DOMESTIC VIOLENCE-BASED ASYLUM CLAIMS:

CGRS Practice Advisory
Updated December 2016

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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 guiding 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 information provided herein may also be relevant to other gender-related claims, including abuse by in-laws who may also view women as male property, forced relationships, and stalking. 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 research memoranda, expert declarations on relevant conditions in dozens of countries, issue-specific expert declarations, including on domestic violence cross culturally and incest, as well as sample briefs and pleadings, which are 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 support our work at http://cgrs.uchastings.edu/about/get-involved.

General Asylum Overview & Guidance

Asylum is available to persons physically present in the United States who meet the statutory definition of a "refugee," set forth in the Immigration and Nationality Act (INA) and deriving from the United Nations Refugee Convention:[1]

[1] Convention Relating to the Status of Refugees, Geneva, 28 July, 1951, U.N.T.S. vol. 189, No. 2545, *available at* http://www.unhcr.org/3b66c2aa10.html.

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

The basic legal elements of asylum stem from this definition, and can be broken down as follows:

1. Harm or threat of harm rising to the level of persecution (persecutory harm);
2. Persecution in the past, or a likelihood and fear of persecution in the future (past persecution or well-founded fear of future persecution);
3. Link between persecution and protected ground(s) (nexus);
4. Protected ground of race, religion, nationality, membership in a particular social group, or political opinion (protected ground);
5. State action *or* inability or unwillingness of the State to provide protection against persecution by a private individual (failure of state protection); and
6. Absence of statutory bars to asylum and/or withholding of removal (statutory bars).[2]

Applicants who meet these elements must also show they merit asylum as an exercise of discretion.[3]

This advisory assumes a familiarity with basic asylum law principles. For more in-depth information on general asylum law, we recommend that attorneys consult the following recommended sources:

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

ILRC's *Essentials of Asylum Law*
https://www.ilrc.org/publications/essentials-asylum-law

[2] There are two types of "withholding:" withholding of removal under the refugee definition and withholding of removal under the Convention Against Torture (CAT). When using the term "withholding" or "withholding of removal" generally, this advisory refers to the former, relating to the non-return of those who meet the refugee definition. When referring to withholding of removal under CAT, this manual will specify "CAT withholding" or "withholding under CAT."

[3] Because asylum is discretionary, the adjudicator must balance positive and negative factors and evaluate the "totality of the circumstances." *Matter of Pula*, 19 I&N Dec. 467, 473 (B.I.A. 1987). Positive factors include family and community ties in the United States; evidence of good moral character, value, or service to the community; humanitarian considerations including age; and likelihood of future persecution. *Matter of H-*, 21 I&N Dec. 337, 347-48 (B.I.A. 1996).

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

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

Kurzban's *Immigration Law Sourcebook*
https://agora.aila.org/product/detail/2885

I. Background: Domestic Violence Asylum Claims & Current State of U.S. 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 holding that women who flee such persecution may establish membership in a particular social group. ***Matter of A-R-C-G-*** 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 focuses solely on the cognizability of the applicable "particular social group" in these cases and does not touch on all elements of asylum that must be established in these as in all cases, such as nexus and available state protection. This section covers developments in the law leading up to this BIA's 2014 decision. Then, it provides an overview of the *A-R-C-G-* ruling and evolving jurisprudence in its wake.

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.[4] In 1996, the BIA broke new ground, issuing a landmark decision, *Matter of Kasinga*, 21 I&N Dec. 357 (B.I.A. 1996), granting asylum to a Togolese woman who fled her country to escape female genital cutting (FGC).[5] In its decision, the BIA applied the holding of its seminal social group decision, *Matter of Acosta*, 19

[4] 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).

[5] *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.

I&N Dec. 211 (B.I.A. 1985), to find that Ms. Kassindja (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.[6]

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 consideration in line with the recommendations of the United Nations High Commissioner for Refugees (UNHCR).[7]

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 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 (B.I.A. 1999).

The BIA majority did not contest that the abuse Ms. Alvarado suffered was egregious and constituted 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

[6] 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."

[7] 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.

societal faction," and Ms. Alvarado had failed to make that showing.[8] 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.

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.[9] 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.[10] 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.

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[8] 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 distinction" (formerly known as "social visibility") and "particularity" of the groups be established.

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

[10] 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 Jan. 4, 2017).

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.[11]

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 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.[12] 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 had no binding precedential value.[13]

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

[11] 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).

[12] 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).

[13] 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 apply 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 (B.I.A. 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 you should forego filing a motion to reopen where the circumstances so require, but rather, to alert you 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 (B.I.A. 2014).

husband.[14] 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.[15] As discussed below, the BIA has attempted to explain these new standards 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 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."[16] 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.[17] The applicant in the case, Ms. C-G-, a mother of three, suffered what the BIA 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 seek 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.

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[14] DHS's Supplemental Brief, *Matter of L-R-* (B.I.A. Apr. 13, 2009), *available at* http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf (last visited Jan. 4, 2017).

[15] *See Matter of C-A-*, 23 I&N Dec. 951 (B.I.A. 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.

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

[17] 26 I&N Dec. 388.

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 (B.I.A. 2014) and *Matter of W-G-R-*, 26 I&N Dec. 208 (B.I.A. 2014)] clarifying the meaning of the term 'particular social group.'"[18] 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.

The existence of a social group in a particular country must be determined on a case-by-case, record-specific basis. Notwithstanding this principle, the BIA's analysis in *A-R-C-G-* 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 explicit 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.[19]

E. Post-*A-R-C-G-* Jurisprudence: Challenges Remain

The *A-R-C-G-* decision represents a major step forward in gender-based asylum jurisprudence, but challenges remain to ensuring much-needed protections for women facing serious harms in their home countries.

First, as mentioned above, the *A-R-C-G-* holding turned on the cognizability of the social group but did not reach nexus or the government's ability and willingness to control the perpetrator. The decision thus leaves open critical questions such as how a woman can establish the reasons why her abuser harmed her and how adjudicators should evaluate situations where a country has passed special laws to prevent domestic violence but the laws are not adequately enforced. Moreover, *A-R-C-G-* leaves open how claims should be evaluated where the woman was not formally married to her abuser.

Because the *A-R-C-G-* holding was narrow and fact-specific, and the Board has yet to publish any additional rulings expanding on the principles established therein, there has been

[18] *Id.* at 392.

[19] *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 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).

inconsistent and arbitrary application of the precedent in subsequent cases involving violence against women. The following are a few factual scenarios that may not appear to fit as neatly into the *A-R-C-G-* framework, but as this advisory describes, should be able to rely on the principles established in the ruling to demonstrate eligibility for relief:

1. **Unmarried relationships**

   A category of cases that may intersect with the aforementioned one consists of relationships that may lack some of the elements frequently associated with being in a recognized "domestic relationship." For example, you may have clients who were not legally married to their partners but considered them to be common law spouses. Other clients may not have been in long-term relationships or ever lived with their abusers, but by having children with them, created a connection that could not be severed. Oftentimes abusers will threaten to harm children or take them away in order to control their mothers. Even in situations where there are no children, this does not preclude the existence of a relationship. It is important to remember that each case should be assessed on the individualized facts and that what may not constitute "a relationship," that is an immutable status giving men the right to control their partner, in the United States could very well be one in another country.

