposes enumerated and unenumerated; and (3) involvement of a public official.¹⁵⁸

a. Severe Physical or Mental Pain or Suffering

The first element, requiring individuals to suffer severe physical or mental pain, is not difficult for egregiously abused domestic violence victims to establish.¹⁵⁹ Ms. Alvarado, for example, suffered numerous

Protection for Battered Women, 97 COLUM. L. REV. 1804, 1838 (1997) (explaining that the floodgates argument is a possible explanation for the difficulties domestic violence victims face in establishing persecution on account of membership in a particular social group). For case law that deals generally with membership in a particular social group, see *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. Mar. 1, 1985) (construing “membership in a particular social group” to mean all members of the group share a common, immutable characteristic).

155. See *Convention Against Torture*, *supra* note 16, arts. 1, 3, 1465 U.N.T.S. at 113-14 (establishing the torture definition and the burden of proof for CAT relief, respectively); 136 CONG. REC. S17,486 (daily ed. Oct. 27, 1990) (providing United States’ understanding that “substantial grounds” in Article 3 of CAT means “more likely than not”).

156. See *infra* notes 159-219 and accompanying text (analyzing how domestic violence victims, such as Ms. Alvarado, can qualify for CAT relief).

157. See generally ANKER, *supra* note 53, at 485 (outlining the main elements of Article 1, Paragraph 1 of CAT).

158. See *infra* notes 159-219 and accompanying text (discussing in detail the outlined areas).

159. See BURGERS & DANIELIUS, *supra* note 47, at 117 (stating that beating, kicking, and similar acts meet the physical pain prong in the Article 1 torture defi-

instances of rape, sodomy, beatings that involved hitting, kicking, hair pulling, pistol-whipping, and whipping with electrical cords.¹⁶⁰ Moreover, international jurisprudence recognizes the acts suffered by Ms. Alvarado as severe physical pain.¹⁶¹ For example, the Committee Against Torture¹⁶² recognizes that rape and beatings with and without the use of additional instruments, such as whips, fulfill this element of the definition of torture.¹⁶³

Additionally, mental pain and suffering is a significant component of the egregious abuse domestic violence victims suffer.¹⁶⁴ Subject to the United States Senate's understanding of Article 1 of CAT,¹⁶⁵ the United States requires that to qualify as torture, mental pain or suffering must satisfy at least one of four criteria.¹⁶⁶ In practice, two of

inition in CAT).

160. *See In re R-A-*, 1999 WL 424364, at *2-4 (providing testimony and statement of abuse of R-A-). The BIA found Ms. Alvarado's testimony credible. *See id.* at *8.

161. *See infra* note 163 (providing a Committee Against Torture case).

162. *See* Convention Against Torture, *supra* note 16, art. 17, para. 1, 1465 U.N.T.S. at 116 (establishing the Committee Against Torture). Articles 17-24 of CAT describe the composition and functions of the Committee. *See id.* at 116-21. Unless the State Party explicitly recognizes the competence of the Committee, the Committee cannot receive communications from or on behalf of individuals within that State. *See id.* art. 22(1), (2), at 120.

163. *See* Report of the Committee Against Torture, Annex V, Comm. No. 41/1996, para. 2.1-2.6, 9.6 (visited Mar. 10, 2000) <<http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/33df74db40ae264880256473004fedf2?OpenDocument>> (finding that a Zairian woman who was regularly raped and beaten in Zaire qualified for relief under Article 3 of CAT); *see also* 1997 Report of the Special Rapporteur on Violence Against Women, *supra* note 62, para. 67 (commenting that rape is increasingly recognized as torture).

164. *See* MARGI LAIRD MCCUE, DOMESTIC VIOLENCE: A REFERENCE HANDBOOK 78-83 (1995) (finding that domestic violence is not limited to physical abuse, but includes emotional and sexual abuse as well); R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 111 (1979) (maintaining that physical abuse causes severe emotional distress).

165. *See* 136 CONG. REC. S17,491-92 (daily ed. Oct. 27, 1990) (attaching an understanding concerning the definition of torture in Article 1, Paragraph 1 to the United States Senate's advice and consent on the ratification of CAT).

