DOMESTIC VIOLENCE-BASED ASYLUM CLAIMS:

CGRS Practice Advisory
Updated September 12, 2014

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Introduction

Thank you for contacting CGRS about your asylum case involving domestic violence – a pervasive form of gender-motivated violence affecting women and girls worldwide. At CGRS, we are playing a central role in advising attorneys on gender asylum issues and tracking these cases to inform national policy work on the issue. We encourage you to keep us up-to-date regarding the outcome of your case and any interesting developments along the way at http://cgrs.uchastings.edu/assistance.

The focus of this advisory is on claims based on violence against women and girls at the hands of intimate partners (husbands, domestic partners, boyfriends), though the advice provided herein may also be relevant to other gender-related claims. Part I of this advisory provides a brief overview of the law related to domestic violence and asylum in the United States. Part II provides guidance to attorneys representing persons fleeing domestic violence, concentrating on developing claims based on membership in a particular social group. Although the focus of the advisory is on asylum, it also briefly discusses applications for withholding of removal and Convention Against Torture (CAT) claims. Please also note that CGRS has extensive country conditions packets, research memos, and expert declarations on relevant conditions in dozens of countries as well as sample briefs and pleadings, some of which are available on our website and others of which can be provided upon request.

CGRS engages in technical assistance and country conditions research support free of charge. We appreciate that many lawyers represent asylum seekers for little or no fee. However, we hope that you will consider supporting our work in whatever way possible so that we are able to continue to provide critical assistance to you and your clients. Our website has more information about ways to get involved http://cgrs.uchastings.edu/.

General Asylum Overview & Advice

The advice and information provided by CGRS assumes a familiarity with basic asylum law principles. Below is a selection of recommended sources for general information on asylum:

AILA's *Asylum Primer*
http://agora.aila.org/Product/List/Publications

The ILRC's *Asylum and Related Immigration Protections*
http://www.ilrc.org/publications

The Ninth Circuit's *Immigration Outline*
http://www.ca9.uscourts.gov/guides/immigration_outline.php

The NIJC's *Asylum Training Materials*
https://www.immigrantjustice.org/attorney-resources

Kurzban's *Immigration Law Sourcebook*
http://agora.aila.org/Product/Detail/1848

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I. Background: Domestic Violence Asylum Claims & Current State of the Law

On August 26, 2014, the Board of Immigration Appeals (BIA) issued the first ever precedent decision recognizing domestic violence as a basis for asylum and that women who flee such persecution may establish membership in a particular social group. This is a historic victory and repudiates the position of some immigration judges that these claims are categorically "unworthy" of relief. However, the BIA's decision does not touch on all elements of asylum that can be problematic in these cases, thus making other related developments and guidance critical for successful presentation. This advisory provides background in developments in the law leading up to this BIA's historic 2014 decision. Then, it provides an overview of the BIA's 2014 ruling and provides advice for attorneys in developing claims for protection.

A. *Matter of Kasinga*: First Gender Asylum Decision

In the United States, few refugee issues have been as controversial as that of gender asylum, that is women and girls fleeing gender-motivated harms.[1] In 1996, the BIA broke new ground, issuing a landmark decision, *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996), granting asylum to a Togolese woman who fled her country to escape female genital cutting (FGC).[2] In its decision, the BIA applied the holding of its seminal social group decision, *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), to find that Ms. Kassindja (this is the correct spelling of her name) was the member of a particular social group defined by gender in combination with other immutable and fundamental characteristics.[3]

The *Kasinga* decision implicitly overcame interpretive barriers that often stand in the way of relief in gender-based asylum claims. The BIA found female genital cutting to be persecution, notwithstanding the fact that it is a widely condoned cultural practice in Togo. It recognized that particular social groups could be defined in reference to gender and it did so in a case involving non-state actors – namely the family and community that sought to impose genital cutting. In addition, the BIA had no difficulty finding a nexus between the persecution and social group membership by taking the societal context into

[1] For a more thorough review of the history of gender asylum in the United States and relevant international instruments, *see* Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, Refugee Survey Quarterly, Vol. 29, No. 2 (2010).

[2] *Kasinga* followed the issuance of gender guidelines in the United States. *See* Memorandum from Phyllis Coven, International and Naturalization Service (INS) Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators, Considerations For Asylum Officers Adjudicating Asylum Claims From Women (May 26, 1995), reprinted in 72 Interpreter Releases 771 (1995). The Gender Considerations are generally positive in their approach and content. For example, the Considerations note the importance of analyzing gender claims within "the framework provided by existing international human rights instruments" and provide examples of gendered harms which could constitute persecution, including "sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence and forced abortion." Id. at 2, 9. However, it should be noted that these guidelines, which are directed only to Asylum Officers (not immigration judges or the BIA), are not binding and do not have the force of law.

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

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consideration in line with the recommendations of the United Nations High Commissioner for Refugees (UNHCR).[4]

B. *Matter of R-A-*: First Domestic Violence Asylum Decision

Three years later, in 1999, the BIA seemed to beat a hasty retreat from *Matter of Kasinga*, when it denied asylum to Rody Alvarado, a Guatemalan woman who fled years of brutal domestic violence. The immigration judge (IJ) in Ms. Alvarado's case initially granted asylum, ruling that she had suffered past persecution on account of her political opinion and membership in a particular social group defined as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination." The IJ also held that Ms. Alvarado had established a well-founded fear of future persecution at the hands of her husband, who the Government of Guatemala was unwilling to control. The then Immigration and Naturalization Service (INS) appealed the IJ's decision to the BIA, which – in a divided decision – reversed the grant of asylum in *Matter of R-A-*, 22 I. & N. Dec. 906 (BIA 1999).

The BIA majority did not contest that the abuse Ms. Alvarado suffered was egregious or that the severe injuries she sustained were more than sufficient to constitute persecution. Nor did the BIA dispute that she had established a failure of State protection. According to the majority, her claim failed because she did not establish that the harm she suffered was on account of membership in a particular social group or any other protected ground. With respect to defining the social group, the Board departed from *Acosta* and ruled that being immutable/fundamental were only threshold requirements. An applicant also had to establish that the proposed social group was "recognized and understood to be a societal faction," and Ms. Alvarado had failed to make that showing.[5] The BIA further held that even if Ms. Alvarado's proposed social group was cognizable, she had failed to show that her husband persecuted her because of her membership in it. In so ruling, the BIA distanced itself from its earlier *Kasinga* decision by largely rejecting the relevance of societal context of violence and discrimination against women in determining nexus.

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

[5] This language regarding the recognition of a group as a societal faction was the forerunner to the BIA's ruling that not all groups that share an immutable or fundamental characteristic are cognizable. In addition to the Acosta factors, the BIA has required that "social visibility" and "particularity" of the groups be established.

C. Aftermath of *Matter of R-A-*: DHS Position on Domestic Violence-Based Asylum Cases in *R-A-* and *L-R-*

The BIA's decision in *Matter of R-A-* provoked a firestorm of criticism, leading to a series of Executive actions. In 2000, under the leadership of Attorney General (AG) Janet Reno, the Department of Justice (DOJ) proposed regulations to address cases such as Ms. Alvarado's.[6] Although the actual regulation is very short, it is preceded by a lengthy preamble, which includes a substantial amount of guidance favorable to gender claims based on domestic violence. Notably, the preamble states that the purpose of the regulation is to remove "certain barriers that the *In re R-A-* decision seems to pose" to domestic violence claims, and recognizes that gender is an immutable characteristic and that marital status may be considered immutable in appropriate circumstances. After the proposed regulation was issued, in 2001, AG Reno vacated the BIA's decision in *Matter of R-A-*, denying relief and remanding the case to the BIA with instructions to stay the case until the proposed regulations were finalized.

Then, in 2003, AG John Ashcroft took jurisdiction and ordered lawyers for the parties to brief the issues in the case. In its 2004 brief, the Department of Homeland Security (DHS) reversed course from the government's previous position and argued that Ms. Alvarado had established statutory eligibility for asylum based on her membership in a particular social group.[7] The brief reaffirmed *Acosta*'s immutable/ fundamental test as the touchstone for defining social groups. It argued that marital status may be immutable, where religious or moral convictions, or other factors make it so. DHS further took the position that the size of the group should not be determinative and that groups need not be small to be cognizable (though groups risk being overbroad if defined by traits that are not the characteristics targeted by the persecutor). Moreover, the 2004 brief addressed nexus in a manner that incorporates circumstantial evidence of the societal context in which the violence is perpetrated.