2. **Cases where the woman left the home she shared with her abuser to escape**

   One of the hallmarks of gender-based persecution is the perpetrator's belief in his absolute right to control the woman. He may use physical violence, psychological abuse, and threats against children or other family members to ensure that the woman cannot escape him. Nevertheless, there are of course circumstances under which women are able to separate from their abusers, at least temporarily. We have seen cases where a woman fled the home and went to live elsewhere – usually with family members – or even was able to obtain a divorce. However, just because they are not living together does not mean that the man has accepted that the relationship is over. In fact, the contrary is frequently true. In many cases, the woman's attempts to leave the man further stoke his resolution to assert his dominance over her, leading to escalating violence, including death.

3. **Forced relationships or stalking scenarios**

   In *A-R-C-G-*, the respondent was in a long-term, marital relationship with her abuser (presumably entered into on the consent of both parties). However, in countries where women and girls are widely viewed as male property and subordinate to men, we have seen cases where a man forces a woman or girl into a "relationship" or perceives a woman or girl as "his" (evidenced by his relentless stalking and attempts to control her) despite her resistance. These types of claim are frequently seen from countries such as Mexico and the Northern Triangle countries in Central America, countries with high rates of gang activity where the dynamics in gang culture reflect heightened patriarchal

attitudes of society at large. You may also encounter cases of forced and early marriage, which occur in countries around the world. The fact that a woman was forced into a relationship, rather than entered into the relationship consensually, does not undermine a claim for protection, but only further highlights the women's inability to end the relationship that exists (since its inception) on the man's terms.

In your view, should a woman in these circumstances qualify for protection? The next section will explore how effective fact-finding and careful crafting of your legal theory can help you make a claim that these cases do in fact fall within the refugee definition.

II. CGRS Guidance

CGRS developed the guidance in this advisory 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 that have come to our attention over the last two decades. This is an area of the law that is still very much evolving. Please check our website or contact us for the most up-to-date information. To inform our broader policy work we encourage you to contact CGRS if the Asylum Office refers a gender-based 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-*.[20]

Because this advisory focuses on domestic violence claims that involve intimate partner violence, it does not address in as much detail 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.

A. Persecution

We note at the outset that this advisory devotes only minimal attention to 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.[21] It is, however, important to

[20] 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.

[21] 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). *But see Santacruz v. Lynch*, No. 15-2102, 2016 WL 7422705 (8th Cir. Dec. 23, 2016) (denying petition to review BIA's decision that the petitioner had failed to

establish the record that the harms, particularly where viewed cumulatively or from the perspective of the applicant (e.g. if she was a child at the time), meet the definition of persecution. [22]

It may be more difficult to establish past persecution in claims involving single or attempted incidents of violence or stalking and threats (i.e., where a relationship has not yet solidified). The First Circuit recently denied a petition to review in a case where the Immigration Court found that a single incident of sexual assault, battery, threats, and attempted rape of a woman did not rise to the level of persecution.[23] Attorneys seeking to argue that harms constitute past persecution where the facts are more on the margin should cite to case law that persecution may include threats and attempted attacks,[24] cumulative harms,[25] psychological harm,[26] and harm to family members or others.[27] The age of the applicant *at the time* she endured the

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establish past persecution, a well-founded fear of future persecution, that the Salvadoran government was unwilling or unable to protect, or that she was a member of the particular social groups of *Salvadoran women in domestic relationships who are unable to leave* or *Salvadoran women who are viewed as property by virtue of their domestic relationships*). Attorneys practicing in the Eighth Circuit should review this decision and seek to distinguish their client's facts as well as to submit ample country conditions evidence supporting nexus and lack of government protection. All 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 recommends that attorneys 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).

[22] The Tenth Circuit recently upheld denial of asylum to a woman on the basis that the harms she suffered did not constitute persecution. *See Sebastian-Juan v. Lynch*, No. 15-9539 (10th Cir. Dec. 6, 2016). The lead applicant in that case suffered years of severe violence at the hands of her in-laws, including virtual slavery as well as repeated physical abuse of her and repeated death threats. She also witnessed her father-in-law beat her daughter, including once breaking her daughter's arm. The Court's opinion does not include a recitation of the facts upon which it based its conclusion that the record does not compel a finding of persecution, and it is unpublished, so it should not serve as a barrier in future cases, but is an important reminder of the importance of carefully building the record for each element of asylum.

[23] *Pineda-Hernandez v. Lynch*, No. 15-1501, 2016 WL 5462084, at *1 (1st Cir. Sept. 29, 2016)

[24] *See, e.g., Madrigal v. Holder*, 716 F.3d 499, 504 (9th Cir. 2013); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074 (9th Cir. 2002); *Meija v. Att'y Gen*., 498 F.3d 1253, 1257 (11th Cir. 2007). *See also* Asylum Officer Basic Training, *Asylum Eligibility Part I: Definition of Refugee; Eligibility Based on Past Persecution*, [Hereinafter AOBT Course], pp. 18-20 deal specifically with assessing when threats rise to the level of persecution. *Available at* https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Definition-Refugee-Persecution-Eligibiity-31aug10.pdf (last visited Jan. 4, 2017).

[25] *See, e.g., Matter of O-Z- and I-Z*, 22 I&N Dec. 23, 26 (B.I.A. 1998); *Krotova v. Gonzales*, 416 F.3d 1080, 1084 (9th Cir. 2005); *Precetaj v. Holder*, 649 F.3d 72 (1st Cir. 2011); *Tomas v. Holder*, 316 F. App'x 510 (7th Cir. 2009).

[26] *See, e.g., Matter of A-K,* 24 I&N Dec 275 (B.I.A. 2007); *Mashiri v. Ashcroft*, 383 F.3d 1112 (9th Cir. 2004). *See also* AOBT Course p. 30.

[27] *See, e.g. Matter of A-K*, 24 I&N Dec 278 (B.I.A. 2007); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000); *Kone v. Holder*, 620 F.3d 760 (7th Cir. 2010). *See also* AOBT Course p. 42.

harms or threats might also be an important factor; the threshold of harm for children is lower than for adults.[28]

In cases where you believe it may be challenging to establish past persecution, it may be more strategic to emphasize the well-founded fear of future persecution. For example, in cases of forced relationships with gang members, the conduct/threats of the gang member may not have yet risen to the level of persecution, but there may be enough facts to make a strong argument that there is a reasonable possibility of a well-founded fear of future persecution if the woman fears being raped, killed, or otherwise seriously harmed.