166. *See* 8 C.F.R. sec. 208.18(a)(4)(i)-(iv) (1999) (setting forth four criteria for mental pain or suffering). The four criteria are:

- (i) The intentional infliction or threatened infliction of severe physical pain or suffering;

the four criteria—"intentional infliction or threatened infliction of severe physical pain or suffering" and "[t]he threat of imminent death"—are particularly tangible for domestic violence victims.¹⁶⁷ The physical pain and suffering that Ms. Alvarado suffered at the hands of her husband is well-documented.¹⁶⁸ Furthermore, in addition to Ms. Alvarado's husband's most recent threat to "hunt her down and kill her if she comes back to Guatemala,"¹⁶⁹ Ms. Alvarado's husband threatened her with death repeatedly over a period of ten years, which satisfies the requirement of prolonged mental harm.¹⁷⁰

b. Intentional Infliction and the Purpose Thereof

The second element, that the severe pain or suffering, whether physical or mental, is intentionally inflicted on a person and the purposes for which it is inflicted, is challenging for domestic violence victims to establish, but not insurmountable.¹⁷¹ The term "intentionally inflicted" is included in the definition of torture to ensure that accidental or negligent acts are not included within the scope of torture.¹⁷² In its understanding of Article 1, the United States interpreted

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

Id.

167. See *id.* at (i), (iii) (enumerating the criteria to establish torture).

168. See *supra* note 145 and accompanying text (discussing the severe physical pain Ms. Alvarado's husband inflicted on her).

169. *In re R-A-*, 1999 WL 424364, at *4.

170. See *In the Matter of Alvarado-Peña*, A73-753-922 (establishing that Ms. Alvarado married her husband in 1984 and the abuse began shortly thereafter and continued until she fled Guatemala in 1995).

171. See *infra* notes 173-178 (discussing the reasons why the intentional infliction and the purpose thereof element may be more difficult for domestic violence victims to establish than the physical pain and suffering element).

172. See BURGERS & DANIELIUS, *supra* note 47, at 118 (maintaining that the term "intentionally" excludes pain or suffering accidentally or negligently in-

the term "intentionally" to mean "specifically intended."¹⁷³ This limits the scope of the severe physical or mental pain or suffering that may constitute torture.¹⁷⁴ It should not, however, require domestic violence victims, such as Ms. Alvarado, to prove that there was a specific intent or reason on the part of their abusers to harm them.¹⁷⁵

In the domestic violence context, Ms. Alvarado's husband told her that he could abuse her if he wanted to do so.¹⁷⁶ The logical implication is that Ms. Alvarado's husband did not accidentally or negligently harm her, but rather did so deliberately and maliciously.¹⁷⁷ Furthermore, domestic violence victims, such as Ms. Alvarado, fit within the enumerated Article 1 purposes of punishment, intimidation, coercion, and discrimination of any kind;¹⁷⁸ that is, domestic violence is widely recognized as a situation in which the man seeks to dominate and control the woman.¹⁷⁹

flicted); *see also* BOULESBAA, *supra* note 116, at 20 (proposing that the United States should substitute "intentional" with "deliberately and maliciously" as a better reflection of its understanding of Article 1).

173. *See* 136 CONG. REC. S17,491-92 (daily ed. Oct. 27, 1990) (setting forth United States reservations, declarations, and understandings to CAT for ratification).

174. *See* BOULESBAA, *supra* note 116, at 20-21 (noting that the United States legal system defines intent as both specific and general, but its understanding of Article 1 reflects only specific intent).

175. *See In re R-A-*, 1999 WL 424364, at *19-20 (concluding that Ms. Alvarado's husband's motivation to beat her varied but was not on account of her membership in a particular social group).

176. *See id.* at *3 (establishing as part of the factual record that Ms. Alvarado testified that her husband told her "I can do it if I want to.").

177. *See generally* BOULESBAA *supra* note 116, at 20 (arguing that "deliberately and maliciously" is a better interpretation of the United States' understanding of the term "intentional").

178. *See* Convention Against Torture, *supra* note 16, art. 1, para. 1, 1465 U.N.T.S. at 113-14 (listing the purposes mentioned in Part III.B.1.b of this Comment).