In Ms. Alvarado's case, DHS suggested that a cognizable social group in domestic violence claims under *Acosta* could be "married women in Guatemala who are unable to leave the relationship." Though DHS recommended a grant of asylum to Ms. Alvarado on the basis of her membership in a particular social group defined by her gender, nationality and status in a domestic relationship, AG Ashcroft did not rule on the case but sent it back to the BIA with the same instructions as his predecessor, for the BIA to reconsider the case once the proposed regulations were issued as final. To date, the proposed regulations have not been issued in final form.[8]

In 2008, AG Michael Mukasey lifted the stay previously imposed on the BIA, as the regulations were still pending, and remanded the case for reconsideration of the issues presented with respect to asylum claims based on domestic violence. Because of the length of time the case had been pending, Ms. Alvarado and DHS made a joint request to send the case back to the IJ for the submission of additional evidence and legal arguments. After the submission of these materials, DHS stipulated to a grant of

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[6] Asylum and Withholding Definitions, 65 Fed. Reg. 76588 (proposed Dec. 7, 2000) (hereafter Proposed Regulations).

[7] DHS's Position on Respondent's Eligibility for Relief, Matter of R-A-, 23 I. & N. Dec. 694 (A.G. 2005) (A 73 753 922), *available at* http://cgrs.uchastings.edu/sites/default/files/Matter%20of%20R-A-%20DHS%20brief.pdf (last visited Aug. 12, 2014).

[8] The Obama Administration indicated its intention to issue the proposed regulations in 2010, but this never happened. *See* The Regulatory Plan, 74 Fed. Reg. 64137, 64220-21 (Dec. 7, 2009).

asylum, and finally, in December 2009, after enduring more than a decade of legal limbo, Ms. Alvarado was granted asylum. Because the grant was by stipulation, there is no extensive IJ decision; the judge's order, which is less than a sentence long, simply refers to the agreement of the parties.[9] Because the *R-A-* case had become the battleground on which the issue of domestic violence as a basis of asylum had been fought for more than a decade, the victory had great symbolic significance. However, it has no binding precedential value.[10]

While *R-A-* was pending before the IJ, DHS filed a supplemental brief to the BIA in a similar case, known as *Matter of L-R-*, involving the claim of a Mexican woman who fled to the United States after enduring more than two decades of atrocious abuse at the hands of her common law husband.[11] Initially, DHS filed a brief to the BIA defending the IJ's ruling that there was neither a cognizable gender-defined social group nor a nexus to an enumerated ground. However, in 2009, under the new Obama Administration, DHS retreated from that position. The agency's approach in its supplemental brief in *L-R-* builds on the position it articulated in its *R-A-* brief five years prior and articulates the agency's official position regarding domestic violence claims. The significant difference between the 2004 and 2009 briefs is that the latter sets forth the agency's position as to how the BIA's new social group requirements of "social visibility" and "particularity," imposed by the BIA in 2006 during the protracted battle in *R-A-*, can be met in such cases.[12] As discussed below, these new standards have been explained by the BIA in twin decisions issued in February 2014.

Specific to Ms. L.R., DHS advanced two formulations of a social group that it argued could meet the immutability, visibility, and particularity requirements, depending on the facts in the record: (1) Mexican women in domestic relationships who are unable to leave; or (2) Mexican women who are viewed as

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[9] The IJ's decision simply stated that: "Inasmuch as there is no binding authority on the legal issues raised in this case, I conclude that I can conscientiously accept what is essentially the agreement of the parties [to grant asylum]." Decision of the IJ, Dec. 10, 2009 (on file with CGRS).

[10] After AG Mukasey's 2008 order issued, the BIA remanded some domestic violence cases back to the immigration court for attorneys to supplement the records in their cases. And, on at least one occasion, the BIA provided an applicant with the opportunity to submit an application for asylum in light of the AG's decision. *See, e.g.*, In re: Ventura-Aguilar, A 98-400-001, 2009 Immig. Rptr. LEXIS 781 (BIA Dec. 2009) (remanding to IJ to provide opportunity for applicant to submit application for asylum and withholding of removal in light of vacatur of *R-A-*). *See also, e.g.*, Morrison v. INS, 166 F. App'x 583 (2d Cir. 2006) (reversing BIA's denial of applicant's motion to reconsider for failure to consider issues related to domestic violence claim in light of vacatur of *R-A-*). On the other hand, CGRS's non-official tracking of cases has revealed that the BIA has also denied several motions to reopen to present asylum claims based on domestic violence in light of Mukasey's 2008 order and the DHS's position taken in *Matter of L-R-*, discussed *infra*. This is not to say that attorneys should forego filing a motion to reopen where the circumstances so require, but rather, to alert attorneys to one potential outcome. The argument for reopening is stronger now after the BIA's long-awaited precedential decision (discussed in the following section), issued on August 26, 2014, recognizing domestic violence as a basis for asylum. *See Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014).

[11] DHS's Supplemental Brief, Matter of L-R- (BIA Apr. 13, 2009), *available at* http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf (last visited Aug. 12, 2014).

[12] *See* Matter of C-A-, 23 I. & N. Dec. 951 (BIA 2006), *aff'd* Castillo-Arias v. Att'y Gen., 446 F.3d 1190 (11th Cir. 2006). Social visibility requires that the members of the group be visible to the society at large, while particularity requires that the group be clearly defined with concise boundaries.

property by virtue of their position in a domestic relationship. DHS suggested that the case be remanded to the IJ for additional pertinent fact-finding. Without issuing a precedential opinion clarifying the governing doctrine, the BIA heeded DHS's request. Upon review of Ms. L.R.'s supplemental evidentiary and legal submissions, DHS – as it had done in the *R-A-* case – stipulated that Ms. L.R. was eligible for asylum and merited it in the exercise of discretion. In 2010, the IJ granted asylum in a summary order, which simply states that asylum is granted and includes a notation that it was a result of "stipulation of the parties."[13] Like the decision in *R-A-*, the decision holds no precedential value.

D. Recent Developments: BIA Precedent Decision, *Matter of A-R-C-G-*, Recognizing Domestic Violence as a Basis for Asylum

On August 26, 2014, after a 15-year silence since its decision in *R-A-*, the BIA issued a precedential decision, *Matter of A-R-C-G-*, recognizing domestic violence as a basis for asylum.[14] The applicant in the case, Ms. C-G-, a mother of three, suffered what the decision deems "repugnant abuse" at the hands of her husband, including beatings, rapes, an assault that broke her nose, and an attack with paint thinner that left her with burn scars. Her efforts to get police protection were in vain, as they refused to interfere, and her husband threatened to kill her if she contacted them again. Her husband thwarted her repeated efforts to leave and stay with relatives when he found her and threatened her if she did not return.

The BIA found that women fleeing domestic violence can be members of a particular social group (in that case, "married women in Guatemala who are unable to leave their relationship"). The BIA held that the social group defined by gender, nationality and marital status "comports with [its] recent precedents [*Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014) and *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014)] clarifying the meaning of the term 'particular social group.'"[15] In other words, based on the facts and evidence presented in the case, the gender defined social group meets the immutability, "social distinction" (formerly "social visibility"), and "particularity" requirements. (These decisions, *M-E-V-G-* and *W-G-R-*, and the BIA's analysis of the requirements in *A-R-C-G-* are discussed in detail below.) The BIA did not rule on the issue of nexus or inability/unwillingness of the government to protect Ms. C-G-, instructing the IJ to consider those issues on remand.

Although the BIA affirmed the principle from *M-E-V-G-* and *W-G-R-* that cognizability of a social group must be determined on a case-by-case basis, the BIA's analysis should help guide attorneys and applicants in building the records in their cases to establish group membership for women fleeing domestic violence from Guatemala and elsewhere. Importantly, the BIA's clear recognition that women fleeing domestic violence at the hands of their intimate partners are deserving of asylum protection where their governments are unable or unwilling to protect them, sends a clear mandate to immigration judges that these cases must be carefully considered and cannot be rejected categorically as "unworthy" of relief. [16]

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[13] Decision of the IJ, Aug. 4, 2010 (on file with CGRS).

