UNIVERSITY OF CONNECTICUT
1881

# DOMESTIC VIOLENCE AND AMERICAN ASYLUM LAW: THE COMPLICATED AND CONVOLUTED ROAD POST *MATTER OF A-R-C-G-*

*Lauren N. Kostes*[*]

*Abstract*

*The United States grants asylum to applicants who can demonstrate they meet the definition of a "refugee," based primarily on the 1951 Convention on the Status of Refugees. The definition has not been substantively updated since 1951 and does not easily apply to domestic violence victims who are seeking asylum. Generally, such victims need to show that the persecution they fear is on account of their membership in a particular social group, a showing that is made more difficult by a series of Board of Immigration Appeals' decisions that set forth complex requirements for social group claims. Even with the BIA's momentous 2014 decision,* Matter of A-R-C-G-, *which approved a possible social group for domestic violence victims, these applicants still have significant legal hurdles they must face to demonstrate they meet the convoluted definition of "membership in a particular social group." Instead of following the circular definition the BIA adopted, a better formulation for domestic violence-based asylum claims is a social group defined by the applicant's gender and nationality which would allow for a social group on behalf of gender and nationality, which more accurately explains why these women are being persecuted and why the government is unable or unwilling to protect them.*

---

* University of Connecticut School of Law, J.D., May 2015. Thank you to Professor Jon Bauer for your support, edits, and advice on this note. Thank to you to all members of CJIL for their editing, particularly to Jade Baldwin. Finally, thank you to my family for their unwavering support of me during the writing of this note and always.

CONNECTICUT
JOURNAL
OF INTERNATIONAL LAW

TABLE OF CONTENTS

INTRODUCTION 213

I. THE HISTORY OF INTERNATIONAL ASYLUM LAW 213

II. ASYLUM LAW IN THE UNITED STATES 216
A. ADDED BURDENS FOR ASYLUM SEEKERS 217

III. CRITERIA REQUIRED FOR ASYLUM: OVERVIEW 220

IV. THE PERSECUTION REQUIREMENT 220

V. GOVERNMENT IS UNWILLING OR UNABLE TO CONTROL THE PRIVATE PARTY 222

VI. THE NEXUS REQUIREMENT—"ON ACCOUNT OF" ENUMERATED GROUPS 223
A. POLITICAL OPINION 224
B. MEMBERSHIP IN A PARTICULAR SOCIAL GROUP 225
1. *MATTER OF R-A-* AND THE FAILURE TO SHOW A NEXUS IN DOMESTIC VIOLENCE CLAIMS 226
2. *MATTER OF L-R-* AND THE BEGINNING OF RECOGNIZING DOMESTIC VIOLENCE AS A SOCIAL GROUP 228
3. *MATTER OF A-R-C-G-*: A PRECEDENTIAL DECISION REGARDING A PARTICULAR SOCIAL GROUP 230
4. THE BETTER FORMULATION: A "GENDER-PLUS" SOCIAL GROUP 231

VII. PRESUMPTION OF A WELL-FOUNDED FEAR 235
A. FUNDAMENTAL CHANGE IN CIRCUMSTANCES 235
B. RELOCATION 236

VIII. HUMANITARIAN ASYLUM 237

IX. CONCLUSION 238

## INTRODUCTION

After World War II, the international guilt and horror at what happened during Hitler's reign led to the creation of an international refugee regime, starting with the 1951 Convention Relating to the Status of Refugees. The United States later followed suit and created a legal system to grant asylum for individuals who met the "refugee" standard laid out in the Convention. The definition of a refugee has not substantively been updated since 1951, and due to that, women who were victims of domestic violence were often left without recourse in the American asylum system because their claims did not fit neatly into the requirements for refugee status that were created in an extremely different world. Recently, the Board of Immigration Appeals issued a precedential decision, *Matter of A-R-C-G-*,[1] which paved an easier path for some domestic violence victims to gain asylum in the United States. Still, domestic violence victims have particularly difficult challenges to prove asylum claims that victims of other types of persecution do not face. Despite the BIA's articulation of a formulation under which some victims of domestic violence may be considered to have been persecuted on the basis of their "membership in a particular social group," (one of the grounds for asylum), the BIA's formulation is unnecessarily convoluted and underinclusive. This paper will advocate for a better solution: a social group defined by the applicant's gender and nationality.