B. Social Group Claims

1. Analytical Framework

CGRS recommends that you follow the analytical framework for social groups set forth in the BIA's decision *A-R-C-G-*, to the extent the facts support it. 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 the decision provides guidance on the evidence in a particular case that fulfills the requirements of "social distinction" and "particularity," as set forth in the BIA's *M-E-V-G-* and *W-G-R-* decisions.[29] In addition to *A-R-C-G-* and the 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 should UNHCR's excellent guidelines on social group and gender. These documents are all available on our website and through our technical assistance program, and we highly recommend that you 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 (i.e., where a woman is "unable to leave") • A group is socially distinct where perceived as such within society or where treated distinctly within society

[28] CGRS has a separate advisory devoted to children's asylum claims; please consult this advisory or request a copy if you did not receive one. Child-sensitive asylum standards apply even if your client is now an adult, so long as the harms she suffered occurred while she was a child.

[29] 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.

	• Relationship status, including non-marital relationships, 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"	• Persecutors need only act in part because of the protected characteristic • Regardless of the initial reasons for the targeting, nexus can be established if the applicant is later persecuted on account of protected ground • Persecutors need not harm more than one person in the group • Nexus can be determined by direct evidence of the persecutors' 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"	• In past persecution cases, a government's inability or unwillingness can be shown by attempts to obtain protection and lack of an adequate government response; or by country conditions that show reporting would have been futile or potentially dangerous • In fear of future persecution cases, the test is whether the government would take steps that reduce the fear to below the well-founded fear threshold

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 the group. A particular social group, according to the BIA, must (1) be comprised by members who share 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).[30]

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, you should define a social group by reference to those immutable or fundamental characteristics, which are the specific reason(s) the applicant is targeted. But, you should avoid defining the social group by terms that incorporate the harm (e.g., "victims of domestic violence" or "women in

[30] For more details on particular social group cognizability, 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,*" updated January 2016, *available at* http://immigrantjustice.org/sites/immigrantjustice.org/files/PSG%20Practice%20Advisory%20and%20Appendices-Final-1.22.16.pdf (last visited Jan. 4, 2017).

abusive relationships"), as this is **circular** reasoning and is not recognized.[31] 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, and the Board has explicitly and consistently held as much on several occasions (albeit in unpublished opinions).[32] The analysis from *A-R-C-G-* should extend to cases involving women in other sorts of domestic relationships, as explained by the BIA (and also DHS in *L-R-*); if there is no formal marriage, adjudicators should "look to the characteristics of the relationship to determine its nature," including the length of the relationship, whether the couple shares children in common, and whether they cohabitated. So long as those relationships are recognized by the society and susceptible to common definition in the society in question, they can be valid characteristic of the social group.[33] 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 – including relationships where a couple does not cohabitate but shares a child in common – 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.[34]

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[31] 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.

[32] CGRS has been monitoring developments in this area and has on file several opinions by the BIA overturning IJ decisions distinguishing *A-R-C-G-* for lack of a formal marriage. We recommend citing to and submitting these decisions in your pre-hearing briefs to the Immigration Court. If your case is before the BIA or the federal Courts of Appeals, you should also consider citing to them in your briefing. Please contact CGRS and we are happy to consult on development of your arguments on appeal.

[33] *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.

[34] 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 to preserve all issues you 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, you should include the specific formulation of "[Nationality] women in domestic relationships who are unable to leave" (substituting "marriage" for "domestic relationship" where applicable). You may also argue in the alternative, or where "unable to leave" could be difficult to establish, the specific formulation of "[Nationality] women who are viewed as property by virtue of their position in a domestic relationship" (substituting "marriage" for "domestic relationship" 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.[35] 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.[36]

[35] We recommend that attorneys 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 above) in *A-R-C-G-*.

[36] 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.[37] We therefore urge you to advance all formulations of the particular social group at issue that might be supported by the record for the IJ to apply the proper legal standard to the undisputed facts. You might consider leading in your briefing with the group you think is most applicable and supported by the record, but preserve the existence of other groups in a footnote. If your case is before the BIA, and DHS argues that you are improperly arguing a social group not raised below or otherwise challenging a 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 assistance 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, or emailing us at CGRS-TA@uchastings.edu if you have already done so.

a. Immutability

Numerous decisions by the BIA and the Courts of Appeals have recognized gender as defining a particular social group or as one factor in defining a particular social group.[38] Many courts have also coupled gender with race or nationality to define a social group.[39]

The BIA in *A-R-C-G-* 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.[40] Inability of women to leave domestic relationships, like all social group determinations described above, should be considered in two steps – first, does the group exist in society in general (e.g. are there economic, social, physical or other constraints that keep women in relationships) and then next is the applicant a member of the group (i.e., did her circumstances make it impossible for her to leave). According to the BIA, a determination of immutability of

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[37] *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).

[38] In addition to *A-R-C-G-* and *Kasinga* at the BIA level, *see, e.g.*, *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010); *Ngengwe*, 543 F.3d at 1033-35; *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993). *See also infra* note 64.

[39] *See* cases cited *supra* note 35.

[40] As mentioned in note 32 above, the BIA has held in numerous decisions that the principle established in *A-R-C-G-* applies to unmarried women when the relationship is immutable. *See e.g.*, *Matter of X* (B.I.A. Dec. March 15, 2016) (finding that a woman was not able to leave her relationship because "although she lived apart from her boyfriend, he regularly came to her residence to threaten and terrorize her").

relationship status is "dependent upon the particular facts and evidence in a case" including factors such as "whether dissolution . . . 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."[41] When evaluating immutability of relationship status, the BIA continued, "adjudicators must consider a respondent's own experiences, as well as more objective evidence, such as background country information."[42] In subsequent cases, the BIA has further explained that the inquiry must look not only to whether a woman initiates legal termination of a relationship (or leaves the shared home), but whether her husband or partner would recognize a woman's attempts to end the relationship as ending his right to continue the relationship that exist on his terms.[43]

The Board's ruling on inability to leave is consistent with the position taken by DHS in *Matter of L-R-.* In its brief in *L-R-*, DHS took the position that ability to leave is determined not only by looking to a woman's ability to legally terminate a relationship or to leave the shared home, but also by looking to whether her abuser would view any such move as ending his right to abuse and control her, taking into account the societal context that supports those views.[44]

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.[45] The Courts declined to defer to the agency's interpretation, for example, because they found that the added requirements are inconsistent with prior BIA decisions and that the BIA did not provide explanation for its shift.[46] As a result, the Third and Seventh Circuits continued to follow the social group standard set out in *Matter of Acosta*.

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

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

[42] *Id*. at 393.

[43] *See Matter of V-C-* (B.I.A. Dec. Nov. 1, 2016) (on file with CGRS).