179. *See* Seith, *supra* note 154, at 1807-09 (explaining the nature of domestic violence). *See generally* Kristin L. Taylor, Note, *Treating Male Violence Against Women as a Bias Crime*, 76 B.U. L. REV. 575, 591-94 (analyzing men's social control of women).

c. Involvement of a Public Official

The third element, the involvement of a public official in the severe physical or mental pain that is intentionally inflicted on a person, is most susceptible to legal interpretation difficulties for domestic violence victims.¹⁸⁰

Domestic violence victims encounter two interrelated, but not insurmountable, difficulties with this third element.¹⁸¹ First, subject to the United States Senate's understanding of Article 1 of CAT,¹⁸² the United States, interprets an act of torture as one that "must be directed against a person in the offender's custody or physical control."¹⁸³ The INS¹⁸⁴ interprets the terms "custody" and "physical control" to mean detention or imprisonment, and command of the body, respectively.¹⁸⁵ These terms, however, are not defined specifically in the regulations implementing CAT.¹⁸⁶ Therefore, it is possible to ex-

180. See, e.g., Service's Opposition to Respondent's Motion to "Reopen and Remand" at 1, *In re R-A-*, Interim Decision 3403, 1999 WL 424364, at *4-5 (B.I.A. June 11, 1999) (File No. A73-753-922) [hereinafter Service's Opposition] (arguing that the Guatemalan government had no prior knowledge of the abuse of which Ms. Alvarado complained and that she was not in her husband's custody or physical control). But see Shamita Das Dasgupta, *Women's Realities: Defining Violence Against Women by Immigration, Race, and Class*, in ISSUES IN INTIMATE VIOLENCE 211 (Raquel Kennedy Bergen ed., 1998) (noting that the individual offender and the victim are not isolated from but "nested within the supportive circles of social institutions and culture").

181. See *infra* notes 182-203 and accompanying text (discussing how domestic violence victims can overcome difficulties with public officials).

182. See 136 CONG. REC. S17,491-92 (daily ed. Oct. 27, 1990) (attaching an understanding concerning the definition of torture in Article 1, to the United States Senate's advice and consent on the ratification of CAT).

183. 8 C.F.R. sec. 208.18(a)(6) (1999).

184. See Service's Opposition, *supra* note 180, at 1 (listing the names and positions of INS employees involved most directly in *In re R-A-*). These persons are Ronald E. Lefevre, District Counsel, William C. Peterson, Deputy District Counsel, and Amy T. Lee, Assistant District Counsel. See *id.* For the purposes of this part of the Comment, INS will serve as the collective term for these three individuals.

185. See *id.* at 6-7 (citing WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (College ed. 1960)) (discussing how Ms. Alvarado failed to meet custody or physical control requirement of the definition of torture codified at 8 C.F.R. section 208.18(a)).

186. See 8 C.F.R. sec. 208.18(a)(6) (1999) ("In order to constitute torture an act

amine other interpretations of these terms.¹⁸⁷ For example, the term "custody" also means mere physical power of imprisoning, and "physical control" also means dominating or overpowering the body.¹⁸⁸ Furthermore, the Special Rapporteur on Violence Against Women recently recommended that "custody" includes "psychological custody," thus recognizing that flashbacks and fear continue even after the physical suffering ends.¹⁸⁹

Because the regulation reads "custody or physical control," domestic violence victims pursuing a claim under CAT can demonstrate either.¹⁹⁰ In *In re R-A-*, Ms. Alvarado testified that her husband routinely walked her to and from work,¹⁹¹ and whenever she tried to escape, he always found her, sometimes beating her unconscious.¹⁹² At one point, Ms. Alvarado's husband threatened to cut off her arms and legs with a machete to prevent her from ever trying to escape

must be directed against a person in the offender's custody or physical control.").

187. See, e.g., BLACK'S LAW DICTIONARY 329, 384 (6th ed. 1990) (explaining that the term "control" means, *inter alia*, to "dominate" and to "overpower" and the term custody "is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, of imprisoning . . ."). The term "physical" is satisfactorily defined by the INS. See *supra* note 185 and accompanying text (defining "physical" as "of the body").

188. Cf. BLACK'S LAW DICTIONARY, *supra* note 187 (presenting alternative definitions to those used by the INS).

189. See 1997 Report of the Special Rapporteur on Violence Against Women, *supra* note 62, pt. II, para. B (discussing forms of custody other than police custody).

