

COMMENT

TAKING THE "FORCE" OUT OF ENFORCEMENT: GIVING EFFECT TO INTERNATIONAL HUMAN RIGHTS LAW USING DOMESTIC IMMIGRATION LAW

INTRODUCTION

An estimated 75 percent of all refugees and displaced persons are female. As women, as girls, as mothers, they bear the brunt of the most egregious forms of human rights abuse, from mass rape and torture to the sale of children. Human rights abuses against refugee women do not abate upon flight or resettlement in neighboring countries. . . . Often, women refugees are subjected to multiple rapes, including vicious gang rapes, and are held apart from their families in inhumane conditions that are isolated from international refugee practitioners and advocates.¹

The journey of refugee women to safety and asylum is a long one, plagued with dangers and struggles only some of which are described above.² This journey illustrates the strengths and weaknesses of the international human rights regime. A refugee's very existence illustrates the weakness: no state can be compelled to follow international human rights law.³ It also, however, illustrates the strength of international human rights law: the victims of human rights abuses have the means, through the mechanism of asylum,⁴ to escape the abuse.

This comment explores a broader perspective on the enforcement of international human rights law using the example of women refugees. The focus is on the use of domestic asylum law to enforce provisions of interna-

1. Sima Wali, *Human Rights for Refugee and Displaced Women*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 336 (Julie Peters & Andrea Wolper eds., 1995) [hereinafter *WOMEN'S RIGHTS, HUMAN RIGHTS*].

2. See *id.*; see also United Nations Fourth World Conference on Women: Declaration and Platform for Action, reprinted in 35 I.L.M. 401 (1996) [hereinafter Beijing Declaration]. The Declaration states women "continue to be vulnerable to violence and exploitation while in flight, in countries of asylum and resettlement and during and after repatriation." *Id.* at ¶ 136.

3. See Beijing Declaration, *supra* note 2, at ¶ 131 (noting that in situations of armed conflict, which generate refugees, international human rights law is often ignored).

4. See *infra* Part II.

tional human rights law. Part I discusses common criticisms of international human rights law. Part II examines current United States asylum policy and the particular difficulties female asylum seekers face within the domestic immigration framework. Part III integrates United States immigration and international law, and explores how a broad perspective is useful in analyzing the international enforcement of human rights.

I. INTERNATIONAL LAW AND THE PROBLEM OF "ENFORCEMENT"

Because of its limitations, some critics question the effectiveness of international law. Skeptics question the legitimacy of international law in general, and international human rights law in particular.⁵ International human rights law involves a delicate balance of the values of human dignity and state sovereignty. Scholars and students debate which value should take precedence in our increasingly interdependent international system.⁶

A landmark decision of the International Court of Justice gave fuel to the debate. In *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*,⁷ these competing values clashed.⁸ Nicaragua brought a complaint in the World Court against the United States alleging the former had violated principles of international law when it armed contras against the Nicaraguan government.⁹ The United States defended on the theory of collective self-defense,¹⁰ arguing that the Nicaraguan government was violating the human rights of its citizens, and as such, the United States was entitled to use force against the Nicaraguan government to stop the abuses.¹¹ The court disagreed.¹²

In finding that the United States was not entitled to use force to compel compliance with international human rights law, the court analogized human rights treaty law to conventional contract law.¹³ As such, the court found that Nicaragua had not undertaken any formal, legally-enforceable obligation to

5. See, e.g., Anthony D'Amato, *Is International Law Really Law?*, 79 NW. U. L. REV. 1293 (1984) (discussing common criticisms of international law); Caroline Dommen, *The UN Human Rights Regime: Is it Effective?*, 9 AM. SOC'Y INT'L L. PROC. 460 (1997) (discussing strengths and weaknesses of UN human rights regime and suggesting improvements for future).

6. See *infra* note 51 and accompanying text.

7. (Nicar. v. U.S.) 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua*].

8. See *id.* at 129-35 (discussion of the use of force against Nicaraguan government).

9. See *id.*

10. See *id.* at 134-35. In fact, the United States refused to appear before the Court, claiming the Court lacked jurisdiction to hear the case. See *id.* at 16-17. The Court found it did have jurisdiction and held public hearings on the issues; the United States was not represented at those hearings. See *id.* at 18.

11. See *id.* at 129-30.

12. See *id.* at 132-34.

13. See *id.* at 132 ("[T]he resolution [to allow Nicaraguans democratic participation in government] is a mere statement which does not comprise any formal offer which if accepted would constitute a promise in law.").

institute a particular (democratic) form of government.¹⁴ Furthermore, the court found that even if Nicaragua had bound itself legally, the United States did not have standing to enforce the obligation.¹⁵ However, assuming the United States did have standing to enforce the obligation, the only appropriate enforcement mechanisms are those defined in the agreement.¹⁶ In this case, the use of force was not authorized.¹⁷ The court stated, "[o]f its nature, a commitment like this is one of a category which, if violated, cannot justify the use of force against a sovereign State."¹⁸

Central to the court's holding in *Nicaragua* was the underlying principle of state sovereignty.¹⁹ The court found, "[e]very State possesses a fundamental right to choose and implement its own political, economic, and social systems."²⁰ The court did qualify this right, stating that decisions on internal affairs are within the State's "exclusive jurisdiction, provided of course that it does not violate any obligation of international law."²¹ In the view of the court, however, such obligations arose only through some affirmative act on the part of the State.²² Absent clear proof that Nicaragua had consented to a limitation on this fundamental right, the court would not disturb the State's autonomy.²³

The *Nicaragua* court received much criticism for its formalistic approach to the case.²⁴ One scholar complained, "the [*Nicaragua*] judgment has dealt a blow to the much needed strengthening of human rights in the Americas."²⁵ Criticisms such as these, and in fact the United States' position in the matter, illustrate this problem: our conception of enforcement of the law tends to involve physical coercion or the power of the courts to compel certain behavior.