[44] DHS Supplemental Br., *Matter of L-R-* at 16 (B.I.A. April 13, 2009).

[45] *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).

[46] 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.

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-*.[47]

Since *M-E-V-G* and *W-G-R,* the Seventh Circuit has published several decisions affirming the *Acosta* definition of particular social group without referencing the social visibility and particularity tests, seemingly indicating that it does not believe them to be binding.[48] The Third Circuit has not issued any precedential decisions, but in a 2015 unpublished decision expressed continued indecision over whether to accept the additional requirements.[49] We recommend that attorneys representing individuals whose claims arise in the Seventh and Third Circuits argue that social distinction and particularity are not required, and prior circuit law upholding the *Acosta* test still applies. 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).[50] And, out of caution until the law is settled, we

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[47] 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://ilw.com/seminars/201008_citation3a.pdf (last visited Jan. 4, 2017).

[48] *See, e.g., Gutierrez v. Lynch*, 834 F.3d 800 (7th Cir. 2016); *N.L.A. v. Holder*, 744 F.3d 425 (7th Cir. 2014).

[49] *See also* 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,*" updated January 2016, at 9, *available at* http://immigrantjustice.org/sites/immigrantjustice.org/files/PSG%20Practice%20Advisory%20and%20Appendices-Final-1.22.16.pdf (last visited Jan. 4, 2017).

[50] 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 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.*, P*erdomo*, 611 F.3d 662. The BIA's hyper focus on the precise definition of a particular

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

The Ninth Circuit had called the validity of the requirements into question in *Henriquez-Rivas v. Holder*[51] but in November 2016 published a decision stating that the BIA's construction of the particularity and social distinction requirements in *M-E-V-G-* and *W-G-R-* is in fact consistent with the statute and therefore entitled to *Chevron* deference.[52] In light of this decision, attorneys practicing in the Ninth Circuit should be prepared to argue that the particular social groups offered in their clients' cases meet the standards for particularity and social distinction.

Social Distinction: The social distinction requirement considers whether a group is "perceived within the given society as a sufficiently distinct group."[53] 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."[54] 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.[55] 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

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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.

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

[52] *Reyes v. Lynch*, No. 14-70686, 2016 WL 6994243 (9th Cir. Nov. 30, 2016). It is possible that counsel in W-G-R- will seek rehearing or petition the Supreme Court to hear the case, so we encourage you to check back for any developments.

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

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

[55] *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'").

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.[56] A woman's individual circumstances might include, for example, unsuccessful past attempts to leave the relationship or seek protection.[57]

The BIA has provided additional guidance since *A-R-C-G-*. In an unpublished decision on file with CGRS, the BIA found the PSG of "El Salvadoran women in domestic relationships who are unable to leave" was distinct in society. In so holding, the BIA relied on country conditions evidence as well as the respondent's testimony "that she knew other women in similar relationships and that it was normal in Salvadoran society to be trapped in bad relationships with no recourse from the police."[58]

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").[59] Although the BIA 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."[60]

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."[61] 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.[62] Note that although

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[56] *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")

[57] Much of this evidence will also be relevant to establishing nexus as well as the government's ability or willingness to prevent the abuse.

[58] *Matter of D-M-R-*, CGRS Database Case, No. 11564 (B.I.A. June 9, 2015).

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

[60] *Id.* at 242.

[61] *Id.* at 239.

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

experience with the police may be useful for establishing boundaries of the group, the BIA did not hold that reporting to the police is 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.

You 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 relationships" (i.e., apart from formal marriage), which thus illustrates 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.

You 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.[63] Moreover, it violates the principle of *ejusdem 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), especially where ample general country conditions documentation does not exist. 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 through our technical assistance program. As stated, CGRS is available to help with defining the social group and identifying country conditions to establish the social distinction and particularity of the group in the given society.

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[63] *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 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 (B.I.A. 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").

c. Cognizability of PSGs where facts deviate from those in *A-R-C-G-*

Returning to the scenarios laid out earlier in this document and applying the preceding analysis on defining the social group, this section demonstrates how to formulate cognizable PSGs for gender-based violence claims when the facts do not as closely mirror those in *A-R-C-G-*.

1. Unmarried relationships

Following *A-R-C-G-,* as mentioned above at page 16, the BIA has held repeatedly that relief does not require that a woman seeking asylum on the basis of domestic violence have been married to her abuser. Rather, the Board instructs that adjudicators should "look to the characteristics of the relationship to determine its nature."[64] In fact, this is consistent with the DHS's own position in the *L-R-* case where the government argued that women in "domestic relationships" other than marriage could proffer viable social groups.[65] However, because the BIA has not published a precedent decision on this issue, there continue to be judges who insist that *A-R-C-G-* does not apply even in cases where women were in long-standing relationships with their abusers, had children together, lived together, and considered themselves to be common-law husband and wife. You should continue to argue that *A-R-C-G-* does not require the existence of a formal marriage; the relevant analysis is of the existence and nature of the relationship and whether it is immutable and recognized by society.

The BIA emphasized in *A-R-C-G-* that the cognizability of a particular social group must be evaluated on a case-by-case basis according to the specific evidence presented.[66] Attorneys whose clients were not married to their abusers, who did not live with their abusers, or who were in a shorter-term relationship should use country conditions evidence and direct evidence of the abuser's words or behaviors to demonstrate that a relationship did exist from the perspective of the abuser and the woman was unable to leave the relationship because her abuser would not let her go – and thus that the relationship was immutable. It will be critical to demonstrate through country

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[64] *Matter of D-M-R-*, CGRS Database Case, No. 11564 (B.I.A. June 9, 2015). *See also Matter of E-M-*, CGRS Database Case, No. 11541 (B.I.A. Feb. 18, 2015) (holding "[a]lthough the legal restraints of divorce and separation may not apply to someone in a long-term, but not necessarily legally formalized relationship, such as that of the [asylum seeker in that case] and her former partner, the absence of a legal marriage is not *ipso facto* a distinguishing factor that precludes otherwise analogous claims under the particular social group rationale set forth in *Matter of A-R-C-G*").

[65] There, DHS argued that "Mexican women in domestic relationships who are unable to leave" or "Mexican women who are viewed as property by virtue of their positions within the relationship" could meet the social group standard. DHS's Supplemental Brief, *supra* note 13.

[66] *A-R-C-G-*, *supra* note 16 at 392 ("any claim regarding the existence of a particular social group in a country must be evaluated in the context of the evidence presented regarding the particular circumstances in the country in question").

conditions, expert testimony, and statements by the client that the relationship is a type viewed as both socially distinct and particular by the society in question. After establishing that the particular social group exists, you should not neglect to engage in the next step of providing evidence that your client is in fact a member of this group.