190. See *infra* notes 191-192 (discussing how Ms. Alvarado satisfies the custody or physical control requirement).

191. See *In re R-A-*, 1999 WL 424364, at *2 (discussing one example of the physical control Ms. Alvarado's husband had over her).

192. See *id.* at *3 (providing another example of the physical control Ms. Alvarado's husband had over her); see also Petitioner's Reply Memorandum in Support of Motion to Reopen and Remand Pursuant to the Convention Against Torture at 6-7, *In re R-A-*, Interim Decision 3403, 1999 WL 424364, at *1 (B.I.A. June 11, 1999) (File No. A73-53-922) (on file with author) [hereinafter Petitioner's Reply Memorandum] (arguing that the examples provided in Ms. Alvarado's testimony meet the INS definition of being "physically controlled" by her husband); Pamela Goldberg, *Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565, 566-67 (1993) (recounting a woman's story describing on-going physical control even after she no longer lived with her abuser).

again.¹⁹³ This is an example that demonstrates physical control.

Second, subject to the United States Senate's understanding of Article 1 of CAT,¹⁹⁴ the United States interprets the term "acquiescence" to require the satisfaction of two criteria.¹⁹⁵ First, the public official must have an awareness of the torture prior to the fact, and second, the public official, having such awareness, must "thereafter breach his or her legal responsibility to intervene to prevent such activity."¹⁹⁶

The INS construes the first criterion to mean that, where fulfilled, the public official had prior knowledge that the torture would occur.¹⁹⁷ However, in the Senate Foreign Relation Committee's report, recommending ratification of CAT, the Committee explained that actual knowledge as well as "willful blindness" satisfy the awareness requirement.¹⁹⁸ In *In re R-A-*, Ms. Alvarado testified that she ap-

193. See *In re R-A-*, 1999 WL 424364, at *3 (providing yet another example of the physical control Ms. Alvarado's husband exerted over her); see also Petitioner's Reply Memorandum, *supra* note 192, at 6-7 (arguing that the facts presented by Ms. Alvarado prove not only the physical control, but also the psychological control, Ms. Alvarado's husband exercised over her); Copelon, *supra* note 68, at 344-48 (analyzing the element of custody in the torture definition and concluding that domestic violence victims meet it).

194. See 136 CONG. REC. S17,491-92 (daily ed. Oct. 27, 1990) (attaching an understanding concerning the definition of torture in Article 1 to the Senate's advice and consent on the ratification of CAT).

195. See 8 C.F.R. sec. 208.18(7) (1999) ("Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.").

196. *Id.*

197. See Service's Opposition, *supra* note 180, at 4-5 (arguing that public officials in Guatemala did not acquiesce to Ms. Alvarado's abuse) (on file with author); see also *Special Rapporteur on Violence Against Women: Framework for Model Legislation on Domestic Violence*, *supra* note 61, para. 14 (recommending that legislation include that police officers must treat domestic violence as seriously as other crimes).

198. See S. EXEC. REP. 101-30, at 9 (1990) ("The purpose of this condition is to make it clear that both actual knowledge and 'willful blindness' fall within the definition of the term 'acquiescence' in [the article]."); see also *Special Rapporteur on Violence Against Women: Framework for Model Legislation on Domestic Violence*, *supra* note 61, paras. 26-43 (setting forth the duties of judicial officers and recommending that countries should include those duties in their domestic violence legislation). These duties include issuing *ex parte* temporary restraining

proached the Guatemalan police and judiciary for protection, but received no assistance.¹⁹⁹ Specifically, the Guatemalan police issued summonses requiring Ms. Alvarado's husband to appear before them, however, when he did not, the Guatemalan police made no effort to pursue him.²⁰⁰ Furthermore, when Ms. Alvarado approached a Guatemalan judge, the judge characterized Ms. Alvarado's severe physical and mental pain and suffering as a domestic dispute and refused to interfere.²⁰¹ Therefore, even if public officials in Guatemala did not know of Ms. Alvarado's torture before she reported it,²⁰² from such point forward, they possessed actual knowledge of its unabated continuance and were willfully blind.²⁰³

2. Meeting the Burden of Proof

The Article 1 torture definition in CAT²⁰⁴ directly bears on whether or not an individual, specifically a domestic violence victim, will

orders and protection orders. *See id.* paras. 26-32. *Ex parte* temporary restraining orders may require the offender to leave the family home, restrain the offender from stalking or harassing the victim, and require that the offender pay the victim's medical bills. *See id.* para. 29(i), (iii)-(iv). These orders may also inform victims of their rights to prosecute their offenders and sue in a civil court for divorce or separation, as well as damages and compensation. *See id.* para. 29(vii)-(viii). Protection orders are a permanent form of relief, which here set forth similar requirements to the *ex parte* temporary restraining orders. *See id.* paras. 33-43.