[14] 26 I. & N. Dec. 388.

[15] Id. at 392.

[16] *See* Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 Hastings Women's L.J. 107 (2013) (analyzing several domestic violence asylum cases

CGRS will continue to engage with DHS and others in the Administration to ensure consistency in application of the BIA's decision and of the government's position in domestic violence cases across jurisdictions. We will also continue to advocate for finalization of asylum regulations to ensure that women who have endured domestic violence and whose countries fail to protect them can clearly establish eligibility for asylum with sufficient guidance addressing all of the elements. To inform our broader policy work we encourage attorneys to contact CGRS if the asylum office refers a domestic violence case to the immigration court for failure to establish social group membership or nexus to such group membership or if a DHS trial attorney makes an argument to an IJ or the BIA that is inconsistent with the BIA's opinion in *A-R-C-G-* or with the agency's position in *L-R-*.[17]

CGRS offers attorneys the following advice to help attorneys craft successful claims, developed based on the BIA's decision in *A-R-C-G-* as well as our analysis of the outcomes of several hundred domestic violence asylum cases for which CGRS has on-file oral or written decisions that have come to our attention over the last two decades.

and finding inconsistent and contradictory outcomes in cases while there was an absence of binding case law or regulations, including some judges who rejected domestic violence claims across the board).

[17] Practitioners representing asylum seekers affirmatively should be aware that because the Asylum Office (AO) is part of DHS, asylum officers are bound by the agency's position. As a result, the AO should grant cases where the evidence supports both the applicant's membership in the social group(s) articulated in the *L-R-* brief and the argument that persecution is linked to social group membership. Please note, however, that a claim could be referred on the basis of relocation being reasonable, the one-year bar, or other grounds.

II. CGRS Advice

We note at the outset that this advisory provides only a brief footnote regarding the element of persecution necessary to establish eligibility for asylum because, in our experience, it is often not contested due to the physical and sexual nature of abuse.[18] Moreover, because this advisory focuses on domestic violence claims that involve intimate partner violence, it does not address the specific considerations that arise in claims involving child abuse, or threats of forced marriage or sale into human trafficking by family members. CGRS has available specific advisories regarding children's claims and other gender-based asylum claims.

Special Note on Forced Relationship Cases
Domestic violence asylum claims should be considered to encompass those where a man forces a woman or girl into a relationship or perceives a woman or girl as "his" despite her resistance. This type of claim is frequently seen from countries such as Mexico and the Northern Triangle countries in Central America with high rates of gang activity, where the dynamics in gang culture reflect heightened patriarchal attitudes of society at large. These claims – even where the relationship is not consensual or established for a long period of time – should be analyzed through the domestic violence lens so long as the hallmarks of domestic violence (*e.g.*, physical violence, sexual abuse, threats, jealousy and isolation, force and lack of agency, intimidation, and stalking) are present.[19]

The social group argued in forced relationship cases such as these may be formulated differently from claims where a woman is married or has children with her partner (see the subsequent section on framing social groups). But if a man believes that a woman or girl is "his" and he has the right to control her, even after a woman has refused his advances, in his view (and that of society) a relationship has formed.[20] What is more, his belief that she is "his" without any indication of interest on her part is itself a reflection of attitudes and norms regarding gender roles, that men/boys are superior to women/girls and thus they get to decide what will happen in a relationship, including whether it will result in sex, reproduction, marriage, and, in the end, separation (i.e. it's not over until he says it is).

[18] Alongside severe beatings, many domestic violence cases involve rape or other sexual harm, which have been found to constitute persecution. *See, e.g.*, Silaya v. Mukasey, 524 F.3d 1066, 1070 (9th Cir. 2008); Balachova v. Mukasey, 547 F.3d 374, 386-87 (2d Cir. 2008). Psychological harm and serious threats of harm – hallmarks of domestic violence – can also rise to the level of persecution. *See, e.g.*, Butt v. Keisler, 506 F.3d 86, 91 (1st Cir. 2007); Ouk v. Gonzales, 464 F.3d 108, 111 (1st Cir. 2006). Attorneys should, of course, submit evidence regarding the physical and psychological harm suffered by the applicant including, for example, the applicant's own testimony, testimony of witnesses, and medical records where available. CGRS also advises attorneys to seek an evaluation by a mental health professional to determine whether an applicant suffers from psychological disorders resulting from the abuse (see section on one-year bar below where this evidence might also be relevant).

[19] *See, e.g.*, KERRY HEALEY ET AL., U.S. DEP'T OF JUSTICE, BATTERER INTERVENTION: PROGRAM APPROACHES AND CRIMINAL JUSTICE STRATEGIES (1998) (discussing hallmarks of domestic violence).

[20] Similarly, DHS has recognized in *L-R-* that a relationship can persist even after a woman has clearly stated her intention to end the relationship and/or separated from her abuser where the abuser refuses to recognize an end to the relationship, which exists on the abuser's terms. The same analysis should be applied to cases where a woman is forced into a relationship from the beginning.

A. Social Group Claims

1. Analytical Framework

CGRS advises attorneys to follow the analytical framework for social groups set forth in the BIA's decision *A-R-C-G-*. The social group articulated in that case – defined by gender, nationality, and relationship status – closely tracks that set forth by DHS in its briefs in *L-R-* and *R-A-* and provides guidance on the evidence in a particular case that fulfills the requirements of "social distinction" and "particularity," as most recently set forth in the BIA's *M-E-V-G-* and *W-G-R-* decisions.[21] In addition to the *A-R-C-G-* and DHS's briefs in *R-A-* and *L-R-*, the principles articulated in the preamble to the DOJ's proposed asylum regulations of 2000, although never finalized, should also help guide attorneys working on these cases as well as UNHCR's excellent guidelines on social group and gender. These documents are all available on our website and we highly recommend that attorneys study them closely.

To follow is a brief outline of the analytical framework to be fleshed out more thoroughly *infra*:

Defining the Particular Social Group	• *Acosta* is the starting point for analysis • Gender and nationality are immutable • Marriage or other status in a domestic relationship can be immutable where certain factors make it so • A group is socially distinct where perceived as such within society or where treated distinctly within society • Relationship status can be sufficiently clear to satisfy particularity • Groups need not be small to be cognizable, but may be overbroad if defined by traits not targeted by the persecutor
Determining nexus or "on account of"	• Persecutor need only act in part because of the protected characteristic • Regardless of initial motive of persecutor, nexus can be established if applicant is later persecuted on account of protected ground • Persecutor need not harm more than one person in the group • Can be determined by direct evidence of the persecutor's beliefs or circumstantial evidence of the legal and social norms that permit abuse of group members
Establishing the government is "unable or unwilling to protect"	• Test is whether the government has taken steps that reduce the fear to below the well-founded fear threshold • Government's inability or unwillingness can be shown by attempts to obtain protection and lack of government response; or by country conditions that show government's inability or unwillingness (individual need have sought protection if futile or potentially dangerous)

[21] The BIA also left open the possibility that gender alone could define the social group. *See Matter of A-R-C-G-*, 26 I. & N. Dec. at 395. As mentioned *infra*, this could be an appropriate social group (or gender plus nationality) to consider based on the facts of your case, or it may be appropriate to argue this social group in the alternative.

2. Defining the Social Group

Claims based on membership in a particular social group should proceed in two steps. First, the social group must be defined. Second, it must be established that the applicant is a member of said group. A particular social group, according to the BIA, must (1) be comprised by members who share a common or immutable or fundamental characteristics (the *Acosta* framework), (2) be socially distinct within the society in question and (3) be defined with particularity (see discussion below fleshing out the social distinction and particularity requirements and their applicability in certain jurisdictions that have rejected the BIA's interpretation).

Groups need not be small to be cognizable, however, the group is **overbroad** if it is defined by traits that are not the characteristics targeted by the persecutor. In other words, attorneys should define a social group by reference to those immutable or fundamental characteristics, which are the specific reason(s) the applicant is targeted. But, attorneys should avoid defining the social group by terms that incorporate the harm (*e.g.*, "victims of domestic violence" or "women in abusive relationships"), as this is **circular** reasoning and is not recognized.[22] DHS also argues that such a group formulation fails the particularity requirement because the meaning of terms such as "abusive" is amorphous.