## I. THE HISTORY OF INTERNATIONAL ASYLUM LAW

For the majority of history, what a state did to its own citizens was its own business, beyond the scrutiny of other nations.[2] If a government persecuted its own citizens, the victims had no formal recourse in other states, nor were other states required to step in to help them. After World War I, the League of Nations began efforts to assist refugees displaced by World War I, the Russian revolution, and the fall of the Ottoman Empire.[3] During this time, international protection for refugees was generally confined to the refugees produced by specific political crises and dealt with through individual treaties.[4] The limitations to these ad-hoc formulations soon became apparent. During Hitler's reign in Germany, when those persecuted attempted to flee the Third Reich to gain refuge elsewhere, the nations they ran to refused the refugees entry and sent them back to Germany—often to their deaths.[5]

---

1. 26 I. & N. Dec. 388 (BIA 2014).
2. RALPH G. STEINHARDT, PAUL L. HOFFMAN, & CHRISTOPHER N. CAMPONOVO, INTERNATIONAL HUMAN RIGHTS LAWYER 2 (2009) [hereinafter STEINHARDT ET AL.].
3. DAVID A. MARTIN, T. ALEXANDER ALEINIKOFF, HIROSHI MOTOMURA, MARYELLEN FULLTERON, FORCED MIGRATION LAW AND POLICY 49 (2d ed. 2013) [hereinafter MARTIN ET AL.].
4. *Id.* at 50.
5. Liisa H. Malkki, *Refugees and Exile: From "Refugee Studies" to the National Order of Things*, 24 ANN. REV. OF ANTHROPOLOGY 495, 500 (1995). In 1939, the *St. Louis* transatlantic liner, carrying nearly 1000 refugees fleeing the Third Reich, landed in Cuba, with the intent to go to the United States. The Cuban government refused to admit the vast majority of refugees and President Roosevelt likewise refused to allow the refugees to be admitted to the United States, forcing the *St. Louis* to return to Europe. 532 of the refugees were forced to return to Germany, and 254 were killed

After the Holocaust led to the genocide of six million Jews and millions of others whom the Third Reich considered "undesirable,"[6] a new trend began in international law: states could no longer violate the rights of their own citizens with impunity.[7] In 1948, the United Nations released the Universal Declaration of Human Rights ("UDHR"). While nonbinding, the UDHR developed into a document of quasi-law, and now governments, courts, and international organizations routinely consider the UDHR "an authoritative articulation of the human rights provisions of the UN Charter."[8] Article 14.1 of the UDHR states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution,"[9] institutionalizing that the right of each person to escape persecution and to be protected from their own nation's actions was a human right that needed to be ensured.

Following the lead of Article 14.1, the United Nations turned to alleviating the plight of refugees. There was significant shame, guilt and a sense of responsibility toward refugees because of refusal of aid and entry during the Holocaust.[10] In 1951, the United Nations adopted the Convention Relating to the Status of Refugees ("the 1951 Convention"). The 1951 Convention defined a refugee as any person:

> [O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. . . .[11]

---

during the Holocaust. *Holocaust Encyclopedia: Voyage of the St. Louis*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM (June 20, 2014), http://www.ushmm.org/wlc/en/article.php?ModuleId=10005267.

6. STEINHARDT ET AL., *supra* note 2, at 2.

7. STEINHARDT ET AL., *supra* note 2, at 7, quoting Louis B. Sohn, *The International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1-62 (1982) ("[T]he human rights revolution that began at the 1945 San Francisco Conference of the United Nations has deprived the sovereign states of the lordly privilege of being the sole possessors of rights under international law.").

8. STEINHARDT ET AL., *supra* note 2, at 5.

9. Universal Declaration of Human Rights, G.A. Res. 217 (III) A., U.N. Doc. A/RES/217(III) (Dec. 10, 1948), *available at* www.un.org/en/documents/udhr [hereinafter UDHR].

10. Malkki, *supra* note 5, at 500; Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 121 (2007) ("The international community, which had failed to extend protection to Jews and other targeted groups fleeing Nazi genocide persecution, came together in the wake of World War II to draft those instruments which would establish the norms of protection—the Refugee Convention, and its 1967 Protocol.").

11. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 152 *available at* http://www.refworld.org/docid/3be01b964.html (last visited Feb. 8, 2014) [hereinafter 1951 Convention]. *See also* Andrea Binder, *Gender and the "Membership in a Particular Social Group" Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L.167, 169 (2000-2001) (The 1951 Convention's "refugee definition was drafted against the backdrop of the atrocities committed by Nazi-Germany. The drafters' main concern was to address the mass persecutions suffered by the European Jews and other targeted persons based on racial, religious, and political grounds. The definition is also a product of the Cold War, which prompted ideologically-based concerns by the West about the international protection of political dissidents from Eastern European communist regimes.").

The 1951 Convention also articuled the concept of nonrefoulment—the prohibition on returning refugees to their home country where they would face oersectuion—which was a critical development in the institutionalization of an international refugee framework.[12] While an important step to begin to codify a system of refugee protection, the 1951 Convention limited protection to refugees who feared persecution as a result of events occurring before January 1, 1951, and was limited to refugees from Europe, unless the state of refuge specified that it would apply to other countries.[13]

The Convention's refugee definition did not include gender as an enumerated ground on which refugee status could be based, but the drafters included "membership in a particular social group" to allow for refugee situations that had causes other than the specifically enumerated grounds. It was added to the 1951 Convention at the last minute by the Swedish delegation because "certain refugees had been persecuted because they had belonged to particular social groups" as opposed to other named grounds (race, religion, nationality, and political opinion) and should likewise be protected.[14] The motivation behind this was "'to stop a possible gap' in the coverage afforded by the other more specific categories."[15] The drafters wanted a "catch-all" to make sure that refugee situations not accounted for in the more explicit groups were not excluded from protection.[16] Gender is a perfect example of this, because women are often targeted on the basis of their gender.[17] The broadness of "gender" as a category should not exclude it; the Convention's history "provides no support for a narrow reading of the grounds of persecution, but rather displays an intent to write a definition of refugee broad enough to cover then-existing victims of persecution."[18] But despite appearing to be a textbook candidate for a group overlooked by the 1951 Convention, gender alone has not been explicitly recognized as a particular social group by American courts.[19]

Recognizing that the problem of refugees reached beyond World War II, the United Nations created the 1967 Protocol Relating to the Status of Refugees ("1967 Protocol"), which incorporated the 1951 Convention's definition of refugee but

---

12. 1951 Convention, *supra* note 11, at art. 33 (1); *see also* REGINA GERMAIN, ASYLUM PRIMER 19 (6th ed. 2010).

13. 1951 Convention, *supra* note 11, at art. 1(B)(1).

14. ANDREAS ZIMMERMANN, ED., THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 390-91 (2011); T. Alexander Aleinikoff, *The Meaning of "Persecution" in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 11 ("For most of the deliberations, the definition of refugee was limited to four categories (political opinion, race, religion, and nationality). Late in the discussions, the Conference of Plenipotentiaries accepted the proposal of the Swedish delegation that 'membership of a particular social group' be added. . . .").

15. Aleinikoff, *supra* note 14, at 11.

16. Aleinikoff, *supra* note 14, at 11.

17. Binder, *supra* note 11, at 167.

18. Aleinikoff, *supra* note 14, at 11.

19. None of the American courts have explicitly held that gender constitutes a social group. The closest the circuits came was the Ninth Circuit in *Mohammed v. Gonzales*, which stated that "[a]lthough we have no previously expressly recognized females as a social group, the recognition that girls or women of a particular clan or nationality (*or even in some circumstances females in general*) may constitute a social group is simply a logical application of our law." Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005) (emphasis added).

removed the temporal and geographic limitation.[20] However, even with the expansion through the 1967 Protocol, gender was still not listed as one of the enumerated grounds to establish refugee status.[21]

## II. ASYLUM LAW IN THE UNITED STATES

The United States had a policy of unrestricted immigration until 1874, when certain "undesirable" immigrants were excluded from entry into the United States.[22] In the decades that followed, immigration became more and more restricted.[23] The United States had no formal refugee scheme, although after World War II, Congress passed the Immigration and Nationality Act of 1952 ("INA"), which included a Withholding of Removal provision that gave the Attorney General discretion to stay deportation when an alien "would be subject to persecution on account of race, religion, or political opinion" in the country he would be deported to.[24]