"Enforcement," however, has many forms. Critics and supporters of international law alike tend to focus on enforcement as physical coercion or another type of sanction designed to punish the wrongdoer.²⁶ A narrow understanding of the term enforcement leads many to disregard the significant progress already made in the enforcement of international human rights.²⁷ By

14. *See id.*

15. *See id.*

16. *See id.* at 133.

17. *See id.*

18. *Id.*

19. *See id.* at 131-32.

20. *Id.* at 131.

21. *Id.*

22. *See id.*

23. *See id.* at 131-32.

24. *See, e.g.,* Fernando R. Teson, *Le Peuple, C'est Moi! The World Court and Human Rights*, 81 AM. J. INT'L L. 173 (1987); Theodor Meron, *The Nicaragua Judgment, in HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 25-37 (1989).

25. Teson, *supra* note 24, at 183.

26. *See D'Amato, supra* note 5, at 1303-05.

27. *See, e.g.,* Dommen, *supra* note 5; D'Amato, *supra* note 5, at 1303-05.

broadening the definition, recognition is given not only to the progress that already has been made, but to the possibilities still available to domestic courts in the enforcement of international law.²⁸

Black's Law Dictionary defines "enforce" as "to make effective."²⁹ Enforcement should not be confined to a notion of "punishment" or "coercion" against the actual or potential lawbreaker. Instead, enforcement should be defined as "any mechanism by which the law is made effective."³⁰ The lack of a world court with compulsory jurisdiction and an international police force does not nullify the efficacy of international human rights law. "[I]t simply means that *international law is enforced in a different way*."³¹

II. WOMEN AND UNITED STATES ASYLUM LAW

Under United States law, there are two elements of a successful asylum claim. First, the applicant must show that she³² meets the definition of "refugee" in the Immigration and Nationality Act.³³ United States immigration law defines "refugee" as one who has left her home country and is unable or unwilling to return "because of persecution or a well-founded fear of perse-

28. See *infra* notes 31, see also *infra* Part III.D.

29. BLACK'S LAW DICTIONARY 528 (6th ed. 1990).

30. *Id.*

31. D'Amato, *supra* note 5, at 1312-13 (emphasis added). International human rights law, in particular, demands creativity in the concept of law and how it is enforced. Human rights are unique in international law because they do not deal with inter-state relations, but rather with the relationship between the individual and the state. See generally Jo M. Pasquallucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297 (1995) (discussing development of international human rights law). Therefore, it seems appropriate when engaging in human rights discourse to have a definition of "enforcement" that takes the victim into account. See *id.* At the domestic level, the analogy can be made to constitutional and civil rights. Arguably, the most significant remedy available for a violation of these rights is equitable relief in the form of an injunction, which affords the victim freedom from further violation. See generally Joseph T. McLaughlin & Harmeet K. Dillon, *Preliminary Injunctive Relief in the Federal Courts*, 540 PLI/Lit 503 (1996). Similarly, victims of human rights violations should have recourse to a remedy that, more importantly than compensating for harms already incurred, provides freedom from further abuse. "[E]ven in those rare instances when practices that effect the subordination of women are conceded to be human rights violations, victims often have no relief." Berta Esperanza Hernandez-Truyol, *Women's Rights as Human Rights – Rules, Realities, and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605, 650-51 (1996). Asylum can, and does, provide this redress by insulating the victim from torture and persecution. Asylum, as a unique form of redress, is appropriate to the particular needs of victims of human rights violations and persecution because it takes the victim into account. See generally Deborah Anker, *Women Refugees: Forgotten No Longer?*, 32 SAN DIEGO L. REV. 771 (1995).

32. Feminine pronouns are used, not only because the focus of this paper is on women refugees, but also because most of the world's refugees are female. See *Gender-Related Persecution: An Analysis of Recent Trends*, in INT'L J. REF. L. SPECIAL ISSUE ON GENDER-BASED PERSECUTION 79, 80 (1997) [hereinafter *Gender-Related Persecution*]. See also Anker, *supra* note 31, at 771.

33. 8 U.S.C. §§ 1101-1503 (1994).

cution on account of race, religion, nationality, membership in a particular social group, or political opinion."³⁴ The very definition of refugee encompasses several important human rights so fundamental to the American concept of justice³⁵ that those who are deprived of them are entitled to asylum in this country.³⁶ "The municipal law of virtually all countries guarantees the rights of their citizens to life, liberty, equality, property, due process, etc. The mere existence of refugees . . . shows that their own governments have violated these rights."³⁷

The second element of the asylum claim is a discretionary grant of asylum by an immigration administrator once a showing of eligibility is made.³⁸ To satisfy her burden, the applicant must show that she has either suffered past persecution, or has a well-founded fear of future persecution.³⁹ "[A]n alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country."⁴⁰ Further, she must show a causal link between the persecution and her race, nationality, religion, political opinion, or membership in a particular social group.⁴¹ The applicant must produce objective evidence that the government routinely subjects members of her group to persecution.⁴²

A. Women as a Particular Social Group

Gender-based asylum claims have been most successful when based on membership in a particular social group.⁴³ Although no court "has so far produced a coherent, cogent, approach valid for all times and places,"⁴⁴ some United States courts have articulated broad guidelines to assist in the adjudi-

34. *Id.* § 1101(a)(42)(A).

35. See U.S. CONST. amend. I (freedom of religion and association); amend. V (due process); amend. XIV (freedom from racial discrimination and equal protection of the law).

36. The United States is one of several countries with a similar definition of refugee and a similar approach to asylum law. Many states have drawn statutory definitions of "refugee" from the 1951 UN Convention on Refugees and the 1967 UN Declaration on Territorial Asylum. See generally GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 3-9 (2d ed. 1996).

37. Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. J. INT'L L. 532, 538 (1986).

38. See 8 C.F.R. § 208.14 (a), (b), (e) (1998).

39. See *id.* § 208.13 (b).

40. *M.A. v. INS*, 858 F.2d 210, 213 (4th Cir. 1988) (citing *Guevara-Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986)).

41. See 8 C.F.R. § 208.13 (b)(1-2).

42. See *M.A.*, 858 F.2d at 314.

43. See *Gender-Related Persecution*, *supra* note 32, at 105.

44. GOODWIN-GILL, *supra* note 36, at 365. Goodwin-Gill further notes that such a concrete definition would probably be incompatible with the idea of asylum. "The individualized approach of the Convention refugee definition requires attention to personal circumstances, time and place, all of which may combine to distinguish those at risk from others who may share similar characteristics and yet not be in danger." *Id.*

cation of asylum claims.⁴⁵

A particular social group may be a voluntary association of individuals united by a common belief or set of beliefs.⁴⁶ The First Circuit held in *Gebremichael v. INS*⁴⁷ that where membership in a particular social group is the claimed grounds for asylum, the applicant must show that “membership . . . is at the root of persecution, such that membership itself generates a specific threat to the [applicant].”⁴⁸ It is unclear whether women fall into this category.

The Board of Immigration Appeals (BIA) recognized in *In re Acosta*⁴⁹ that women may constitute a “particular social group,” because gender is an “immutable characteristic” which defines the group.⁵⁰ Nevertheless, most courts have been reluctant to grant asylum to an applicant on the sole basis of her gender. For example, the Second Circuit, six years after *Acosta*, held that “[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.”⁵¹

Most American courts have been unwilling to create a blanket rule that women comprise a particular social group. The courts, maintaining a relativist stance,⁵² agree that for purposes of asylum law, mere social or legal

45. See generally *Gender-Related-Persecution*, *supra* note 32, at 108-10 (discussing legal problems faced by women refugees); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (identifying a three-pronged approach to determining refugee status on particular social group grounds); *Gebremichael v. INS*, 10 F.3d 28 (1st Cir. 1993) (defining particular social group); *In re Acosta*, 19 I.&N. Dec. 211 (B.I.A. 1985), *overruled on other grounds by In re Mogharabi*, 19 I.&N. Dec. 439, 441 (B.I.A. 1987) (defining particular social group).

46. See generally *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986) (defining “particular social group”); see also *In re Acosta*, 19 I.&N. Dec. 211 (B.I.A. 1985); *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994); *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991); *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985); *Gebremichael v. INS*, 10 F.3d 28 (1st Cir. 1993).

47. 10 F.3d 28 (1st Cir. 1993).

48. *Id.* at 35 (internal quotations omitted) (citing *Ananeh-Firempong*, 766 F.2d at 626-27).

49. 19 I.&N. Dec. 211 (B.I.A. 1985).

50. See *id.* at 233.

51. *Gomez*, 947 F.2d at 664 (2d Cir. 1991); see also *Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc) (“Persecution on account of sex is not included as a category allowing [asylum] relief.”). The inconsistency stems from conflicting perspectives in international human rights law, as seen in *Nicaragua*. For some, known as universalists, human rights norms transcend cultural boundaries; for others, known as cultural relativists, a universal definition of human rights infringes on a State’s right to autonomy. See Judith Hippler Bello & Linda A. Malone, *International Decision: In re Kasinga*, 91 AM. J. INT’L L. 140, 142 (1997). While cultural relativism, particularly on social issues, and its corresponding respect for State sovereignty remains popular with most courts, see, for example, *Nicaragua and Gomez*, there is also increasing support for universalism. See Robert J. Beck, *International Law and International Relations: The Prospects for Interdisciplinary Collaboration*, 1 J. INT’L L. STUD. 119, 131 (1995). Beck notes, “[a]s the world’s transactions—be they economic, environmental, cultural, military, political, or social—increasingly transcend national boundaries, so the utility of the concept of the sovereign state diminishes.” *Id.*

52. See *supra* note 51.

discrimination does not rise to the level of persecution.⁵³ Perhaps this is because most cultures around the world treat women as second-class citizens.⁵⁴ "The United Nations Human Development Report 1995 states the shocking, but all-too-well known fact quite plainly: 'In no society today do women enjoy the same opportunities as men.'"⁵⁵ This is true despite several international instruments which provide for equal treatment of women.⁵⁶

There are instances, however, where the discrimination is so severe that gender can, in fact, pose a specific threat of persecution.⁵⁷ Certain human rights violations are particular to women, or at least are experienced far more frequently by women than by men. These include rape, sexual abuse, genital mutilation, forced abortion, and domestic violence.⁵⁸ Such abuses constitute persecution.⁵⁹ "Severe sexual abuse does not differ analytically from beatings, torture, or other forms of physical violence that are commonly held to amount to persecution."⁶⁰

Although gender discrimination is not a recognized ground for asylum, American and Canadian courts are recognizing particularly egregious gen-

53. See *Fisher*, 79 F.3d at 961-62 (citing *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995)); *Fatin*, 12 F.3d at 1240 ("the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.").

54. See *Hernandez-Truyol*, *supra* note 31, at 607.

55. See *id.*; see also United Nations Convention on the Elimination of All Forms of Discrimination Against Women, 19 I.L.M. 33, 35 (1980) ("despite [instruments promoting gender equality] extensive discrimination continues to exist") [hereinafter Convention for the Elimination of Discrimination]; Beijing Declaration, 35 I.L.M. at 407 ("[T]he status of women has advanced in some important respects in the past decade but . . . progress has been uneven, inequalities between women and men have persisted and major obstacles remain.").