Notably, the First Circuit recently denied a petition for review in a case, *Vega-Ayala v. Lynch*, in which the petitioner was in a relationship with her abuser for eighteen months but never lived with him, upholding the agency finding that she had failed to show her social group was defined by immutable characteristics and had social distinction. The asylum seeker in *Vega-Ayala* had a daughter with her abuser after he raped her. He was incarcerated on an unrelated charge and called the petitioner daily to threaten her. The Court distinguished this case from *A-R-C-G-*, stating the "facts are a far cry from the circumstances in *A-R-C-G-*. Vega-Ayala could have left Hernandez. She never lived with him. She saw him only twice a week and continued to attend a university. She chose to live in a home that he purchased in her name while he was in jail. Their relationship spanned only eighteen months, and he was incarcerated for twelve of those months."[67] The Court rejected the particular social group of "Salvadoran women in intimate relationships with partners who view them as property." In our view, this case was wrongly decided on the facts. The petitioner had a child with her abuser – a product of rape – and he called to threaten her from jail every day. After the petitioner fled to the United States, her abuser contacted her there and also threatened her mother back at home. It seems clear that, from the perspective of the abuser, there was indeed an immutable relationship in existence. Nevertheless, given the Court's decision in *Vega-Ayala*, attorneys in the First Circuit should both seek to distinguish the facts of their cases while arguing that whether a particular social group is cognizable and an applicant is a member of the group are inquiries that must be conducted independently in each case based on the evidence included in the record.

2. Women who have left the home or gone into hiding

One element of the *A-R-C-G-* decision that has caused confusion is what "unable to leave" means in the context of cases involving violence against women.[68] Some adjudicators have found that women who obtained a divorce or who moved out of the home were able to leave the relationship, even if they continued to be threatened, stalked, or otherwise victimized by their abusers. For example, a recent Sixth Circuit decision upheld the IJ's determination that the petitioner was not a member of a cognizable PSG because she "failed to substantiate any religious, cultural or legal

[67] *Vega–Ayala v. Lynch*, 833 F.3d 34, 39 (1st Cir. 2016).

[68] For more on this issue, *see* National Immigrant Women's Advocacy Project, Inc. et al, Amicus Curiae Brief, 2016, *available at* http://immigrantjustice.org/sites/immigrantjustice.org/files/Unable%20to%20Leave%20Amicus%20Brief-5COA-2016_0.pdf (last visited Jan. 4, 2017).

constraints that prevented her from separating from the relationship in Zimbabwe or moving to a different part of that country." The BIA had distinguished from *A-R-C-G-* saying that: "(1) when Marikasi went into hiding with the Musasa Project [a program for battered women, presumably with a shelter], she did not have any contact with her husband; (2) after she left the Musasa Project, she stayed with friends and never returned to her husband; (3) a substantial period of time had passed since Marikasi went into hiding and she remained out of contact with her husband; and (4) she remained out of contact with her husband after leaving Zimbabwe."[69]

In fact, all women applying for asylum or other forms of relief have managed to leave the home by coming to the United States in an effort to get away from their abusers, and many women had left the shared home in the home country for some period before fleeing. But, this does not mean that they were able to leave the relationship.[70] The relevant question is not whether the applicant is still living with her abuser but whether the abuser has accepted that the relationship is over.[71] The determination requires the adjudicator to factor in societal and cultural constraints, well documented domestic violence dynamics, up to date research on the use and effect on the victim of coercive control tactics, as well as the abuser's beliefs, particularly whether the abuser recognizes divorce or other forms of separation as ending his right to abuse the victim. In fact, research has shown that an abusive man may retaliate with even more violence after the woman tries to leave him because she has tried to escape his control and thwart his male-dominated world view.[72] As with the evaluation of whether a particular

[69] *Marikasi v. Lynch*, 840 F.3d 281, 291 (6th Cir. 2016)

[70] While it should be fairly obvious that the fact that a domestic violence victim traveled to the United States cannot prevent a victim from establishing that she was "unable to leave" her relationship, some immigration judges have considered that fact when analyzing social group membership, ignoring evidence that an abuser would not recognize her leaving as stopping his right to control. For example, in a case following *Matter of A-R-C-G-*, an immigration judge expressed confusion regarding what it means for a woman to be able to leave a relationship because "by a very definition of her being here [the United States], [the applicant in *A-R-C-G-*] was able to leave the relationship." CGRS Database Case, No. 13570 (Immigration J. Dec. Nov. 9, 2015); *see also* CGRS Database Case, No. 7186 (Immigration J. Dec. May 20, 2010) (finding that the applicant was "able to leave" her relationship because she had left her husband before, including her flight to the United States); CGRS Database Case, No. 6649 (Immigration J. Dec. Sept. 15, 2009) (finding that the applicant's status in a domestic relationship with the father of her children was not immutable because she "did eventually leave [her abuser]" to flee to the United States, which "terminat[ed] the relationship"). Were this the case, no domestic violence survivor could be a member of the particular social group recognized in *A-R-C-G-*, including the respondent in *A-R-C-G-* herself.

[71] The Ninth Circuit recently granted a petition for review in the case of a Honduran woman saying the BIA's determination that the asylum seeker was able to leave her relationship was not supported by substantial evidence where – even after she attempted to leave her abuser's home and resisted his attempts to reconcile – he "continued to abuse and control" her, beating her when he found out she had reported to the police, following her when she came home from work and demanding reconciliation, and enlisting his gang to threaten her into returning. *See Alvarado-Garcia*, No. 15-71138 (9th Cir. Nov. 16, 2016) (on file with CGRS).

[72] *See* Section D, "Post-Separation Abuse and Impact on Ability of Women to Leave Abusive Relationships," Expert Affidavit of Nancy Lemon, on file with CGRS.

social group is cognizable, the BIA emphasized in *A-R-C-G-* that whether a woman is able to leave a relationship is fact-specific and should take into account the applicant's own experiences as well as country conditions evidence.[73]

We have advocated for the BIA to publish a precedent decision on this issue as well, as it would go a long way towards resolving ongoing inconsistencies in decision making.

3. Forced relationships or stalking scenarios

The social group argued in forced relationship cases *may* be formulated differently from claims where a woman is married to, cohabitates, or has children with her partner. You should consider particular social groups such as "[nationality] women viewed as property." Furthermore, the *A-R-C-G-* formulation may still be applicable if, for example, 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, and in his view (and that of society) a relationship has formed.[74] Even where the relationship is not consensual, as in the case of *L-R-* where the applicant had been raped and kidnapped by the man who later became the father of her children, it can 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.[75]

The man's belief that the woman 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). The foundation of the particular social group in these types of cases might be "nationality X women unable to leave the relationship," with more tailored language according to the facts of the case. For example, for a case involving a forced relationship with a gang member, the social group might be "nationality X women unable to leave relationships with gang members."

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[73] *See Matter of V-C-* (B.I.A. Dec. Nov. 1, 2016) (on file with CGRS).

[74] 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 moved out of a shared home with 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.

[75] *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).