Following the BIA's framework set forth in *A-R-C-G-* (and that of DHS in *L-R-*), and assuming the facts and socio-political context support the argument, social groups for domestic violence asylum cases should be defined by gender, nationality, and status in a domestic relationship. Although *A-R-C-G-* involved a woman who was formally married to her abuser, the case is not limited to only domestic violence in the context of a "marriage." Formal marital status is not required to succeed on a claim. The analysis from *A-R-C-G-* should extend to cases involving women in other sorts of domestic relationships, as explained by DHS in *L-R-*, so long as those relationships are recognized by the society and susceptible to common definition in the society in question.[23] For example, a woman may be in a common law marriage formally recognized by the laws of the country, generally defined by the number of years the couple has been living together. Other types of domestic relationships may also be recognized by the laws and customs of the country, including how the couple is perceived by society including how the abuser perceives his partner.[24]

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[22] This issue is not so clear or well understood, however, and we have seen adjudicators deny social groups that simply and appropriately reference the harm. The fact of past harm may be an immutable characteristic for claims based on a well-founded fear of persecution or threats to life/freedom. For example, in Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003), the Court held that former child soldiers constitute a particular social group and that the applicant had a well-founded fear of persecution on the basis of his membership in said group. Moreover, an escaped trafficking victim may suffer persecution upon return to her country because she worked as, or is perceived as having worked as a prostitute abroad, and/or for having escaped her traffickers. *See, e.g.*, Cece v. Holder, 733 F.3d 662 (2013) (en banc). For more information, we also suggest you refer to the UNHCR's guidelines on social group and trafficking, which is available on our website.

[23] *See* DHS's Supp. Br., Matter of L-R-, *supra* note 11, at 19 explaining how a domestic relationship other than formal marriage may still form part of a cognizable social group.

[24] Please contact CGRS if you need help finding types of domestic relationships recognized by the laws and customs of your client's home country – we have this research for Central American and other countries and can refer you to experts.

We recommend that attorneys proffer several alternative groups depending on the facts and circumstances of the case (and note that the social group for past persecution may be distinct from the social group for future depending on the facts). Where appropriate, attorneys should include the specific formulation of "[Nationality] women in domestic relationships who are unable to leave" (substituting "marriage" for "domestic relationship" where applicable). Attorneys may also argue in the alternative, or where "unable to leave" difficult to establish, the specific formulation of "[Nationality] women who are viewed as property by virtue of their position in a domestic relationship (marriage where applicable). In addition, similar groups such as "Married [nationality] women" and "[Nationality] women in domestic relationships" that do not reference the inability of the woman to leave the relationship or her status as being viewed as property might be more appropriate for the facts and circumstances of the case.[25] In the past, some adjudicators have been resistant to inclusion of characteristics beyond gender, nationality, and the relationship status (such as inability to leave), seeing the group as circularly defined by the persecution. However, the BIA's decision in *A-R-C-G-* provides guidance for these judges, clearly explaining that "unable to leave" refers to the immutability of the relationship status and does not make a group impermissibly circular (or defined by the persecution itself). In any case, some adjudicators may still be more willing to recognize a group defined by gender, nationality, and relationship status, only because country conditions focus on women's status in a domestic relationship as a target for abusers rather than inability to leave as a relevant or necessary characteristic of the group.

Other immutable characteristics may also be relevant, for example, ethnicity (*e.g.*, indigenous women) may be a characteristic that further defines group members, or sexual orientation (*e.g.*, lesbian women) where a woman may be forced into a relationship to "cure" her of her homosexuality. In forced relationship cases described above, or where the circumstances otherwise warrant, the social group of gender plus nationality alone may be most applicable in terms of why a woman or girl was initially forced into the relationship (and the BIA's decision in *A-R-C-G-* leaves open the viability of such a group). Once in the forced relationship the abuser may view the woman or girl as his property or make it impossible for her to leave the relationship. In addition, the social group of nuclear family may also be applicable in a domestic violence case where the evidence shows that the victim was targeted on account of family membership. However, it may be that a family-based social group is more appropriate to the child abuse context, where the fact of family membership or a child's status in the family may be the reason for the abuse. Our advisory regarding children's claims discusses this position in more detail.

It is the applicant's burden to articulate the particular social group in which she claims membership, and to proffer evidence to support existence of the social group in the society in question (and causal connection between the abuse and such a group – as detailed below). However, cognizability of a social group is a legal question for the adjudicator to analyze, based on the evidence.[26] We therefore urge attorneys to advance all formulations of the particular social group at issue that might be supported by

[25] We advise attorneys to preserve the social group of gender plus nationality, such as Guatemalan women, in the alternative. Some judges prefer such a formulation, while others consider it overbroad. In any case, such a group has been accepted by courts in other cases, namely in the FGC context. *See, e.g.*, Bah v. Mukasey, 529 F.3d 99, 112 (2d Cir. 2008); Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005). Moreover, the BIA left open the possibility of such a social group (as mentioned in note 21 *supra*) in *A-R-C-G-*.

[26] *See, e.g.*, Ayala v. Holder, 640 F.3d 1095, 1096-97 (9th Cir. 2011) (whether a group constitutes a PSG is reviewed de novo as a question of law); Gomez-Zuluaga v. Att'y Gen., 527 F.3d 330, 339 (3d Cir. 2008) (same); Ngengwe v. Mukasey, 543 F.3d 1029, 1033 (8th Cir. 2008) (same; Elien v. Ashcroft, 364 F.3d 392, 396 (1st Cir. 2004) (same).

the record for IJ to apply the proper legal standard to the undisputed facts. If your case is before the BIA, and DHS argues that you are improperly arguing a social group not raised below or otherwise challenging group formulation that closely tracks the BIA's decision in *A-R-C-G-* and the agency's position in *L-R-*, CGRS is available to discuss legal strategy.

If you would like tailored advice regarding the social group in your case, please do not hesitate to request consultation by filling out a request on our website here, http://cgrs.uchastings.edu/assistance.

a. Immutability

Numerous decisions by the BIA, including *A-R-C-G-*, and the Courts of Appeals have recognized gender as defining a particular social group or as one factor in defining a particular social group.[27] Many courts have also coupled gender with race or nationality to define a social group.[28] The BIA, in its recent domestic violence decision, has now clearly established that a woman's status in a domestic relationship can too be considered an immutable characteristic where she is unable to leave the relationship due to economic, social, physical or other constraints. According to the BIA, a determination of immutability of marital status is "dependent upon the particular facts and evidence in a case" including factors such as "whether dissolution of a marriage could be contrary to religious or other deeply held moral beliefs or if dissolution is possible when viewed in light of religious, cultural, or legal constraints."[29] When evaluating immutability of marital status, the BIA continued, "adjudicators must consider a respondent's own experiences, as well as more objective evidence, such as background country information."[30] DHS has also explained that immutability can be established where the abuser would not recognize separation or divorce as ending the relationship were the woman to be deported to the country of origin. The BIA's decision in *A-R-C-G-* involved an applicant who was formally married to her partner; however, attorneys should argue that the same analysis extends to common-law or other informal relationships recognized by the society in question.

b. Social Distinction and Particularity

Prior to the BIA's companion decisions in *M-E-V-G-* and *W-G-R-*, issued in February 2014, the social visibility and particularity requirements were rejected as unreasonable interpretations of the statute by two Courts of Appeals, the Third and Seventh Circuit Courts.[31] The Courts declined to defer to the agency's interpretation, for example, because they found that the added requirements are inconsistent

[27] *See, e.g.*, A-R-C-G-, 26 I. & N. Dec. at 388; Ngengwe, 543 F.3d at 1033-35; Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993).

[28] *See* cases cited supra note 25.

[29] A-R-C-G-, 26 I. & N. Dec. at 392-93.

[30] *Id*. at 393.