56. See, e.g., Convention for the Elimination of Discrimination, *supra* note 55; Beijing Declaration, *supra* note 2. See generally NATALIE KAUFMAN HEVENER, INTERNATIONAL LAW AND THE STATUS OF WOMEN (1983) (reprinting and discussing several important international treaties and UN documents relating to the rights of women).

57. See generally WOMEN'S RIGHTS, HUMAN RIGHTS, *supra* note 1.

58. *Hernandez-Truyol*, *supra* note 31, at 610, 634-37. Although the article states that "women's rights are human rights," there is little doubt that human rights violations such as bride-burning, foot-binding, face-hiding, forced pregnancy, and forced abortion are suffered by women exclusively. Other violations, such as domestic violence, genital mutilation, gender-based infanticide and sexual exploitation are suffered primarily by women. See *id.*; see also G.A. Res. 48/104, U.N. GAOR, 48th Sess., U.N. Doc. A/48/629, reprinted in 33 I.L.M. 1049 (1994); AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL LAW AND PRACTICE, *Recommendation and Report on Women's Human Rights*, 30 INT'L LAW 867, 870 (1996) ("the human rights of women and girls are not a separate or special category of rights, but an integral and indivisible part of international human rights."); GOODWIN-GILL, *supra* note 36, at 364 ("[W]omen suffer particular forms of persecution as women, and not just or specifically because of political opinion or ethnicity."); Jane Connors, *Legal Aspects of Women as a Particular Social Group*, INT'L J. REF. L. SPECIAL ISSUE: GENDER-RELATED PERSECUTION 115, 117 (1997) ("[T]here are some harms which are experienced disproportionately by women that are . . . [an] egregious and outrageous . . . denial of international human rights.") [hereinafter SPECIAL ISSUE].

59. See generally INS Considerations for Asylum Officers Adjudicating Asylum Claims from Women, reprinted in Anker, *supra* note 31, at 794 [hereinafter *INS Guidelines*].

60. *Id.* at 804.

der-based violence as persecution with increasing frequency.⁶¹ Recent developments in immigration law, discussed below, indicate that asylum law is being used effectively to combat these abuses, both in providing relief for the victim and creating international pressure on the abuser to stop the abuse. Thus, although general inequality among the sexes is not recognized as a ground for asylum, extreme examples of gender-based violence are being identified as persecution.⁶² By allowing for the grant of asylum to women who have suffered extreme discrimination and mistreatment, immigration law works as a domestic institution enforcing international law, which forbids these kinds of human rights abuses.⁶³

B. Feminists as a Particular Social Group

In order to use membership in such a group as a ground for asylum, the applicant must show that the common belief "is so fundamental to the individual's identity or conscience that . . . she ought not be required to change."⁶⁴ Feminism is defined as the belief that women should have rights and opportunities equal to those of men in the same culture or society.⁶⁵ A woman's belief that she is entitled certain rights is fundamental to her self-esteem and identity.⁶⁶ Thus, feminists may be understood as a particular social group.

"Particular social group" lacks a clear definition, in part because this ground for asylum, added as an afterthought to the UN Convention on Refu-

61. See generally SPECIAL ISSUE, *supra* note 58.

62. See generally *id.*

63. See Elissavet Stamatopoulou, *Women's Rights and the United Nations*, in WOMEN'S RIGHTS, HUMAN RIGHTS, *supra* note 1, at 36-37.

64. *Safaie*, 25 F.3d at 640 (citing *Ananeh-Firempong*, 766 F.2d at 626).

65. See Convention for the Elimination of Discrimination, *supra* note 52, at Art. 3 ("to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men"), Art. 15 ("accord to women equality with men before the law"); Beijing Declaration, *supra* note 2, at 407 ("Women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development, and peace.").

66. See *Fatin*, 12 F.3d at 1241-42 (citing *Acosta*, 19 I.&N. Dec. at 234); see also Beijing Declaration, *supra* note 2, at 407. The declaration notes that fundamental freedoms such as freedom of thought, religion, and belief contribute to the moral and spiritual well-being of the individual. See *id.* It further states that these freedoms benefit not only the individual but the community as well. See *id.* The declaration later states:

Women have the right to the enjoyment of the highest attainable standard of physical and mental health. The enjoyment of this right is vital to their life and well-being and their ability to participate in all areas of public and private life. Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

Id. at 423.

gees,⁶⁷ was meant as a catch-all.⁶⁸ Feminism is a characteristic that may define a social group, or it may be considered a political opinion.⁶⁹

Three appellate courts have recognized that feminists are a particular social group.⁷⁰ However, these courts have limited the definition of "feminists" to include only those women whose beliefs in gender equality are so strong that they would risk severe punishment to express them.⁷¹ All three cases concerned Iranian women who were opposed to the strict dress codes imposed on them by their government.⁷² All three applicants were denied asylum because not one could demonstrate that her beliefs were "so profound that she would choose to suffer the consequences of noncompliance."⁷³

It is worth mentioning here that the "consequences of noncompliance" include "74 lashes, a year's imprisonment, and in many cases brutal rapes and death."⁷⁴ The requirement that a woman risk death to show that she is truly dedicated to the cause of gender equality is overly stringent. Nevertheless, the courts have taken a step in the right direction in recognizing feminists as a particular social group.

This step is a small one. Other countries, including Canada, Australia, and New Zealand, have been quicker to move their asylum policy in line with their international obligations.⁷⁵ Although the United States also has instituted more progressive guidelines for adjudicating the asylum claims of women,⁷⁶ the demands placed on the applicant remain restrictive.⁷⁷ With less stringent demands on the applicant, the argument could be made that United States asylum law is an effective tool for enforcing a woman's right to fight for equality. More substantial moves in this direction must be taken before that will be true.