This same type of analysis would also apply to situations where a woman was the victim of stalking.[76] Even though she never believed herself to be in a relationship with her stalker, from his perspective, she "belonged" to him. Depending on the facts, it may also be possible to present the client as an imputed member of a particular social group. Please contact CGRS to discuss the specific facts of your case and which social group (or other potential protected ground discussed in the following section) might be the most applicable.

C. Other Protected Grounds

Gender cases may arise under any of the other asylum grounds: race, nationality, religion, or political opinion (actual or imputed).[77]

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. Abusers might also escalate violence when a woman expresses her views on birth control and family planning. You might argue that the applicant's actual or imputed political opinion is feminism, the right to bodily autonomy or self-determination, or opposition to male dominance (or some combination or iteration of these beliefs).[78] Successfully arguing a political opinion claim requires you to show (1) that the applicant has a political opinion, either real or imputed; and (2) that the persecutor targets the applicant due to such opinion.[79] As with particular social group nexus, these two elements may be established by either direct or circumstantial evidence.[80] Direct evidence

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[76] Bear in mind though that threats and stalking may not be sufficient to rise to the level of past persecution. Depending on the facts of the case, consider arguing past persecution and/or an independent well-founded fear of future persecution if it can be demonstrated that there is a reasonable possibility that the stalker will cause the woman serious harm.

[77] Note that other grounds do not appear to have been raised by the applicant in the *A-R-C-G-* case and thus were not addressed by the BIA in this context.

[78] *See* Asylum Officer Basic Training Course, "Female Asylum Applicants and Gender-Related Claims, March 12, 2009, 27-29, *available at* https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf (discussing gender-based political opinion claims such as "expressions of independence from male social and cultural dominance in society, feminism, and imputed political opinion based on violation of social norms) (last visited Jan. 4, 2017).

[79] An imputed political opinion describes a situation "where one is erroneously thought to hold particular political opinions" and is persecuted out of that erroneous belief. *In re S-P-*, 21 I&N Dec. 486, 489 (B.I.A. 1996). *See also Espinoza-Cortez*, 607 F.3d 101, 108 (3d Cir. 2010) (reviewing circuit court decisions accepting the concept of an imputed political opinion).

[80] *Elias-Zacarias*, 502 U.S. at 816-17 ("Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial.").

includes statements by the persecutors that explain the reason for the persecution. As there is no "requirement that persecutors recite a bill of particulars while they are holding a gun to someone's head," circumstantial evidence may also establish a valid political opinion claim.[81] You may also include 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 and any resulting increase in violence by the abuser. Circumstantial evidence that may support a political opinion asylum claim includes country conditions and other documentation of the underlying social context that encourages harm of women who speak their mind.

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.[82]

Claims involving violence against women may also involve persecution on account of race or nationality. For example, indigenous women may be subject to abuse in part because their culture normalizes violence against women and embraces patriarchal attitudes about male superiority. They may be even more vulnerable to abuse if government authorities are unlikely to provide protection to indigenous persons, giving the abusers even more confidence that they can commit violence with impunity. In this scenario, the victim is persecuted on account of her race/nationality, which may be by someone of the same race/nationality or not. For example, an indigenous woman who has darker skin may face race-based persecution from a partner who may also be indigenous. As always, attorneys arguing persecution on account of membership in an indigenous group should submit country conditions evidence of the indigenous culture[83] as well as direct evidence of the persecutor's motivations.

More than one enumerated ground may be applicable in some cases. CGRS recommends that you raise all available grounds where the evidence supports them. As a matter of strategy, you may choose to lead with the strongest ground and include others as alternative arguments but the record should be developed as to all counts to preserve the issues for appeal.

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[81] *Escobar v. Holder*, 657 F.3d 537, 549 (7th Cir. 2011). For additional discussion of direct and circumstantial evidence, see *supra* Part A(iii).

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

[83] *See, e.g.,* Declaration of Linda B. Green, Expert on Violence Against Indigenous Women in Guatemala, available on file with CGRS.

D. 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.[84] Under this standard, the reasons for persecution may be mixed, including protected and non-protected bases.[85] Nexus can be established through the submission of direct or circumstantial evidence.[86]

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, accepting the parties' stipulation on the issue. In subsequent unpublished decisions, the BIA has looked to societal context that subordinates women as evidence of nexus, that the PSG was one central reason for the persecution.[87]

The 2004 and 2009 DHS briefs in *R-A-* and *L-R-* provide further guidance on how to establish the nexus element in domestic violence cases that is still relevant. Direct evidence of the persecutor's motives could include 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.[88] 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

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

[85] *See, e.g.*, *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (B.I.A. 2007).

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

[87] *See, e.g.,* Matter of D-M-R-, CGRS Database Case, No. 11564 (B.I.A. June 9, 2015).

[88] *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).

within a domestic relationship is acceptable and may be one central reason for persecution. We recommend that you 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 (and the unpublished BIA case mentioned above is also instructive).[89]

CGRS has on file a declaration written by domestic violence expert Nancy Lemon, a member of the UC Berkeley Law School faculty, which, among other things, spells out the central role played by gender and status in a domestic relationship in the motivation of battering and abuse, by both intimate partners and in-laws. The declaration also debunks the common misconception that alcohol and other substance abuse drive domestic violence. And it discusses the phenomenon of separation assault, explaining how a woman's attempt to leave her abuser can be the impetus for increased violence. The declaration is available upon request through our technical assistance program and may be submitted as evidence in Immigration Court.

For political opinion claims, you 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 you 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.

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

E. Government Inability or Unwillingness to Protect

Persecution must either be by the government or by a non-governmental actor the government is unable or unwilling to control.[90] In some cases, the persecutor will have some connection to the state that should be highlighted.[91] In most domestic violence cases where the persecutor is a spouse, intimate partner, or family member with no state tie, it is essential to prove that the government is unable or unwilling to control the persecutor in order to meet the required legal standard.[92]

For cases based on past harm, applicants must show that the government had been unable or unwilling to protect them in order to establish past persecution. Relevant evidence will demonstrate what steps the government took (or did not take) to control the persecutor if the applicant reported the abuse. However, 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.[93] 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-* case 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. Evidence of how police have treated other women in similar circumstances is also relevant to demonstrating the government's unwillingness or inability to protect the applicant. This evidence may be comprised of country conditions documentation as well as testimony from the applicant about other women she knew who have reported crimes to the authorities and what action was or was not taken.[94]

In cases that turn on a well-founded fear of future persecution, the correct test is whether a State takes measures that reduce the risk of persecution to below the well-founded fear

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

[91] 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*).

[92] 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.

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

[94] *See, e.g., Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010); *Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010).

threshold (i.e., 1 in 10 percent chance of persecution).[95] 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.