[31] *See* Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009); Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582, 608 (3d Cir. 2011).

with prior BIA decisions and that the BIA did not provide explanation for its shift.[32] As a result, the Third and Seventh Circuits continued to follow the social group standard set out in *Matter of Acosta*. The Ninth Circuit has also called the validity of the requirements into question.[33] In *M-E-V-G-* and *W-G-R-*, the BIA purported to address the Courts of Appeals concerns, providing an explanation for its addition of the requirements beyond the *Acosta* framework (that had been in operation for over two decades), though commentators question the cogency and genuineness of such post-hoc rationalization. The BIA also renamed social visibility to social distinction and purported to clarify the requirement, stating that social distinction does *not* require ocular (or on-sight) visibility but rather perception of the group by society. Remarkably, the BIA had not found any proposed social groups to be cognizable in a published decision since it imposed the new requirements in 2006 until its 2014 decision in the domestic violence case of *A-R-C-G-*.[34]

As of the time of writing, neither the Third Circuit nor the Seventh Circuit has had occasion to rule on the continued validity of the requirements, as newly articulated by the BIA, and whether the courts would now defer to the BIA's interpretation. We recommend that attorneys representing individuals whose claims arise in those jurisdictions argue that social distinction and particularity are not required, and prior circuit law upholding the *Acosta* test still applies.[35] In the alternative, attorneys in those jurisdictions (like other jurisdictions where the requirements have not been rejected) should argue that the requirements constitute a significant departure from the *Acosta* analysis and are unreasonable interpretations of the asylum statute, and should not be accorded deference (suggested arguments in the following footnote).[36] And, out of caution until the law is settled, we recommend that all attorneys

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[32] Social visibility was heavily criticized because it had been interpreted to require ocular (or on-sight) visibility, such that a group member's characteristics were identifiable to a stranger on a street, which is antithetical to individuals who would likely go to great lengths to avoid being visible to avoid persecution and torture.

[33] *See* Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013) (en banc).

[34] In its decision, the BIA rebuffed the position of UNHCR, which the U.S. Supreme Court has said provides persuasive guidance. UNHCR has clearly stated that it does not consider social distinction to be a separate independent requirement for establishing a cognizable social group. Rather, UNHCR considers social perception to be an alternative approach to establishing particular social group membership if a group does not possess any immutable or fundamental characteristics but is nevertheless cognizable in the society in question. Neither approach according to UNHCR requires that members of a particular social group be visible to society at large in the literal sense. *See* Brief of UNHCR as Amicus Curiae in Support of the Petitioner, Valdiviezo-Galdamez v. Holder, No. 08-4564 (3d Cir. Apr. 14, 2009), *available at* http://www.unhcr.org/refworld/category,LEGAL,UNHCR,AMICUS,,49ef25102,0.html (last visited Aug. 12, 2014).

[35] *See* NATIONAL IMMIGRANT JUSTICE CENTER, *PARTICULAR SOCIAL GROUP PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER* MATTER OF M-E-V-G- *AND* MATTER OF W-G-R- (2014), *available at* https://www.immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20PSG%20Practice%20Advisory_Final_3.4.14.pdf (last visited Aug. 12, 2014).

[36] Although the BIA sought to clarify these requirements in W-G-R- and M-E-V-G-, those decisions do not clarify the confusion surrounding the terms, nor do they convincingly establish that the particularity and social distinction requirements are a natural evolution of their case law or were considered or applied in earlier BIA precedent as the BIA claims. Contrary to the BIA's contention, the social distinction and particularity requirements are inconsistent with what is required to prove the other grounds for asylum and so violate the principle of *ejusdem generis*. Although renamed, social distinction continues to focus on external perception of a group in society, which would deny protection to members of a group so marginalized that society refuses to recognize their

submit ample country conditions evidence and argue that the social distinction and particularity requirements have been met in any event.

Social Distinction: The social distinction requirement considers whether a group is "perceived within the given society as a sufficiently distinct group."[37] As the BIA explained in *A-R-C-G-*, the following evidence should be considered in determining the distinction of a group: "documented country conditions," "law enforcement statistics and expert witnesses," "the respondent's past experiences (which are relevant to how members of the PSG are treated or perceived), and "other reliable and credible sources of information."[38] In the specific context of domestic violence, country conditions relevant to distinction can include "whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors" – for example, a culture of machismo and high rates of violence against women without adequate response from the police.[39] The enactment of special laws directed at violence against women – such as Guatemala's law against femicide (or gender-motivated killings) – are especially pertinent, as enactment of such laws indicates the group's distinct status, because laws directed at the general public are not enough to protect group members who are in need of special protection.[40] A woman's individual circumstances might include, for example, unsuccessful past attempts to leave the relationship or seek protection. Much of this evidence will also be relevant to establishing nexus as well as the government's ability or willingness to prevent the abuse.

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existence (*e.g.*, homosexuals in Iran). Different in name only, particularity is essentially the same thing as social distinction. Particularity is an unnecessary filter as a group must be clearly defined in order to be cognizable. In addition, to the extent that particularity as explained in M-E-V-G- and W-G-R- requires that a social group must be narrowly defined, homogenous, or cohesive, the decisions are inconsistent with BIA and federal precedent in numerous circuits. *See, e.g.*, Perdomo v. Holder, 611 F.3d 662 (9th Cir. 2010). The BIA's hyper focus on the precise definition of a particular social group, as well as the evidence required to prove social distinction and particularity significantly disadvantage pro-se litigants. Finally, social distinction and particularity are inconsistent with the object and purpose of the 1951 Refugee Convention and its 1967 Protocol relating to the Status of Refugees, and Congress's clear intent to bring the United States into compliance with its international obligations.

[37] Matter of M-E-V-G-, 26 I. & N. Dec. at 238.

[38] A-R-C-G-, 26 I. & N. Dec. at 395.

[39] *Id*. at 394 (in finding the group distinct, considered record evidence that that "Guatemala has a culture of machismo and family violence," "[s]exual offenses, including spousal rape, remain a serious problem" in the country, and "Guatemala has laws in place to prosecute domestic violence crimes, enforcement can be problematic because the National Civilian Police often failed to respond to requests for assistance related to domestic violence") (internal quotation marks and citations omitted); *see also* M-E-V-G-, 26 I. & N. Dec. at 244 (stating that "country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as 'distinct' or 'other'").

[40] *See, e.g.*, Henriquez-Rivas, 707 F.3d at 1092 (noting that "[i]t is difficult to imagine better evidence that a society recognizes a particular class of individuals as uniquely vulnerable, because of their group perception by [their persecutors], than that a special . . . protection law has been tailored to its characteristics")

Moreover, in its 2009 brief, DHS took the position that social visibility can be shown by proof of differential treatment of group members, which is supported by the BIA's recent social group decisions noting that "upon their maltreatment, it is possible that [people] would experience a sense of 'group'" (though "self-awareness is not a requirement for the group's existence").[41] Although the BIA has stressed in *M-E-V-G-* that the persecutor's perception of the group is alone not sufficient to establish a cognizable social group, a persecutor's perception "can be indicative of whether a society views a group as distinct."[42]

Particularity: The requirement of particularity considers whether a group is "defined by characteristics that provide a clear benchmark for determining who falls within the group," and whether "the terms used to describe the group have commonly accepted definitions in the society of which the group is a part."[43] In *A-R-C-G-*, the BIA held that the group has the requisite particularity because the terms used to describe the group – "married," "women," and "unable to leave the relationship" – "have commonly accepted definitions within Guatemalan society based on the facts in this case, including the respondent's experience with the police" – for example, where police say they will not help married women or intervene in domestic matters, it establishes that a group has meaningful boundaries in society.[44] Note that although experience with the police may be useful for establishing boundaries of the group, the BIA did not hold that reporting to the police not required to establish eligibility for asylum. Indeed, the BIA and Courts of Appeals have repeatedly held that reporting to the police is *not* required, for example, to meet the unable/unwilling element and should not be read to be a requirement for the PSG. Moreover, DHS does not suggest in the *L-R-* brief that reporting is required. It is merely one factor to be considered when analyzing particularity. Country conditions or expert testimony regarding lack of assistance from the government for women in these situations, not necessarily treatment of the particular applicant, could fill this gap.

Attorneys should be prepared to argue that the terms that characterize the group are, like those in *A-R-C-G-*, susceptible to clear definition in the relevant society. For example, a family law or domestic violence statute in the country of origin might recognize various kinds of "domestic relationship" (*i.e.*, apart from formal marriage), which thus illustrates that the fact that the term is susceptible to a definition in the society in question that is specific enough to indicate who is included in such a group. Expert testimony might also help establish that the terms defining the group have meaning in a given society, or that who is in and who is out of the group is determinable in that society.