67. United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

68. See *Gender-Related Persecution*, *supra* note 32, at 105.

69. See *id.* at 120-21. For a complete discussion, see *infra* Part II.C., discussing feminism as a political opinion.

70. See *Fisher*, 79 F.3d at 960-62; *Safaie*, 25 F.3d at 640; *Fatin*, 12 F.3d at 1241.

71. See *Fisher*, 79 F.3d at 963; *Safaie*, 25 F.3d at 640; *Fatin*, 12 F.3d at 1241.

72. See *Fisher*, 79 F.3d at 963; *Safaie*, 25 F.3d at 640; *Fatin*, 12 F.3d at 1241.

73. *Safaie*, 25 F.3d at 640; see also *Fisher*, 79 F.3d at 963; *Fatin*, 12 F.3d at 1242-43.

74. *Fatin*, 12 F.3d at 1241.

75. See generally SPECIAL ISSUE, *supra* note 58. For example, Canada has instituted immigration guidelines which recognize gender-based violence as a form of persecution and, therefore, as a ground for asylum. See Stephanie Kaye Pell, Comment, *Adjudication of Gender Persecution Cases Under the Canada Guidelines: The United States Has No Reason to Fear an Onslaught of Asylum Claims*, 20 N.C. INT'L L. & COM. REG. 655, 658 (1995). For a comparison of immigration approaches taken by the United States, Canada, Germany, and the United Kingdom, see generally Gregory A. Kelson, *Gender-Based Persecution and Political Asylum: The International Debate for Equality Begins*, 6 TEX. J. WOMEN & L. 181 (1997).

76. See INS Guidelines, *supra* note 59.

77. See *supra* note 75 and accompanying text.

C. *Feminism as a Political Opinion*

A female asylum applicant may also be successful in basing her claim on her political opinion. One of the appellate courts that discussed feminism as a social group also found that feminism is a political opinion.⁷⁸ In *Fatin*, the female Iranian applicant had to: (1) identify feminism as a political opinion; (2) demonstrate that her feminist beliefs were strongly held; and (3) show that feminists as a group were singled out for persecution in her native country.⁷⁹ The court found “the administrative record does not show that Iranian feminists are generally subjected to treatment so harsh that it may accurately be described as persecution”⁸⁰ and thus the applicant’s request for asylum was denied.⁸¹

Nonetheless, *Fatin* was an important milestone in United States immigration law.⁸² In recognizing feminism as a political opinion, and therefore as a basis for granting asylum, American courts have finally acknowledged the importance of women’s right to fight for equality internationally.

An earlier Ninth Circuit case made a similar finding. In *Lazo-Majano v. INS*,⁸³ the applicant, Olimpia Lazo-Majano, suffered repeated brutal rapes and beatings at the hands of her employer, a sergeant in the Salvadoran Armed Forces.⁸⁴ Her persecutor forced her to have intercourse with him by threatening her with a variety of weapons, from guns to hand grenades to bombs.⁸⁵ He also beat and humiliated her on numerous occasions.⁸⁶ He labeled her a “subversive” and told her “it was his job to kill subversives.”⁸⁷

The court found that the sergeant’s “generalized animosity”⁸⁸ toward women and his belief that women should be subordinate to men constituted one political opinion.⁸⁹ To the extent that Olimpia attempted to escape her

78. See *Fatin*, 12 F.3d at 1242 (“[T]here is little doubt that feminism qualifies as a political opinion.”).

79. See *id.*; see also *Safaie*, 25 F.3d at 639.

80. *Fatin*, 12 F.3d at 1242.

81. *Id.*

82. See Alison E. Graves, *Women in Iran: Obstacles to Human Rights and Possible Solutions*, AM. U. J. GENDER & L. 57, 84 (1996) (“*Fatin v. INS* was a stepping stone. . . . It finally showed an international awareness of repression on the basis of gender persecution.”).

83. 813 F.2d 1432 (9th Cir. 1987), *overruled on other grounds by Fisher*, 79 F.3d 955.

84. See *id.* at 1433.

85. See *id.*

86. See *id.* Physical and emotional abuse of this sort involves patterns of behavior that allow the aggressor to establish power and control over the victim. Examples of this behavior in Lazo-Majano’s case, aside from the rapes and beatings, include being dragged by the hair in public and being forced to eat pieces of her identity card, which her abuser had destroyed. See *id.* at 1433. This was not a typical domestic violence situation, however. The abuser’s position in the Salvadoran Army, and his repeated threats to use his position against Olimpia, were crucial in the determination that she had suffered persecution. See *id.* at 1435.

87. *Id.*

88. *Id.* at 1435.

89. *Id.*

abuser, her attacker perceived this as a contrary political opinion, and the further rapes and beatings that ensued were found to be persecution on account of an imputed political opinion.⁹⁰ Based on this reasoning, the court held, as a matter of law, that Olimpia had suffered persecution because of political opinion, and that the BIA had abused its discretion in denying her asylum claim.⁹¹

As these cases illustrate, feminism as a political opinion or feminists as a particular social group can provide a basis for a successful gender-based asylum claim. By thus affording female victims of human rights abuses a safe haven, immigration law is a domestic structure that enforces international human rights law.

III. COORDINATION: USING DOMESTIC LAW TO ENFORCE INTERNATIONAL RIGHTS

In *Filartiga v. Pena-Irala*,⁹² the Second Circuit Court of Appeals stated, “[i]t is an ancient and a salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case.”⁹³ The court went on to find “federal courts [are open] for the adjudication of rights . . . recognized by international law.”⁹⁴ This part addresses whether domestic immigration law can be employed as an enforcement mechanism for international law.