In 1968, the United States acceded to the 1967 Protocol, but did not implement legislation to bring American law into conformity with the 1967 Protocol until 1980, when Congress passed the Refugee Act.[25] The definition of a refugee used in the Refugee Act is virtually identical to the one in the 1951 Convention and 1967 Protocol,[26] although the U.S. definition added that refugee status could be granted on the basis of "past persecution or a well-founded fear of future persecution,"[27] as opposed to the Convention, which limited refugee protection to those who have a well-founded fear of future persecution.[28] Additionally, the Refugee Act finally created a systematic procedure for the United States to address asylum claims.[29]

---

20. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, 268, *available at* http://www.refworld.org/docid/3ae6b3ae4.html (last visited Mar. 23, 2015). Refugees are no longer restricted to those who feared persecution as a result of events that occurred before January 1, 1951 and it was no longer limited to Europe. *Id.* 146 countries have signed onto the Protocol. United Nations High Comm'r for Refugees, State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol 1, *available at* http://www.unhcr.org/3b73b0d63.html (last visited May 19, 2015).

21. Malkki, *supra* note 5, at 501.

22. Walter A. Erwing, *Opportunity and Exclusion, A Brief History of U.S. Immigration Policy*, IMMIGRATION POLICY CTR., 2-3 (Jan. 2012), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/ opportunity_exclusion_011312.pdf.

23. *Id.*

24. 1952 Immigration and Nationality Act, Pub. L. No. 82-414, §243(h), 66 Stat. 163, 214 (1952).

25. MARTIN ET AL., *supra* note 3, at 90; Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980).

26. Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980) ("The term 'refugee' means (A) any 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 . . . .").

27. 8 U.S.C. § 101(a)(42) (2012).

28. 1951 Convention, *supra* note 11, at 152.

29. Anita Sinha, Note, *Domestic Violence and U.S. Asylum Law: Eliminating the "Cultural Hook" for Claims Involving Gender-Related Persecution*, 76 N.Y.U. L. REV. 1562, 1668 (2001).

*A. Added Burdens for Asylum Seekers*

During the Cold War, welcoming refugees who fled the Soviet Union served American foreign policy interests while the exit restrictions in many of the sending countries kept the numbers of asylum seekers low.[30] After the Cold War ended, the United States (and other industrialized countries) became far less welcoming to asylum seekers.[31] Today, refugees come from all parts of the world, not just from the Soviet Bloc, and few refugees "fit the category of 'trophy' refugees" who were "dissidents who fled those countries the U.S. condemned as being oppressive."[32]

The changing opinions regarding asylum seekers can be seen through later amendments to the Immigration and Nationality Act regarding asylum, which added additional burdens for asylum applicants. First, in 1996, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (IIRAIRA).[33] IIRAIRA amended the INA to permit "expedited removal" of asylum applicants who failed to establish a "credible fear" of persecution in their home country shortly after arriving in the United States.[34] Perhaps most importantly, IIRAIRA requires anyone seeking asylum to file for it within one year of arrival into the United States. If an applicant misses that deadline, she is barred from asylum unless she is able to show "extraordinary circumstances for the delay or the existence of changed circumstances that materially affect [her] eligibility for asylum."[35]

The one-year deadline has had a profound impact on all asylum seekers, including domestic violence victims. Such victims often suffer from Post-Traumatic Stress Disorder.[36] A common PTSD symptom is to avoid anything that would bring back memories of the trauma.[37] Unfortunately, a necessary part of an asylum claim is explaining, in detail, what happened to the applicant. It can be extremely difficult for an applicant who suffers from PTSD to apply for asylum and be required to speak about, in minute detail, what is likely the most traumatic thing that has ever happened to her. The regulations do say that extraordinary circumstances that excuse a late application include "serious illness or mental or

30. Musalo, *supra* note 10, at 130.

31. Musalo, *supra* note 10, at 130.

32. Musalo, *supra* note 10, at 130.

33. Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

34. 8 U.S.C. §§ 1225 (b)(1)(B)(ii)-(iii) (1996). IIRAIRA defines a "credible fear of persecution" as when "there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the office, that the alien could establish eligibility for asylum." Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, § 302(b)(1)(B)(v) (1996).

35. 8 U.S.C. § 1158 (2)(D) (2012).

36. Loring Jones, Margaret Hughes, & Ulrike Unterstaller, *Post-Traumatic Stress Disorder (PTSD) in Victims of Domestic Violence: A Review of the Research*, 2 TRAUMA, VIOLENCE, & ABUSE 99, 99 (2001).