Attorneys should argue that the size of the proposed group is irrelevant to the particularity analysis. To reject a group based on size alone would be contrary to BIA and Courts of Appeals precedent recognizing gender-defined social groups, including in the domestic violence context in *A-R-C-G-*, as cognizable without concern for the size of the group.[45] Moreover, it violates the principle of *ejusdem*

[41] Matter of M-E-V-G-, 26 I. & N. Dec. at 243, 238 n.12.

[42] Id. at 242.

[43] Id. at 239.

[44] A-R-C-G-, 26 I. & N. Dec. at 393.

[45] *See, e.g.*, Cece, 733 F.3d at 673; Sarhan v. Holder, 658 F.3d 649 (7th Cir. 2011); Bi Xia Qu v. Holder, 618 F.3d 602 (6th Cir. 2010); Perdomo, 611 F.3d at 669; Ngengwe, 543 F.3d 1029; Hassan v. Gonzales, 484 F.3d 513 (8th Cir. 2007); Mohammed v. Gonzales, 400 F.3d 785 (9th Cir. 2005); Niang v. Gonzales, 422 F.3d 1187 (10th Cir. 2005); Lin

generis, as the other enumerated grounds (race, religion, nationality, political opinion) are not so limited. Establishing membership in a cognizable social group does not entitle each such person to asylum protection; the nexus requirement and other elements of the refugee definition such as well-foundedness of fear must also be proven.

CGRS recommends that attorneys consider seeking expert opinion to establish the social distinction and particularity of the proffered group(s). CGRS can suggest country-specific experts where necessary to tailor testimony to your case, and CGRS also maintains some general expert declarations on file that have been accepted and considered by adjudicators in a range of cases, which are available on our website. As stated, CGRS is available to help on defining the social group and identifying country conditions to establish the social distinction and particularity of the group in the given society.

3. Additional Strategic Consideration

In light of the BIA's recent precedential decision in *A-R-C-G-* (as well as its decisions in *M-E-V-G-* and *W-G-R-*) and DHS's position regarding social groups in *L-R-*, DHS may be willing to cooperate with attorneys representing applicants with domestic violence claims pending at the BIA. For example, if a case was granted by the IJ but DHS appealed based on social group and/or nexus, DHS may consider withdrawing its appeal. Whereas, if a case was denied by the IJ based on social group and/or nexus, DHS may join the applicant in a motion to remand to the IJ for submission of additional evidence and argument, or in some cases upon reconsideration may be willing to stipulate to a grant of asylum and file a motion to remand for entry of a stipulated order granting asylum. In cases where the facts are undisputed, the record is already strong and includes the types of evidence called for in *A-R-C-G-* (or recommended in the *L-R-* brief), and where the social group argued by the applicant before the IJ was similar to one of the formulations articulated by the BIA in *A-R-C-G-* or DHS in its *L-R-* brief, attorneys could ask the DHS trial attorney to file a brief (or supplemental brief) in support of asylum or withholding before the BIA. Attorneys may also seek leave to file a supplemental brief on the impact of *A-R-C-G-* on the case before the BIA regardless of whether DHS joins. Moreover, an applicant who has not previously raised a claim based on domestic violence may successfully move the BIA to remand to the IJ to allow her the ability to submit a new claim entirely given intervening changes in the law.[46] Courts of Appeals have also remanded cases to the BIA where the BIA denied on failure to establish a cognizable social group in light of the intervening precedents issued after the BIA's initial denial.[47] Please contact CGRS if you would like to discuss case strategy further or to report an outcome in your case – we will be monitoring application of *A-R-C-G-* by the BIA as well as DHS's position in light of the decision.

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v. Ashcroft, 385 F.3d 748 (7th Cir. 2004); Yadegar-Sargis v. INS, 297 F.3d 596 (7th Cir. 2002); Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000); Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993); Matter of Kasinga, 21 I. & N. Dec. 357 (BIA 1996); *see also* Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 n. 2 (2d Cir. 2007) (clarifying in a non-gender case that the BIA's particularity requirement "must not mean that a group's size can itself be a sound reason for finding a lack of particularity," but rather, "indeterminacy is a relevant consideration").

[46] *See, e.g.*, Morrison v. INS, 166 F. App'x 583 (2d Cir. 2006) (reversing BIA's denial of applicant's motion to reconsider for failure to consider issues related to domestic violence claim in light of vacatur of *R-A-*); In re: Ventura-Aguilar, A 98-400-001, 2009 Immig. Rptr. LEXIS 781 (BIA Dec. 2009) (remanding to provide opportunity for applicant to submit application for asylum and withholding of removal in light of vacatur of *R-A-*).

[47] *See, e.g.*, Paloka v. Holder, --- F.3d ----, 2014 WL 3865992 (2d Cir. Aug. 7, 2014); Pirir-Boc v. Holder, 750 F.3d 1077 (9th Cir. 2014).

DHS trial attorneys may even be amenable to requests for joint motions to remand in other types of gender-based cases (*e.g.*, trafficking and forced marriage) that were denied based on particular social group and/or nexus, where the social group is defined by gender and status in a relationship, status in the family, or status in society. While the *A-R-C-G-* decision is in the context of a domestic violence case, the framework for defining social groups set forth by the BIA (tracking closely that set forth in the DHS brief in *L-R-*) should apply more broadly to gender-based cases. As mentioned, we have practice advisories specific to other gender-based claims.

B. Other Protected Grounds

Gender cases may arise under any of the other asylum grounds: race, nationality, religion, or political opinion (actual or imputed). For example, if a woman's resistance to abuse, attempts or perceived attempts at independence, and efforts to escape were frequently met by increased violence, an argument can be made based on political or imputed political opinion. To support such a claim, evidence of the woman's efforts to leave a relationship, or where relevant, the applicant's direct challenge to the abuser's ideas about her status in the relationship would be highly relevant. Attorneys might argue, for example, that the applicant's actual or imputed political opinion is feminism, the right to bodily autonomy or self-determination, or opposition to male dominance.

Moreover, religion-based domestic violence claims may be viable depending on the facts of the case. Subsequent to the BIA's 1999 decision in *R-A-*, the BIA granted asylum to a woman from Morocco who suffered extreme abuse at the hand of her orthodox Muslim father because she believed in a liberal, egalitarian version of Islam.[48] (Note that other grounds do not appear to have been raised by the applicant in the *A-R-C-G-* case and were not addressed by the BIA, thus remaining viable.)

More than one enumerated ground may be applicable in some cases. CGRS recommends that attorneys raise all available grounds where the evidence supports them.

C. Nexus: Determining "On Account Of"

To establish her eligibility for asylum, a woman must demonstrate a nexus between her membership in a particular social group and the persecution she suffered or fears in the future. An applicant need only show that her membership in a protected social group was "one central reason" for the persecution; she need not prove that it was the dominant or most important reason.[49] Nexus can be established through the submission of direct or circumstantial evidence.[50]

The BIA did not reach the issue of nexus in the *A-R-C-G-* case, despite DHS stipulating that nexus had been established there, leaving that issue open for consideration on remand. However, the 2004 and 2009 DHS briefs in *R-A-* and *L-R-* provide guidance on how to establish the nexus element in domestic violence cases that are still relevant. Direct evidence of the persecutor's motives could include

[48] *See In re S-A-*, 22 I. & N. Dec. 1328 (BIA 2000).

[49] *See* 8 U.S.C.A. § 1158(b)(1)(B)(i); Ndayshimiye v. Att'y Gen., 557 F.3d 124, 129 (3d Cir. 2009).