Perhaps the most concrete and significant example of the use of domestic immigration law to enforce international human rights law is in the area of women’s rights. These rights include physical integrity, freedom of self-expression, and reproductive choice.⁹⁵ Courts are recognizing with increasing frequency that female genital mutilation, rape, forced abortions, and other forms of sexual violence are forms of persecution and torture.⁹⁶ Recent cases highlight the legal developments in this area.

90. *See id.*

91. *See id.* at 1436.

92. 630 F.2d 876 (2d Cir. 1980).

93. *Id.* at 886.

94. *Id.* at 887; *see also* Edward D. Re, *Human Rights, International Law, and Domestic Courts*, 4 CARDOZO J. INT’L & COMP. L. 1, 20 (1996) (“[A]n independent judiciary must effectuate and, indeed, when possible, enlarge and expand upon those human rights that have become universally accepted as indispensable to the dignity of all people.”).

95. *See* Convention for the Elimination of Discrimination, *supra* note 54, *passim*.

96. *In re Kasinga*, Int. Dec. 3278 (B.I.A. 1996) (granting asylum to African woman who feared female genital mutilation); *Angoucheva v. INS*, 106 F.3d 781 (7th Cir. 1997) (granting asylum to victim of sexual harassment and assault); *Lazo-Majano*, 813 F.3d at 1436 (granting asylum to rape victim); *In re X—P—T—*, Int. Dec. 3299 (B.I.A. 1996) (granting asylum to Chinese woman who had been forcibly sterilized).

A. *The Right to Physical Integrity and Freedom from Sexual Violence and Assault*

There is no question that the right to be free from rape and sexual assault is a fundamental human right for all women.⁹⁷ The violation of this right is particularly heinous when the state is either the perpetrator or is unwilling to punish the perpetrator.⁹⁸ According to one scholar, "there has been increasing recognition by governmental and inter-governmental organs that state-sponsored rape . . . should rank among the gravest of human rights violations. Rape, particularly when used as a political weapon, meets the definition . . . of torture."⁹⁹

In *Angoucheva v. INS*,¹⁰⁰ the Seventh Circuit recognized that sexual assault and attempted rape are forms of persecution,¹⁰¹ and, therefore, form a basis for a successful asylum claim.¹⁰² In that case, the Bulgarian applicant, Natasha Angoucheva, had been arrested for holding a Macedonian independence meeting at her apartment.¹⁰³ During the subsequent interrogation, the interrogating officer insinuated that "if she was good to him, he would not report her to . . . the State Security Office."¹⁰⁴ At that point, he locked the doors to the office, turned off the lights, and molested her sexually.¹⁰⁵ He was interrupted by an urgent telephone call,¹⁰⁶ and both the applicant and the court felt that this telephone call was the only thing that saved her from forcible rape at the hands of her interrogator.¹⁰⁷

The *Angoucheva* court made clear that sexual molestation and harassment were rights violations entitled to redress in the form of political asylum.¹⁰⁸ The court explicitly rejected the INS's contention that sexual assault by an interrogating officer did not constitute persecution at the hands of a government actor, or someone the government could not or would not control.¹⁰⁹ In remanding to the BIA for further examination, the court noted that "it could be that the assault was inextricably linked to Bulgarian government's disapproval of Angoucheva's [political] activities."¹¹⁰

97. See Anker, *supra* note 31, at 782.

98. See *id.*

99. *Id.*

100. 106 F.3d 781 (7th Cir. 1997).

101. See *id.* at 790.

102. See *id.*

103. See *id.* at 785-86.

104. *Id.* at 786.

105. See *id.*

106. See *id.*

107. See *id.* at 786, 790.

108. See *id.* at 790.

109. See *id.*

110. *Id.*

B. The Right to Self-Expression

The INS Guidelines¹¹¹ recognize that in certain countries, social norms concerning women's dress and behavior are often imposed to the point of depriving women of their rights.¹¹²

Breaching social mores (e.g., marrying outside an arranged marriage, wearing lipstick, or failing to comply with other cultural or religious norms) may result in harm, abuse or harsh treatment that is distinguishable from the treatment given the general population, frequently without meaningful recourse to state protection. As a result, *the civil, political, social and economic rights of women are often diminished in these countries.*¹¹³

Two interesting examples illustrate how domestic immigration law can be used to restore the rights of these women: Iranian women who do not conform to Muslim dress and behavior codes, and Russian lesbians who choose to be open about their sexuality.

In *Fatin*,¹¹⁴ the court found that Iranian women who did not agree with the strict dress and behavior codes in that country could constitute a particular social group.¹¹⁵ The applicant testified that in addition to the statutory one-year imprisonment, women who refused to wear the chador¹¹⁶ were also often whipped or stoned in public.¹¹⁷ The court agreed that "the indicated consequences of non-compliance would constitute persecution."¹¹⁸ Moreover, it noted that the punishments suffered by non-conforming Iranian women could amount to persecution.¹¹⁹

The Ninth Circuit expressed similar views in *Fisher v. INS*.¹²⁰ In *Fisher*, the applicant stated she feared punishment for not following the Iranian dress code.¹²¹ Although the court ultimately found Fisher ineligible for asy-

111. INS Guidelines, *supra* note 59.

112. *Id.* at 798.

113. *Id.* (emphasis added).

114. 12 F.3d at 1233. This case was discussed earlier in relation to its findings as to women and feminism as a social group, and feminism as a political opinion. *See supra*, Part II.

115. *Id.* at 1242-43. The court held, nevertheless, that the applicant did not satisfy the requirements for a granting of asylum. In the court's opinion, the applicant had not demonstrated that her objections to the dress code were so strong that she would risk harsh punishment and violate them. *See id.* at 1241-42; *see supra* note 45 and accompanying text.