37. Karen Musalo & Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 HASTINGS INT'L & COMP. L. REV. 693, 703 (2008). *See also* Stephanie J. Woods, Rosalie J. Hall, Jacquelyn C. Campbell & Danielle M. Angott, *Physical Health and Posttraumatic Stress Disorder Symptoms: Women Experiencing Intimate Partner Violence*, 53 J. MIDWIFERY & WOMENS HEALTH 538, 539 (2008) ("PTSD avoidance or numbing consists of avoiding thoughts, feelings, activities, people, or discussions related to the trauma . . . .").

physical disability . . . ."[38] Thus, PTSD should qualify as a mental disability qualifying an individual for an exception to the one-year filing deadline. However, adjudicators often fail to understand the ways in which PTSD can contribute to a late filing.[39] Some judges believe that if PTSD did not prevent an applicant from doing other activities in her life—marrying, worshipping, working, giving birth, et cetera—within the year of arrival, then her PTSD could not have delayed her application for asylum.[40] These judges overlook the key difference between those activities and the process of applying for asylum—asylum requires a victim to explain at length the very events that traumatized her, while the other activities are just the victim living her life and trying to move on from the trauma and function in society.[41]

In 2005, Congress passed the REAL ID Act, codifying new evidentiary rules relating to credibility determinations[42] and requirements for corroborative evidence in asylum cases.[43] These standards can have a devastating impact for asylum seekers because they authorize the adjudicator to:

> base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements, . . . the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.[44]

---

38. 8 C.F.R. § 208.4(a)(5) (2014).

39. Musalo & Rice, *supra* note 37, at 700 (noting that a victim of female genital mutilation and domestic violence victim submitted evidence that she was diagnosed with PTSD but was still denied asylum on the basis of the one-year bar; a Guatemalan domestic abuse victim who also suffered from PTSD was denied asylum on the basis of the one-year bar despite her diagnosis).

40. Musalo & Rice, *supra* note 37, at 703. In the notable domestic violence asylum case, *Matter of L-R-*, L-R's asylum application was initially denied by an immigration judge because she missed the one-year filing deadline, despite multiple experts testifying that she had PTSD, because the judge believed that her ability to work and raise her children meant she could likewise have been able to meet the one year deadline. *Our Work: Matter of L-R-*, CTR. FOR GENDER & REFUGEE STUDIES (last visited Feb. 9, 2014), http://cgrs.uchastings.edu/our-work/matter-l-r [hereinafter *CGRS: Matter of L-R-*]. For more information on *Matter of L-R-*, *see infra* Section VI.B.2.

41. Musalo & Rice, *supra* note 37, at 703-04, 705 (noting that a Nepalese domestic violence victim's application was denied despite her PTSD diagnosis because she still suffered from PTSD when she did eventually file, leading a judge to conclude that the condition could not have prevented her from filing earlier; an Albanian woman who was a victim of abuse and sex trafficking was diagnosed with PTSD and a clinical psychologist testified that the applicant's psychological condition "prevented her from talking about the trauma she had been subjected to" but her claim was denied because the Immigration Judge concluded that "the applicant could easily rectify her feelings of shame by seeking out an attorney.").

42. 8 U.S.C. § 1158(3)(B)(iii) (2012).

43. 8 U.S.C. § 1158(3)(B)(ii) (2012).

44. 8 U.S.C. § 1158(3)(B)(iii) (2012).

The prior statements that triers of fact can compare with the applicant's current testimony include statements applicants made at the border or the airport, when she first entered the United States, likely tired after a long and arduous journey. Notably, the statute specifically authorizes triers of fact to consider inconsistent statements "without regard to whether an inconsistency . . . goes to the heart of the applicant's claim."[45] Therefore, an asylum applicant can be found to be not credible based on inconsistencies of facts that have absolutely nothing to do with her asylum claim that she made after a long, difficult journey. Additionally, women who fled from domestic violence at the hands of a male partner often come from countries of severe patriarchy, where men have not only failed to help them, but often made their situations worse.[46] Such a woman will therefore be extremely cautious when speaking to American law enforcement, and may withhold or alter information to try to avoid being returned to her home country by telling the interviewer what she believes he wants to hear.[47]

Furthermore, women who have undergone years of abuse may need psychiatric and legal assistance before they are able to tell a consistent version of their claim due to memory repression.[48] "Women who suffer from PTSD may block out memories or forget details or events intermittently, including important details relating to the trauma."[49] Testifying can heighten memory problems for many PTSD sufferers, furthering credibility problems under the REAL ID Act.[50]

Additionally, cultural barriers can have a severe impact on how much a woman is comfortable sharing with (male) law enforcement.[51] While prior to the REAL ID Act, an applicant's failure to mention during a border interview that she was raped would not affect her credibility if she subsequently mentioned rape, now such women can be found to lack credibility, despite how difficult it can be for abuse survivors to explain (especially to a man) what has happened to them.[52]

---

45. 8 U.S.C. § 1158(3)(B)(iii) (2012).