199. *See In re R-A-*, 1999 WL 424364, at *4 (establishing that public officials in Guatemala were aware of the abuse suffered by Ms. Alvarado).

200. *See id.* (providing an example of the actual knowledge of public officials of the torture suffered by Ms. Alvarado).

201. *See id.* (providing an example of the willful blindness of a Guatemalan public official to the torture suffered by Ms. Alvarado).

202. *See Service's Opposition*, *supra* note 180, at 4-5 (arguing that CAT regulations require a public official to have prior knowledge of the *specific* act of torture before it occurred) (on file with author). *But see* Petitioner's Reply Memorandum, *supra* note 192, at 4-5 (arguing that CAT does not require that public officials have knowledge of the *specific* acts of torture before they happen) (on file with author).

203. *See generally* ANKER, *supra* note 53, at 500-01 (providing additional analysis on the United States understanding of acquiescence as actual knowledge or willful blindness).

204. *See supra* notes 109-133 and accompanying text (analyzing how the definition of torture narrows the scope of relief available) and notes 143-147 and accompanying text (demonstrating how domestic violence victims satisfy the elements of the torture definition).

meet the burden of proof to qualify for withholding of removal under Article 3 of CAT.²⁰⁵ In evaluating whether domestic violence victims meet the burden of proof,²⁰⁶ immigration judges and the BIA²⁰⁷ should consider evidence of past torture,²⁰⁸ the availability of an internal flight alternative,²⁰⁹ the existence of country-wide human rights abuses,²¹⁰ and other relevant country conditions information.²¹¹ The successful applicant must prove that “it is more likely than not that he or she would be tortured if removed to the proposed country of removal.”²¹²

In *In re R-A-*, Ms. Alvarado suffered severe physical and mental pain and suffering,²¹³ intentionally inflicted by her husband in order to punish, intimidate, and coerce her.²¹⁴ Guatemalan public officials willfully ignored these acts of violence.²¹⁵ Furthermore, Ms. Alvarado

205. See 8 C.F.R. sec. 208.16(c)(2) (1999) (establishing that the burden of proof is on the applicant).

206. See 8 C.F.R. sec. 208.16(c)(3) (1999) (providing an illustrative, but not exhaustive, list of evidence and information to consider when assessing a CAT claim).

207. See INS Supplemental Instructions, *supra* note 27 (explaining that only immigration judges and the BIA rule on CAT claims).

208. See 8 C.F.R. sec. 208.16(c)(3)(i) (1999) (including evidence of past torture suffered by the applicant as a tool for evaluating CAT claim).

209. See 8 C.F.R. sec. 208.16(c)(3)(ii) (1999) (“Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured”). *But cf.* Donkoh, *supra* note 62, at 7-8 (dispelling the mistaken belief that an internal flight alternative is more feasible for domestic violence victims); UNHCR Handbook, *supra* note 96, para. 91 (explaining that failure to seek refuge elsewhere in the flight country does not exclude a person from refugee status).

210. See 8 C.F.R. sec. 208.16(c)(3)(iii) (1999) (“Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable.”).

211. See 8 C.F.R. sec. 208.16(c)(3)(iv) (1999) (providing a broad fourth category of suggested relevant evidence for determining a CAT claim).

212. 8 C.F.R. sec. 208.16(c)(2) (1999).