[50] *See* INS v. Elias-Zacarias, 502 U.S. 478 (2002); *see also* Preamble to 2000 Regulations.

comments he made about the victim's status or ability to leave the relationship, or about the victim's religion or actual or imputed political opinion. It could also include comments that he has the right to abuse her because of their relationship (*e.g.*, "you're my wife, I can do what I want to you"). In forced relationship cases, nexus can be established through similar comments establishing his belief that she is "his," regardless of her desire, because she is a woman, as well as through actions demonstrating assertion of control over his perceived "woman" or "girlfriend," such as stalking. Circumstantial evidence could include country conditions information regarding societal acceptance of domestic violence, impunity for domestic violence, and lack of protection for victims of domestic violence as well as acceptance of and impunity for violence against women in general.[51] This evidence helps to establish the persecutor's state of mind– that he has authority to harm the victim on account of her status in the relationship or inability to leave it. Put another way, societal acceptance of domestic violence may embolden an abuser and reinforce his belief that abuse of women within a domestic relationship is acceptable and may be one central reason for persecution. We recommend that attorneys consult a Seventh Circuit decision in a gender-based asylum case involving honor killing that offers helpful analysis of gender-related social norms critical to the nexus analysis.[52]

CGRS has on file a declaration written by domestic violence expert Nancy Lemon, a member of the UC Berkeley Law School faculty, which spells out the central role played by gender and status in a domestic relationship in the motivation of battering and abuse, which is available on our website. A certified copy can be provided upon request.

For political opinion claims, attorneys should submit evidence that the abuse was inflicted because of the applicant's political opinion, not despite it. In *R-A-*, the BIA ruled that persecution was not on account of Ms. Alvarado's political opinion of opposition to male dominance because it found there was no record evidence that her husband was aware of her opinion or that it in any way motivated his abuse. DHS agreed with the BIA's reasoning and determination that persecution was not on account of Ms. Alvarado's political opinion. DHS took the same position in *L-R-*. At the same time, DHS conceded that domestic violence claims can be based on political opinion depending on the evidence presented.

Studying the perceived shortcomings in the evidence in *R-A-* and *L-R-* should help attorneys identify the types of evidence required to establish nexus for domestic violence claims based on political opinion grounds. For example, evidence that the applicant has a political opinion and that it was expressed to her abuser directly through her words or actions – such as resisting the abuser's attempts to control her, seeking a divorce or an end to the relationship, or reporting the abuse to the authorities – would be highly relevant. Evidence that the abuse escalated after the applicant expressed her opinion and statements made by the abuser exhibiting his beliefs about her opinion would further support a finding that persecution was on account of this protected ground. Circumstantial evidence demonstrating that women who stray from or challenge prescribed gender roles are targeted for harm and/or cannot expect state protection would buttress the argument.

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[51] *See, e.g.*, Proposed Regulations, *supra* note 6, at 76,593 (evidence of "patterns of violence [that] are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society" is relevant to determining whether the persecution is "on account of" a protected characteristic); Asylum Officer Basic Training Course, Female Asylum Applicants and Gender-Related Claims 26 (Mar. 12, 2009) (hereafter AOBTC, Female Asylum Applicants).

[52] *See* Sarhan, 658 F.3d at 656.

D. Government Inability and Unwillingness to Protect

Persecution must either be by the government or by a non-governmental actor the government is unable or unwilling to control.[53] In some cases, the persecutor will have some connection to the state that should be highlighted.[54] In most domestic violence cases where the persecutor is not the government but rather a spouse, intimate partner, or family member, it is essential to prove that the government is unable or unwilling to control the persecutor in order to meet the required legal standard.[55] The correct test, it should be argued, is whether a State takes measures that reduce the risk of persecution to below the well-founded fear threshold (*i.e.*, 1 in 10 percent chance of persecution).[56] Evidence demonstrating government complicity in the persecution or establishing a pattern of government unresponsiveness to the applicant or others similarly situated would support a finding that state protection is unavailable and not reliable. Although reporting the abuse is not required, evidence that it would have been futile or potentially dangerous to seek protection obviates the need to show that the applicant's requests for help were rebuffed.[57] It would be considered futile to report to the authorities, for example, if they are unlikely to respond or even if they respond, to respond effectively (*e.g.*, if a protective order is issued but then not enforced). And, it would be dangerous to report abuse if it could lead to retaliation from the abuser (without protection). There are also cases where reporting could lead to mistreatment or discrimination by the very authorities there to protect. The *L-R-* is illustrative: when Ms. L-R- sought assistance from a family court, the judge told her he would help only if she had sex with him.

As with social group and nexus, country conditions evidence, including expert testimony, is central to proving lack of state protection. Attorneys should look to the existence of laws against domestic violence and spousal rape, as well as information regarding the enforcement of such laws (since enactment of a law alone is not dispositive of a government's willingness to implement such a law), including prosecution rates for crimes of domestic violence and spousal rape to show the failure of state protection.[58] In many countries where violence against women has culminated in the practice of femicides, evidence of such a pattern should be presented. Practitioners should also seek information regarding other governmental efforts to curb domestic violence – such as governmental services to victims of domestic violence, or campaigns to educate the public about domestic violence. It should be

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[53] *See, e.g.*, Sangha v INS*,* 103 F.3d 1482, 1487 (9th Cir. 1997).

[54] Practitioners should note that the Ninth Circuit long ago rejected the argument that harm perpetrated by a solider did not amount to persecution because it occurred in the context of the "personal" relationship between the solider and his victim. Lazo-Majano v. INS, 813 F.2d 1432, 1435-36 (9th Cir. 1987), *overruled on other grounds by* Fisher v. INS, 79 F.3d 955 (9th Cir. 1996) (*en banc*).

[55] The BIA's decision in A-R-C-G- does not reach the unable/unwilling element and therefore provides no specific guidance for domestic violence cases.

[56] *See* AOBTC, Female Asylum Applicants, *supra* note 51, at 25.

[57] *See, e.g.*, Ngengwe, 543 F.3d 1029 (citing In re S-A-, 22 I. & N. Dec. at 1335).

[58] *See, e.g.*, UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees ¶ 11 (2002).

noted that state protection is a disjunctive test and each prong must be analyzed separately – even if a government has demonstrated *some* willingness to protect, for example, through the enactment of laws and special programs, it may be wholly unable to do so for a variety of reasons, such as lack of resources or lack of will on the part of all law enforcement and justice sector workers to implement the law.[59]

As mentioned elsewhere, CGRS has extensive country conditions packets and research memos on dozens of countries available upon request.

E. Internal Relocation

An applicant does not have a well-founded fear of persecution if she could avoid future harm by relocating to another part of her country of nationality *and* it would be reasonable to expect her to do so.[60] This is a two-part test. For the first half of the test, evidence that a woman attempted to leave but was found by her abuser can establish her inability to safely relocate. Moreover, evidence specific to the abuser's ability to track the applicant (*e.g.*, through familial connections or connections to government officials) would be highly pertinent to an applicant's ability to safely relocate – as would general country conditions information showing that it is difficult to escape detection because, for example, government officials can be bribed for information or localities post address information publicly. The geographic size of the country might also be relevant.[61]

The second half of the test requires that even if relocation is possible, it must be reasonable considering the totality of the circumstances. Attorneys should submit evidence of the applicant's individual circumstances that might make relocation unreasonable (*e.g.*, mental health concerns, employment skills, language barriers, child care responsibilities). Practitioners should also present general information about legal or social restraints in the country that would make relocation unreasonable (*e.g.*, widespread societal discrimination and lack of employment opportunities for women). Additionally, civil or political strife in the country that would make a woman vulnerable outside the protection of her family or community would bear on her ability to relocate. With the proliferation of gang-related violence throughout Central America, for example, relocation may be particularly unsafe or unreasonable for women and girls.

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[59] *See, e.g.*, Garcia v. Att'y Gen., 665 F.3d 496, 503 (3d Cir. 2011); Hassan v. Gonzales, 484 F.3d 513, 519 n.2 (8th Cir. 2007).

[60] *See* 8 C.F.R. § 1208.13(b)(2)(ii).

[61] For example, in *R-A-*, DHS explained that the facts that Ms. Alvarado's abuser had been in the military and had military contacts, and that Guatemala is a small country (smaller than the state of Tennessee) supported a favorable finding in this regard.

F. One-Year Bar

Exceptional circumstances, including, for example, a mental disability that relates to an applicant's delay in filing for asylum, may justify waiving the one-year bar.[62] Victims of domestic violence often suffer from Post-Traumatic Stress Disorder (PTSD), depression, or other psychological disorders, which affect their ability to file for asylum in a timely manner. CGRS strongly advises attorneys to seek an evaluation by a mental health professional to determine whether an applicant suffers from PTSD or some other psychological disorder, which would be relevant to the one-year bar issue and to other aspects of the claim. Attorneys should be sure the mental health professional explicitly addresses how the particular psychological disorder relates to the delay in filing. For example, avoidance is one of the symptoms of PTSD. A client who suffers from PTSD and attempts to avoid any reminder of the trauma she endured would naturally shun the asylum process because it requires sustained, ongoing focus and recollection of the traumatic event(s). Practitioners should also ask mental health professionals to explain how an applicant who suffers from a psychological disorder can manage the functions of daily life, such as holding a job or paying rent, while being unable to seek asylum.