116. A chador is a veil that covers the face entirely, except for slits for the eyes. *See* Alison E. Graves, *Women in Iran: Obstacles to Human Rights and Possible Solutions*, AM. U. J. GENDER & L. 57, 70 (1996). Women in Iran are required to wear such veils because of the religious belief that "the appearance of an unveiled woman in public is an attack on . . . the morality of the Muslim community." *Id.*

117. *See Fatin*, 12 F.3d at 1236.

118. *Id.* at 1242.

119. *See id.*

120. 79 F.3d 955 (9th Cir. 1996).

121. *Id.* at 960.

lum,¹²² it also stated that the applicant “may suffer persecution on account of her religious beliefs as a result of Iran’s enforcement of its conduct and dress rules.”¹²³

In a convincing and well-reasoned dissent from the denial of asylum, Justice Noonan noted that petitioner had demonstrated that the State viewed her as a “religious nonconformist.”¹²⁴ Noonan argued that “the religious beliefs imputed to her by the regime were also political opinions, and the persecution she fear[ed] from the regime would also be ‘on account of’ those imputed political opinions.”¹²⁵

Neither court in the preceding cases found the nonconforming women eligible for asylum. However, there is indication that courts are ready to consider asylum as a possibility for women seeking to express themselves in a way contrary to prevailing cultural and social mores.¹²⁶ If this is the case, domestic law will be an effective means of enforcing the human right of freedom of expression.

Gay rights activists have also claimed a small but significant victory in the Ninth Circuit concerning the granting of asylum to homosexuals. In *Pitcherskaia v. INS*,¹²⁷ the petitioner, a lesbian, sought asylum based on the possibility of being institutionalized to “cure” her homosexuality.¹²⁸ The court of appeals reversed the BIA’s determination that an asylum applicant demonstrate her persecutor’s subjective intent to punish.¹²⁹ The Russian militia had subjected Pitcherskaia to interrogation, beatings, and electroshock therapy.¹³⁰ The BIA had determined that in doing so, her persecutors were attempting to “cure” her, and thus “their actions did not constitute ‘persecution’ within the meaning of the Act.”¹³¹

The court rejected this determination, stating “persecution simply requires that the perpetrator cause the victim suffering or harm.”¹³² On this basis, the BIA’s denial of asylum to Pitcherskaia was reversed.¹³³ *Pitcherskaia* is a clear example of the court using asylum to give redress to a victim of human rights abuses. Coupled with *Angoucheva*, the two cases show a trend in courts to find official, state-based persecution where earlier courts would

122. *Id.* at 963.

123. *Id.* at 960.

124. *Id.* at 970 (Noonan, J., dissenting).

125. *Id.*

126. See Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J. L. & FEMINISM 23, 47-48 (1997) (arguing that United States courts are increasingly providing safe haven for applicants with gender-based claims).

127. 18 F.3d 641 (9th Cir. 1997).

128. See *id.* at 644-45.

129. See *id.* at 646, 648.

130. See *id.* at 644.

131. *Id.* at 645.

132. *Id.* at 648.

133. See *id.*

have rejected the applications as merely personal.¹³⁴

C. The Right to Reproductive Choice

A woman's right to reproductive freedom is hotly debated in this country when it is discussed in terms of the right to an abortion.¹³⁵ However, few would contest that a pregnant woman has the right to carry her pregnancy to term; nor would they contest the human right to procreate.¹³⁶

These reproductive rights provide possibly the clearest example of how domestic asylum law is giving effect to international human rights law. Not only have there been successful asylum claims by Chinese nationals seeking to protect their reproductive rights,¹³⁷ but Congress now has made it easier for such applicants to gain asylum by enacting the Illegal Immigration and Immigrant Responsibility Act (IIRIRA or "the Act").¹³⁸

Section 601 of the Act explicitly states "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization or who has been persecuted for failure or refusal to undergo such procedure . . . shall be deemed to have been persecuted on account of political opinion."¹³⁹ An applicant meets her burden of showing persecution by demonstrating she has been subjected to involuntary abortion or sterilization.¹⁴⁰ "The new language seems to establish clearly a per se asylum case by labeling a forced abortion or involuntary sterilization as persecution on account of political opinion."¹⁴¹ Thus, section 601 effectively removes the decision to grant asylum from the immigration judge's discretion.¹⁴²

The first case under section 601 was *In re X—P—T—*.¹⁴³ The applicant in that case was a Chinese woman who had violated China's one child per couple mandate.¹⁴⁴ She and her husband had three children, after which she

134. See, e.g., *Gomez*, 947 F.2d at 664-65 (denying asylum to victim of military rapes).

135. See generally Bharati Sadasivam, *The Rights Framework in Reproductive Health Advocacy - A Reappraisal*, 8 HASTINGS WOMEN'S L.J. 313 (1997) (discussing current international and domestic issues in reproductive rights).

136. See Beijing Declaration, *supra* note 2, at 423; Convention for the Elimination of Discrimination, *supra* note 55, at art. 12, 16.

137. *In re X—P—T—*, Int. Dec. 3299 (B.I.A. 1996); *Matter of C—Y—Z—*, Int. Dec. 3319 (B.I.A. 1997).

138. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 § 601 (stating that any foreign national who has undergone forced abortion or sterilization has been "persecuted").

139. *Id.* § 601.

140. *Id.* § 601(a)(1).

141. Steven C. Bell, *BIA Rejects INS Policy on New Refugee Provision*, 16 IMM. L. REP. Oct. 1, 1997, at 223-24.

142. See *id.*

143. Int. Dec. 3299 (B.I.A. 1996).

144. See *id.* at 3. The mandate was adopted in late 1979 after a decade-long population boom. See Anne M. Gomez, *The New INS Guidelines on Gender Persecution: Their Effect on Asylum in the United States for Women Fleeing the Forced Sterilization and Abortion Poli-*

was forcibly sterilized.¹⁴⁵ The court found, as a matter of law, that under section 601, the applicant had suffered past persecution and was thus entitled to a grant of asylum.¹⁴⁶ The court explicitly concluded, “as a result of the amendments made by section 601 of the IIRIRA, that forcible sterilization is a basis for grants of asylum.”¹⁴⁷

By providing this statutory *per se* asylum claim, Congress has reaffirmed that the right to reproductive freedom is a fundamental human right. Under this statute, victims of China’s strict population control measures are sheltered from persecution.