213. See *supra* Part III.B.1.a (analyzing how Ms. Alvarado satisfies the first element of the torture definition).

214. See *supra* Part III.B.1.b (describing how Ms. Alvarado satisfies the second element of the torture definition).

215. See *supra* Part III.B.1.c (analyzing how Ms. Alvarado satisfied the third element of the torture definition).

presented evidence that her husband will "hunt her down and kill her if she comes back to Guatemala."²¹⁶ This evidence demonstrates that there is nowhere in Guatemala where Ms. Alvarado can live safely.²¹⁷ In addition, through the testimony of an expert witness, Ms. Alvarado established that domestic violence is a serious problem in Latin America, particularly Guatemala.²¹⁸ Social and legal resources are inaccessible to domestic violence victims in Guatemala, and pursuing legal relief is often ineffective.²¹⁹ For all of the foregoing reasons, Ms. Alvarado qualifies for withholding of removal under CAT.

IV. RECOMMENDATIONS

Although asylum is the preferred legal remedy for persons immigrating to the United States,²²⁰ CAT is an important and viable alternative legal remedy for domestic violence victims.²²¹ Withholding of removal under CAT is an additional means through which to ensure that the United States will not extradite, expel, or return a domestic violence victim to a country where she will probably be tortured.²²² Since the INS regulations, which apply the implementing legislation,

216. *In re R-A-*, Interim Decision 3403, 1999 WL 424364, at *4 (B.I.A. June 11, 1999).

217. See 8 C.F.R. sec. 208.16(c)(3)(ii) (1999) (establishing that evidence concerning an internal flight alternative is relevant to assessing CAT claim); CAT Support Memorandum, *supra* note 63, at 15 (arguing that Ms. Alvarado cannot escape her husband's torture by relocating within Guatemala).

218. See *In re R-A-*, 1999 WL 424364, at *4 (noting testimony of expert witness on this point).

219. See *id.* at *4-5 (summarizing the testimony of the witness, Dr. Doris Bersing); see also CAT Support Memorandum, *supra* note 63, at 15 (indicating that the BIA found Dr. Bersing's testimony credible).

220. See discussion *supra* Part II.A and accompanying notes (discussing the reasons why asylum is always the preferred form of relief).

221. See, e.g., Rosati, *supra* note 139, at 3-4 (confirming that Article 3 of CAT is a "powerful tool" because it is mandatory and not discretionary relief).

222. See DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES sec. 9.3(c) (Norton Tooby, updating ed., Release # 26, July 1999) (explaining that prior to the Mar. 22, 1999 INS Regulations implementing CAT, the BIA lacked jurisdiction over CAT claims). See generally *In re H-M-V-*, Interim Decision 3365, 1998 WL 611753 *1, *2-4 (B.I.A. Aug. 25, 1998) (denying an Iranian asylum seeker's motion to reopen his case to evaluate a CAT claim because, at the time, no regulations implementing Article 3 of CAT existed).

are largely untested thus far, it is too soon to tell how effective the new procedures for adjudicating CAT claims will be.²²³ For domestic violence victims, there are legitimate concerns that CAT relief is not a completely satisfactory safety net, but these concerns are not insurmountable.²²⁴ In the aftermath of *In re R-A-*, it is even more important to address these concerns in a timely and efficient manner.²²⁵

A. ESTABLISHING A MORE FAVORABLE STANDARD OF REVIEW

First, the INS should amend 8 C.F.R. sec. 208.16(c)(3)²²⁶ to include the following provisions: (1) the INS and United States federal and immigration courts should give the individual seeking alternative relief under CAT the benefit of the doubt in establishing his or her claim; (2) it is frequently difficult to obtain relevant documentary evidence corroborating a claim; and (3) the absence of relevant documentary evidence that corroborates a claim should not prejudice the claim.²²⁷ These amendments are particularly important for do-

223. See Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8478 (1999) (codified in scattered sections of 8 C.F.R.) (indicating that these regulations took effect on Mar. 22, 1999). At the time of this writing, February 2000, therefore, the Regulations were approximately one year old.

224. See discussion *supra* Parts II.B, III.B and accompanying notes (evaluating the benefits and drawbacks of CAT relief in the context of domestic violence victims).

225. See *In re R-A-*, 1999 WL 424364, at *20 (holding that United States asylum law, as currently formulated, does not provide protection for domestic violence victims, such as Ms. Alvarado). This is particularly troublesome because the BIA's decision in this case is binding precedent for asylum officers and immigration judges unless the Attorney General certifies the case and overturns it, or the Ninth Circuit reverses it on appeal. See Public Affairs Staff, *supra* note 1 (on file with author) (discussing the structure of the BIA, its jurisdiction, and where its decisions are subject to appellate review); see also Rosati, *supra* note 139, at 1 (commenting that while the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 has foreclosed avenues of relief for asylum-seekers, CAT claims may be a viable alternative form of relief).