As with social group and nexus, country conditions evidence, including expert testimony, is central to proving lack of state protection. You 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.[96] 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 noted that state protection is a disjunctive test and each prong must be analyzed separately. Which is to say, 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.[97]

As mentioned elsewhere, CGRS has extensive country conditions research memos on dozens of countries (which include information on local domestic violence related laws) available upon request.

F. 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.[98] 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, connections to government officials, or country-wide gang networks in cases involving gang members) 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

[95] *See* AOBTC, Female Asylum Applicants, *supra* note 88, at 25.

[96] *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).

[97] *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); *Canahui v. Lynch,* 642 F. App'x 745 (9th Cir. 2016).

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

because, for example, government officials can be bribed for information or localities post address information publicly. It can also be helpful to find documentation of any internal registry requirements, databases, mandatory registration for children to attend school, and other systems that would make it easy to track someone down in the country. In some countries, women are unable to travel without male protection. In addition, if an abuser has ties to organized crime that operate throughout the country, this can also be relevant to safe relocation. The geographic size of the country might also be relevant.[99]

The second half of the test requires that even if relocation is possible, it must be reasonable considering the totality of the circumstances. You should submit evidence of the applicant's individual circumstances that might make relocation unreasonable (*e.g.*, age, mental health concerns, employment skills, language barriers, child care responsibilities). It may be unreasonable to expect applicants to live apart from their families in cases where they rely on family for financial support, child care, or housing. The Ninth Circuit has pointed out that it is not only unreasonable but also "exceptionally harsh" to expect asylum applicants to start their lives over in a new town with no property, family, or home, and with the prospect of great difficulty finding employment.[100] 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 or women living alone with children). 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.

G. One-Year Bar

Under INA § 208(a)(2)(B), an application for asylum must be filed within one year of an applicant's arrival in the United States.[101] An applicant may qualify for an exception to the one-year bar if she can demonstrate either (1) "changed circumstances" materially affecting her eligibility for asylum, or (2) "extraordinary circumstances" relating to her delay in filing. The individual must apply within a "reasonable period" after such circumstances.

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[99] 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.

[100] *Knezevic v. Ashcroft,* 367 F.3d 1206, 1214 (9th Cir. 2004)

[101] As of September 2016, applications for asylum may be filed at the window or by mail for applicants in removal proceedings rather than being required to be filed at a master calendar hearing. Applications filed at the window or by mail will be considered filed on the date of receipt for the purposes of the one-year filing deadline. *See* EOIR, Operating Policies and Procedures Memorandum: Filing Applications for Asylum, September 16, 2016, *available at* https://www.justice.gov/sites/default/files/pages/attachments/2016/09/14/oppm_16-01.pdf (last visited Jan. 4, 2017).

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.[102] 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 recommends that you 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 (such as corroborating persecution and its severity and shedding light on credibility). You 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 you craft arguments that the bar should be waived; we also have helpful materials on the one-year bar to share.

H. 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*).[103] 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

[102] 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 Jan. 4, 2017).

[103] *See* 8 C.F.R. § 1208.13(b)(1).

serious harm upon removal to that country."[104] 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 atrocious nature of the past persecution suffered in domestic violence cases often involving chronic physical, sexual, and psychological abuse may justify a grant of humanitarian asylum.[105] In arguing for humanitarian asylum based on the severity of the past persecution, you should emphasize factors including the duration of the persecution, age at the time of persecution, persecution of family members, ongoing medical or psychological issues resulting from the persecution, and the effect on the applicant if she is returned to her country of origin.[106] A psychological evaluation or other forensic medical evaluation may provide evidence of severity.

Domestic violence survivors may also be eligible for humanitarian asylum based on the reasonable possibility of other serious harm that women may face upon removal to their home country (*e.g.*, rife gang violence, ostracism, homelessness, inability to find work, and lack of mental health services). The BIA has explained that "other serious harm" need not be inflicted on account of a protected characteristic for asylum purposes, but that it must "equal the severity of persecution" and that it may include "civil strife, extreme economic deprivation beyond economic disadvantage, or situations where the claimant could experience severe mental or emotional harm or physical injury."[107] The client's personal circumstances, in addition to country conditions evidence, are relevant to establishing the harm she would suffer upon removal. The other serious harm in the case of humanitarian asylum need not have a nexus to one of the five protected grounds.[108]

I. Additional Strategic Considerations

In light of the BIA's precedential decision in *A-R-C-G-* (and its decisions in *M-E-V-G-* and *W-G-R-*), DHS has been willing to cooperate with attorneys representing applicants with domestic violence claims pending at the BIA under the Obama Administration. For example, where a case was granted by the IJ but DHS appealed based on social group and/or nexus, DHS has withdrawn its appeal. Or, where a case was denied by the IJ based on social group and/or

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

[105] *See Matter of Chen*, 20 I&N Dec. 16 (B.I.A. 1989) (requiring "more than the usual amount of ill-treatment" for a grant of humanitarian asylum based on severity of past persecution). *See also Matter of L-S-,* 25 I&N Dec. 705, 715 (B.I.A. 2012) (explaining relevant considerations for assessing severity).

[106] Although relevant, ongoing disability is not required to meet the severity standard. *See Lal v. INS*, 255 F.3d 998, 1003 (9th Cir. 2001), *as amended by* 268 F.3d 1148 (9th Cir. 2001).

[107] *Matter of L-S-*, 225 I&N Dec. 705 (B.I.A. 2012).

[108] *Id.*

nexus, DHS has joined the applicant in a motion to remand to the IJ for submission of additional evidence and argument. In some cases, DHS has even been willing to stipulate to a grant of asylum and jointly filed a motion to remand for entry of a stipulated order granting asylum. Attorneys have successfully sought leave to file a supplemental brief on the impact of *A-R-C-G-* on the case before the BIA even where DHS did not join. 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.[109] Courts of Appeals have also remanded cases to the BIA where the IJ/BIA denied on failure to establish a cognizable social group in light of the intervening precedents issued after the agency's initial denial.[110] Please contact CGRS if you would like to discuss case strategy further or to report an outcome in your case – we are monitoring application of *A-R-C-G-* by the BIA as well as DHS's position in light of the decision.

DHS trial attorneys under the Obama Administration have also been 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 should apply more broadly to gender-based cases. As mentioned, we have practice advisories specific to other gender-based claims. Please contact CGRS if you would like to discuss strategy for working with DHS, and this will be an evolving conversation as the new Administration takes office.[111]

J. 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.[112] Withholding requires a similar showing to

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[109] *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 (B.I.A. Dec. 2009) (remanding to provide opportunity for applicant to submit application for asylum and withholding of removal in light of vacatur of *R-A-*); *Matter of X*, CGRS Database Case, No. 9002 (B.I.A. Feb. 8, 2016) (remanding to consider whether proposed social groups of "Salvadoran women who are unable to leave their domestic relationship" and "Salvadoran women who are treated like property within a domestic relationship" are cognizable following the publication of *A-R-C-G-*).