D. What Effect Does United States Asylum Law Have on International “Lawbreakers”?

As the foregoing illustrations demonstrate, immigration can be effective as a direct means of enforcing human rights by providing victims of human rights abuses with relief from persecution. Immigration law also can have a more indirect enforcement effect on international law. When refugees bring asylum claims in domestic court, they increase the world-wide awareness of particular human rights abuses that occur in their home countries.¹⁴⁸ As many feminists and activists agree, raising awareness is the first step to effecting political change.¹⁴⁹ Political powerlessness is often a result of “invisibility” or ignorance of the issues on the part of those in power.¹⁵⁰

Women worldwide are rendered invisible and silenced by being killed, physically abused into submission, and even starved. In addition to such direct physical abuses, women’s human rights and freedoms are further imperiled by the systematic denial of their political, economic, social, civil, and other legal rights which purportedly ensure women’s full participation in the cultural and political life of the state.¹⁵¹

Therefore, increasing visibility is crucial to eradicating abuses.¹⁵² “The methodological question remains: how does the human rights community inform a group that certain practices violate human rights norms?”¹⁵³ Asylum law can fill this communication gap. By its very definition, the term *refugee*

cies of the People’s Republic of China, 21 N.C. J. INT’L & COM. REG. 621, 623 (1996). In accordance with the policy, official quotas are instituted for each local region. *See id.* Officials use forced abortions and sterilizations to enforce these quotas. *See id.*

145. *See In re X—P—T—*, Int. Dec. 3299 at 3.

146. *See id.* at 5.

147. *Id.* at 7.

148. *See* Beth A. Lubetkin, *Violence Against Women and the U.S. Immigration Laws*, 90 AM. SOC’Y INT’L L. PROC. 616, 618-19 (1996).

149. *See* Hernandez-Truyol, *supra* note 31, at 608-09.

150. *See id.*

151. *See id.* at 639.

152. *See id.*

153. *Id.* at 674.

indicates that the individual's country of origin is violating human rights.¹⁵⁴ "The country that turns its own citizens into refugees is in violation of all the articles of the Universal Declaration of Human Rights."¹⁵⁵ By granting asylum to women who have suffered persecution based on their gender, asylum countries are sending a strong message that the refugee's home country has violated human rights norms.¹⁵⁶

As the international community learns of particularly egregious human rights violations, the pressure increases for the wrongdoer to stop the abuse. This has been the case with female genital mutilation and forced abortion.¹⁵⁷ In effect, the international community, outraged at the practices of certain countries, embarrasses the wrongdoer into compliance with international law.

Critics will argue that if United States courts open themselves to the adjudication of gender-based asylum claims, a significant portion of the world's women will seek refuge here, and that the United States cannot support this inflow of refugees.¹⁵⁸ This fear is unfounded.¹⁵⁹ The INS has stated "we do not expect or anticipate a dramatic increase in the number of asylum claims that are gender-based."¹⁶⁰ Other countries with similar approaches to gender-based claims report no significant rise in the number of gender-based claims.¹⁶¹

There are several reasons why this may be the case. As a practical matter, it takes resources to get to a country of refuge that many, if not most, refugee women do not possess.¹⁶² In addition, an applicant for asylum from gender-based persecution still has the burden of showing her case to be true by a preponderance of the evidence.¹⁶³ These obstacles may prove insurmountable for the majority of refugees and asylum-seekers.

CONCLUSION

Recognizing that the enforcement of international human rights law is

154. See Connors, *supra* note 58, at 118.

155. Lee, *supra* note 37, at 538.

156. See Graves, *supra* note 82, at 90-91.

157. See, e.g., *In re Kasinga*, Int. Dec. 3278 (B.I.A. 1996) (granting asylum to potential victim of female genital mutilation); *In re X—P—T—*, Int. Dec. 3299 (B.I.A. 1996) (granting asylum to a woman who had been forcibly sterilized).

158. See Pell, *supra* note 75, at 656.

159. See Paula Lynch & Lori Scialabba, *United States Presentation*, in SPECIAL ISSUE, *supra* note 58, at 72.

160. *Id.* at 74.

161. See generally Pell, *supra* note 75. Since the adoption of its immigration guidelines recognizing gender-based violence as a form of persecution, Canada has not experienced a significant increase in the number of asylum claims from women. See *id.* at 658. Of approximately 150 gender-based asylum claims brought before the Canadian Immigration and Refugee Board, seventy percent have been granted. See *id.* at 658 n.12.

162. See Bello & Malone, *supra* note 51, at 146.

163. See *id.* at 141.

often impeded by competing value systems, there are various options available in the enforcement of international human rights law. Physical coercion or jurisdictional power are not required for enforcement.

The use of domestic asylum law is an example of an effective means of enforcing international human rights. It accomplishes this directly by providing the victim with a safe haven from human rights abuses. It also accomplishes this indirectly by increasing awareness of rights abuses within the international community, thereby creating pressure for the abuser to stop the mistreatment.

The use of domestic immigration law in this way allows American courts to enforce, i.e., give meaning to, international human rights, without disturbing the balance of humanitarian objectives versus state sovereignty. This does not suggest that asylum law is sufficient for the enforcement of international human rights. There must be increased enforcement, in both the traditional and non-traditional senses of the word.

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