226. See Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (1999) (codified in scattered sections of 8 C.F.R.) (establishing procedures to ensure compliance with article 3 of CAT (non-refoulement)).

227. See 8 C.F.R. sec. 208.16(c)(2), (3) (1999) (indicating that credible testimony of the applicant "*may be sufficient*" to sustain the burden of proof without corroboration" and establishing four categories of evidence that are illustrative, but not exhaustive) (emphasis added). The four illustrative categories of relevant evidence are:

mestic violence victims because of the inherently private nature of the abuse suffered.²²⁸

B. BROADENING THE BASE OF SUPPORT FOR CAT CLAIMS

Second, the INS, in keeping with United States' international obligations under CAT, should amend 8 C.F.R. sec. 208.18(a) to include the language of Article 1(2) of CAT.²²⁹ Article 1(2) of CAT provides that the Article 1 torture definition in CAT "is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."²³⁰ Article 1(2) of CAT suggests that immigration advocates can rely on relevant provisions within other international treaties to support claims for withholding of removal under Article 3 of CAT.²³¹ By providing a broader base of instruments from which to draw support, domestic violence victims who seek alternative relief under Article 3 of CAT are better positioned to prove their claims.²³² For domestic violence victims who do not qualify for a grant of asylum or withholding of removal under INA section 241(b)(3), such a provision in the INS regulations im-

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- (i) Evidence of past torture inflicted upon the applicant;
 - (ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
 - (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
 - (iv) Other relevant information regarding conditions in the country of removal.

Id. sec. 208.16(c)(3).

228. Cf. Emily Love, *Equality in Political Asylum Law: For a Legislative Recognition of Gender-Based Persecution*, 17 HARV. WOMEN'S L.J. 133, 141-45 (1994) (discussing the intersection of private abuse and political persecution that judges are missing).

229. See Convention Against Torture, *supra* note 16, art. 1, para. 2, 1465 U.N.T.S. at 114 (defining the procedural parameters of the definition of torture in Article 1, Paragraph 1).

230. *Id.*

231. See Dutton, *supra* note 46 (discussing how European law can assist American immigration lawyers).

232. See *supra* notes 67-74 and accompanying text (discussing other international instruments, some of which are customary international law, which are relevant to domestic violence victims).

plementing CAT could help to resolve the tension between narrowing and broadening CAT relief in their favor.²³³

C. INTERPRETING "TORTURE" EXPANSIVELY

Third, the INS should amend 8 C.F.R. sec. 208.18(a) to expand the term "acquiescence" to recognize that public officials can play a passive rather than active role in torture. The term "acquiescence" in the Article 1 torture definition allows United States federal and immigration courts to interpret the CAT torture definition expansively and recognize that egregious domestic violence can qualify as a form of torture.²³⁴ Furthermore, an expansive interpretation of Article 1 does not violate the United States' obligations under CAT, as would a narrower interpretation.²³⁵ Moreover, an expansive interpretation of Article 1 need not contravene the reservations, declarations, and understandings that the United States Senate submitted before advising the United States to ratify CAT.²³⁶ The incorporation of the phrase "or with the consent or acquiescence of" into the final definition of torture in Article 1 provides support for a more expansive interpretation of the role of the public official in the torture suffered by domestic violence victims.²³⁷

233. See *supra* notes 43-46 and accompanying text (discussing international human rights instruments, other than CAT, and implementing bodies that form part of the customary international norm of prohibiting torture); see also *supra* notes 72-74 and accompanying text (providing a more detailed discussion of the ICCPR and the UDHR).

234. See *supra* notes 124-133 and accompanying text (supporting the position that the terms "public official" and "at the instigation of or with the consent or acquiescence of" have an expansive capacity).

235. See Copelon, *supra* note 68, at 355-56 (arguing that "acquiescence" in Article 1 of CAT is a broad enough term to include domestic violence victims); see also *supra* notes 159-219 (analyzing how a domestic violence victim denied asylum qualifies for withholding of removal under Article 3 of CAT).