[110] *See, e.g.*, *Paloka v. Holder*, 762 F.3d 191, 2014 WL 3865992 (2d Cir. Aug. 7, 2014); *Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014).

[111] As a starting point, you may want to reference a document produced by a number of immigrant rights organizations, including CGRS, "Post-Election Q&A for Advocates and Attorneys Serving Immigrant Survivors of Gender-based Violence," last updated November 29, 2016, *available at* http://nationallatinonetwork.org/images/Survivor-Safety-and-Immigration-Policy.pdf (last visited Jan. 4, 2017).

[112] 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. If your case involves reinstatement of removal, CGRS has additional resources for

asylum (*e.g.*, persecution, nexus to a protected ground, inability/unwillingness of government to protect), and thus the guidance provided above is applicable. But, withholding differs in key respects from asylum: (1) withholding cannot be granted on the basis of past harm alone (i.e., humanitarian asylum);[113] (2) withholding requires that the likelihood of harm be a clear probability (i.e. more than 50% chance) whereas asylum requires only that the fear be a reasonable possibility (i.e. 10% chance);[114] and 3) once an individual meets the legal standard for withholding and establishes that none of the statutory bars apply, relief is mandatory, rather than discretionary.

K. Convention Against Torture (CAT) Protection

Where the facts support such a claim, we encourage you to seek CAT relief as an alternative to the preferable asylum or statutory withholding described in the previous section (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.[115]

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,[116] 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 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

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challenging the reinstatement order or strategies for preserving asylum eligibility for any futures changes in the law.

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

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

[115] *See* 8 C.F.R. § 1208.16(c).

[116] *See* 8 C.F.R. § 1208.18(a)(1).

asylum and withholding cases, though related in many respects. 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.[117] 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.[118] Applicants must show through country conditions that the ineffectiveness of legal protections for women in the home country manifests more than individual injustices. Rather, the lack of an adequate government response often due to pervasive institutional bias and discrimination against women in the justice system serves as de facto encouragement for the violence and is tantamount to acquiescence.[119]

L. Considerations for Women Applying with their Children in the United States

In light of the increase of women applying for asylum with their children since 2014, this section includes some brief notes on asylum claims of children. Often children will be included as derivatives on their mothers' applications. However, it is important to keep in mind that children may have their own, independent claims that should be explored depending on the circumstances of the case including, for example, the strength of the mother's case. In many cases, the children of women who are fleeing domestic violence have also themselves been victimized by the same abuser.[120]

In children's cases raising domestic violence, you should consider particular social groups analogous to that presented in *A-R-C-G-* such as "X Nationality children who are unable to leave the parent-child (or familial) relationship," or the group "X Nationality children viewed as property by virtue of their position in a familial relationship."[121] These formulations contain the immutable characteristics of nationality, age, and family ties. Other possible groups include "children of X Nationality women who are unable to leave the marriage/domestic relationship,"

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[117] *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.

[118] *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").

[119] *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)

[120] CGRS published a Children's Asylum Manual in April 2016 that covers these issues in greater depth. Please contact us for a copy.

[121] *See Ming Li Hui v. Holder*, 769 F.3d 984 (8th Cir. 2014).

"stepchildren of X," or "children of [mother]" depending on facts presented in the case.[122] In order to satisfy social distinction and particularity, it will be useful to submit evidence demonstrating that children in the relevant country are viewed and treated in a certain manner that leads abusers to believe they can persecute them with impunity. You should identify country conditions research or direct evidence that demonstrates children are viewed as property or as subordinate to adults in the country of feared persecution. As with all particular social group formulations, take into account the specific facts of your case. For example, if the perpetrator is an adult male, you might look for country conditions evidence that demonstrate that deep-seated patriarchal attitudes contribute to a society in which it is accepted that men have the right to abuse the women and children in their homes.[123]

In many instances, women also suffered child abuse before entering the abusive partnership, which can be additional persecution to include in their asylum applications. Inclusion of the child abuse not only paints a full picture of the asylum seeker's past harms, but it can be especially important in cases where a woman may no longer have a well-founded fear on the basis of domestic violence. In those cases, even if the government can show changed circumstances that rebut a well-founded fear of persecution (e.g., because their abusive partner and persecutor caregiver have passed away), the child abuse may have been severe enough to warrant a grant of humanitarian asylum (see *supra* Section F and note 120).

M. I-730 Derivative Issues

Asylum beneficiaries are entitled to bring their unmarried children under the age of 21 to the United States as derivative asylees. However, obtaining travel documents and/or permission for children to leave their country can pose a serious hurdle in reuniting families in asylum cases where consent of both parents is required but difficult or dangerous to obtain. In cases of domestic violence, abusive partners may be unwilling to provide consent for children to travel or they may no longer be in contact with the family.

CGRS reached out to attorneys throughout the country to try and learn if or how they have addressed this issue to successfully bring children to the United States as derivative beneficiaries. Although these efforts have revealed that there is no single assured method, some themes emerged among success stories.[124] If you have particular success stories or strategies that you believe would be of help to other attorneys, we would be grateful to hear of them. And please reach out to CGRS if you would like to discuss the particular facts of your client's circumstances.

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[122] Please refer to CGRS's Children's Asylum Manual, *supra* note 120, for further information and possible legal grounds in children's cases raising domestic violence.

[123] For a more in-depth analysis of how *A-R-C-G-* can be applied to child abuse claims, *see* Sarah M. Winfield, *In Re A-R-C-G-: A Game-Changer for Children Seeking Asylum on the Basis of Intrafamilial Violence*, 67 Hastings L.J. 1153 (2016).

[124] *See* Lisa Vollendorf Martin, *Reconsidering Dual Consent*, 82 UMKC L. Rev. 705 (2014), *available at* http://scholarship.law.edu/cgi/viewcontent.cgi?article=1837&context=scholar (last visited Jan. 4, 2017).

- Be creative and flexible. Each case we learned of and each method of success was different. This problem can emerge during any stage of the procedural timeline and what works with one office or official may not work with another.

- Address the problem before it arises. Many attorneys have found that a well-written cover letter with attached documentation of the reason why joint consent is unobtainable will result in waivers, formal and informal, of documentation requirements.

- Utilize local resources. A local family law attorney in the asylee's country of origin may be able to assist in obtaining sole custody for your client, which may make joint parental consent unnecessary.

III. Conclusion

Because the issue of gender asylum is in flux, we encourage you to be in touch with CGRS regarding questions you might have about developments in the law and how recent developments are being interpreted and applied by lower level adjudicators. We also recommend that you consider joining CGRS's listserv devoted to domestic violence- and other gender-based asylum issues. To join the Gender-Based Asylum listserv, simply send an email to info@cgrs-hastings.org with "Gender 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 research memos and expert declarations that may be more tailored to the case at hand are available on submission of a case request through our online portal. 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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