Changed circumstances may also be a valid reason for waiving the one year deadline in domestic violence cases, where, for example, the abuser has renewed contact with or threats against the applicant or applicant's family members, or has recently been deported from the United States to the home country – placing the applicant at risk upon removal. Arguments raised to excuse the bar should be well documented through reports by mental health experts, medical records, affidavits, police reports, and other relevant evidence. CGRS can help attorneys craft arguments that the bar should be waived; we also have helpful materials on the one-year bar to share.

F. Humanitarian Asylum

In order to establish eligibility for asylum, an applicant must show that her fear of future persecution is well-founded. If a woman is found to have suffered past persecution, there is a presumption that her fear is well-founded. The government can rebut the presumption by showing changed circumstances (*e.g.*, the abuser is no longer alive) or reasonable relocation alternatives (discussed *supra*).[63] However, even in cases where the presumption has been rebutted, a grant of humanitarian asylum may be appropriate if the asylum seeker establishes "compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution," or "a reasonable possibility that he or she may suffer other serious harm upon removal to that country."[64] The atrocious nature of the past persecution suffered in domestic violence cases often involving chronic physical, sexual, and psychological abuse as well as the circumstances women may face upon removal to their home country (*e.g.*, ostracism, homelessness, inability to find work, and lack of mental health services) may justify a

[62] We recommend that you consult additional resources mentioned at the beginning of this advisory for a discussion of other potential bars from relief. *See also* Public Counsel, Asylum Manual for Public Counsel's volunteer Attorneys (2012), available at http://www.publiccounsel.org/tools/publications/files/AsylumManual.pdf (last visited Aug. 12, 2014).

[63] *See* 8 C.F.R. § 1208.13(b)(1).

[64] *See* 8 C.F.R. § 1208.13(b)(1)(iii); *see also, e.g.*, Matter of Chen, 20 I. & N. Dec. 16 (BIA 1989); In re S-A-K- and H-A-H-, 24 I. & N. Dec. 464 (BIA 2008).

grant of humanitarian asylum. Indeed, in the *A-R-C-G-* case, the BIA instructed that the immigration judge may consider humanitarian asylum, if reached, signaling that it could be a viable form of relief for a domestic violence victim. The client's personal circumstances, in addition to country conditions evidence, are relevant to establishing the harm she would suffer upon removal.

G. Withholding of Removal

If an applicant is denied asylum, for example, for failure to file within one-year of her arrival, she may still be eligible for withholding of removal.[65] Withholding requires a similar showing to asylum (*e.g.*, persecution, nexus to a protected ground, inability/unwillingness of government to protect), and thus the advice provided above is applicable, but it differs in one key respect – the threshold likelihood of fear. Withholding requires that an applicant establish that it is more likely than not (*i.e.*, a greater than 50% chance) that her life or freedom would be threatened in her country on account of race, religion, nationality, membership in a particular social group, or political opinion. For asylum, an applicant need only show a reasonable likelihood (*i.e.*, a 1 in 10 chance) of persecution.[66] If a withholding applicant has been persecuted in the past, like in an asylum claim, she is entitled to a presumption that her life or freedom would be threatened in the future.[67] If she is not found to have suffered past persecution, she must establish an independent likelihood through personal circumstances as well as country conditions documentation or expert testimony. Unlike asylum, which is a discretionary form of relief, if found eligible for withholding, relief is mandatory.

H. Convention Against Torture (CAT) Protection

Where the facts support such a claim, we encourage attorneys to seek CAT relief as an alternative to the preferable asylum or withholding (for example, if an adjudicator finds that the applicant has not established nexus between her harm and a protected ground). Indeed, we have seen several grants of CAT protection in domestic violence cases. To establish eligibility for CAT relief, an applicant must demonstrate that it is more likely than not that she would be tortured if removed to the proposed country of removal carried out by or at the instigation of or with the consent or acquiescence of public officials.[68]

Abuse associated with domestic violence, including physical and sexual violence often associated with prolonged restriction of movement and psychological abuse, have been determined to rise to the level of torture. Under the statute, even a single, isolated act may suffice to constitute torture,[69] and domestic violence often involves repeated and sometimes escalating abuse over periods of months or years. Moreover, to demonstrate likelihood of future torture, the regulations mandates that

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[65] There may be other bars that apply to asylum that do not apply with respect to withholding, but such bars will not be discussed herein.

[66] *See* INS v. Cardoza, 480 U.S. 421 (1987).

[67] *See* 8 C.F.R. § 1208.16 (b)(1)(i).

[68] *See* 8 C.F.R. § 1208.16(c).

[69] *See* 8 C.F.R. § 1208.18(a)(1).

adjudicators consider *all* evidence relevant to the possibility of future torture, including evidence of past torture and relevant country conditions information, evidence that is generally present in domestic violence cases.

One difficult aspect of establishing eligibility for CAT relief involves the requirement that the torture be inflicted by a government official acting in an official capacity or with the consent or acquiescence of the government. Because domestic violence is typically inflicted by private actors, most cases will need to establish acquiescence by the government. While similar (and sometimes conflated by the courts), the acquiescence test in CAT cases is a separate inquiry from the inability/unwillingness of a government to protect in cases of non-state actors for asylum and withholding cases. Like in the asylum context, failure to report torture is not fatal to a claim because CAT relief does not require actual knowledge on the part of the government – willful blindness is the standard in most jurisdictions.[70] Thus, evidence that the "authorities have been especially slow to end abuses against women or bring perpetrators to justice" and that "[t]here is also very little support for women who have been abused" is relevant to the acquiescence determination, as explained by the Third Circuit.[71] The ineffectiveness of legal protections for women manifests more than individual injustices. Rather, it serves as de facto encouragement for the violence and is tantamount to acquiescence.[72]

III. Conclusion

Because the issue of gender asylum is in flux, we encourage attorneys to be in touch with CGRS regarding questions they might have about developments in the law and how recent developments are being interpreted and applied by lower level adjudicators. We also recommend that attorneys consider joining CGRS's listserv devoted to domestic violence and other gender asylum issues. To join the Gender-Based Asylum listserv, simply send an email to info@cgrs-hastings.org with "Asylum Listserv" in the subject line or body of your email. You can sign up to receive CGRS newsletters as well as information about advocacy campaigns, events and other important updates on our website. Or, you can stay in touch with us on Facebook http://www.facebook.com/cgrs.uchastings.

We hope that this information has proven useful. Remember that specific country conditions packets and expert declarations that may be more tailored to the case at hand are available on our website. We hope that you will continue to keep CGRS apprised about the outcome of your cases and we welcome any feedback regarding our assistance.

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[70] *See, e.g.*, Zheng v. Ashcroft, 332 F.3d 1186, 1194-95 (9th Cir. 2003); Matter of W-G-R-, 26 I. & N. Dec. at 226.

[71] Gomez-Zuluaga, 527 F.3d at 351; *see also* Ali v. Reno, 237 F.3d 591, 598 (6th Cir. 2001) (noting that where "authorities ignore or consent to severe domestic violence, the Convention appears to compel protection for a victim").

[72] *See* CAT General Comment No. 2, ¶ 18 (2007) (interpreting the Convention Against Torture to mean that a government's failure to exercise due diligence to prevent, investigate, prosecute, and punish gender-based violence is tantamount to consent or acquiescence); *see also, e.g.*, Rhonda Copelon, *Gender Violence as Torture: The Contribution of CAT General Comment No. 2*, 11 N.Y. CITY L. REV. 229, 254-57 (2008)

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The Center for Gender & Refugee Studies (CGRS) is a national organization that provides legal expertise, training, and resources to attorneys representing asylum seekers, advocates to protect refugees, advances refugee law and policy, and uses domestic, regional and international human rights mechanisms to address the root causes of persecution.

To request assistance in your asylum claim, go to http://cgrs.uchastings.edu/assistance/.

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