236. See Convention Against Torture, *supra* note 16, art. 1, para. 2, 1465 U.N.T.S. at 114 (establishing that the torture definition in Article 1, Paragraph 1 does not close the door on other torture definitions with wider applications than the instant one).

237. See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 702(d) cmt. n (1992) (commenting on the prohibition against torture).

D. ADDRESSING THE NEEDS OF DOMESTIC VIOLENCE VICTIMS

Finally, the United States Congress should legislate an INA provision, similar to the special rule for battered spouses and children under INA section 240A, that would allow domestic violence victims who received grants of withholding of removal under Article 3 of CAT to adjust to legal permanent resident status.²³⁸ Currently, INA section 240A codifies cancellation of removal provisions and adjustment of status for certain nonpermanent residents, and section 240A(b)(2) includes a special rule for battered spouses and children.²³⁹ In the context of domestic violence victims suffering egregious abuse, this special rule for battered spouses only applies to women who have a United States citizen or legal permanent resident spouse who subjected them to extreme cruelty.²⁴⁰ In addition, the domestic violence victim must have resided continuously in the United States for at least three years immediately preceding the filing date of an application to adjust status.²⁴¹ Furthermore, the domestic violence victim must prove herself to be "a person of good moral character during such period."²⁴²

The current INA section 240A(b)(2) provision demonstrates that the United States Congress recognizes domestic violence in instances where the immigrant domestic violence victim was abused in the United States. In cases where domestic violence victims have received withholding of removal under Article 3 of CAT, the fact that the abusive spouse is outside of the United States should not preclude her from adjusting to legal permanent resident status. Furthermore, domestic violence victims who receive withholding of removal

238. See 8 U.S.C.A. sec. 1229 (West 1999) (codifying section 240A(b)(2) (providing cancellation of removal and adjustment of status for certain nonpermanent residents); see also *In re R-A-*, 1999 WL 424364, at *20 (noting that the issue of amending asylum law to provide more protection for domestic violence victims is a matter for Congress to consider).

239. See 8 U.S.C.A. sec. 1229(b)(2) (West 1999) (codifying special rule for battered spouse or child).

240. See *id.* sec. 1229(b)(2)(A) (setting forth one criterion for canceling removal and adjusting status of battered spouses who are inadmissible or deportable).

241. See *id.* sec. 1229(b)(2)(B) (establishing a physical presence criterion that battered spouses and children must meet to qualify for cancellation of removal and adjustment of status).

242. *Id.* sec. 1229(b)(2)(C).

under Article 3 of CAT are not inadmissible criminals or security risks under INA section 212.²⁴³ Domestic violence victims who receive withholding of removal under Article 3 of CAT also are not deportable criminals, security risks, or perpetrators of marriage fraud under INA section 237.²⁴⁴ Moreover, for domestic violence victims who received withholding of removal under Article 3 of CAT, the United States already determined that it cannot return them to their home countries.²⁴⁵ Ultimately, domestic violence victims forced to flee to the United States to escape the egregious abuses that they suffered in another country are still battered immigrant spouses. The United States government should afford these domestic violence victims the same benefits currently available under INA section 240A(b)(2) by allowing domestic violence victims to adjust to LPR status if they have qualified for withholding of removal under Article 3 of CAT.

CONCLUSION

Withholding of removal under Article 3 of CAT is an important and viable alternative legal remedy for domestic violence victims who have suffered particularly egregious abuse. While improvements to ensure the accuracy, consistency, and fairness of CAT relief decisions for domestic violence victims are still necessary, withholding of removal under Article 3 of CAT provides domestic violence victims seeking asylum with an additional claim to argue. For domestic violence victims who either do not qualify for asylum or have grants of asylum revoked, such as Ms. Alvarado, withholding of removal under Article 3 of CAT may save their lives by preventing the United States from delivering them back into the hands of their abusers.

243. *See id.* sec. 1229(b)(2)(D) (explaining that while the battered spouse may be inadmissible, it cannot be for INA section 212 reasons).

244. *See* 8 U.S.C.A. sec. 1229 (b)(2)(D) (precluding battered spouses deportable under INA section 237 from qualifying for cancellation of removal and adjustment of status under section 1229(b)(2)).

245. *See supra* notes 80, 86 and accompanying text (explaining that CAT prohibits the United States government from returning persons granted withholding of removal to risk countries).