46. For example, in the notable case, *Matter of L-R-,* L-R- was a woman who was kidnaped and held in virtual captivity for two decades. When she attempted to escape, she found that the police did not help, and a judge she tried to go to for help said he would only help her if she had sex with him. *CGRS: Matter of L-R-*, *supra* note 40. For more information on the *Matter of L-R-*, *see infra* Section VI.B.2.

47. Aubra Fletchers, Note, *The REAL ID Act: Furthering Gender Bias in U.S. Asylum Law*, 21 BERKELEY J. GENDER L. & JUST. 111, 123 (2006).

48. Katherine E. Melloy, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 640 (2006) ("Women who have been tortured or traumatized face large psychological barriers, such as Post-Traumatic Stress Disorder . . . which *prohibit them from testifying consistently* and with the appropriate demeanor. Thus, under the REAL ID Act, women asylum seekers, particularly victims of . . . assault, are at risk of being erroneously deemed not credible.") (emphasis added).

49. *Id.* at 655.

50. *Id.*

51. *Id*. at 640.

52. *Id.* at 656. However, some U.S. courts have acknwoeldged that failure to address sensitive information at border interviews does not necessarily undermine an applicant's credibility, and courts should look to other factors and the record as a whole. *See, e.g.,* Ramsameachire v. Ashcroft, 357 F.3d 169, 179-80 (2d Cir. 2004).

## III. CRITERIA REQUIRED FOR ASYLUM: OVERVIEW

For an applicant to be eligible for asylum, it is not enough that she has suffered horrifically in her home country. She needs to show that she meets the definition of a "refugee." The U.S. refugee definition, like the 1951 Convention definition, requires that an asylum applicant show that the persecution is based on one of the five enumerated groups: race, religion, nationality, political opinion, or membership in a particular social group.[53] Persecution also requires that the harm be done by the government "or persons a government is unwilling or unable to control. . . ."[54]

If an applicant has proven that she faced persecution under the INA, then there is a presumption that the applicant has a well-founded fear of future persecution if she returns to her country of origin.[55] The government may rebut this presumption by showing one of two things: there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear, or that the applicant could avoid persecution by relocating to a different part of the country "and under all the circumstances, it would be reasonable to expect the applicant to do so."[56]

Asylum may be granted in certain situations based on past persecution alone, even where there "is little likelihood of future persecution."[57] This alternative, humanitarian asylum, requires that an applicant either establish that she has "demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution" or "there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country."[58]

The following sections of the paper will examine how these standards apply to domestic violence victims who are applying for asylum and the particular challenges they pose for such applicants.

## IV. THE PERSECUTION REQUIREMENT

The first hurdle an applicant must overcome is to prove that she suffered past persecution, or has a well-founded fear of future persecution. There is no definition in the asylum statute or regulations as to what equals "persecution." When the 1951 Convention defined "refugee," the drafters purposefully left "persecution" vague to allow Western states to admit a broad range of ideological dissidents and give them international protection.[59] The United Nations High Commissioner for Refugees (UNHCR) acknowledged that "there is no universally accepted definition of

---

53. 8 C.F.R. § 208.13(b)(1) (2014).
54. *In re* Kasinga, 21 I. & N. Dec. 357, 365 (BIA 1996).
55. 8 C.F.R. § 208.13(b)(1) (2014).
56. 8 C.F.R. § 208.13(b)(1)(i)(B) (2014).
57. Matter of L-S-, 25 I. & N. Dec. 705, 710 (BIA 2012); Matter of Chen, 20 I. & N. Dec. 16, 19 (BIA 1989), *quoting* The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva 1979).
58. 8 C.F.R. § 1208.13(b)(1)(iii) (2014). *See infra* Section VIII.
59. James Hathaway, *The Development of the Refugee Definition in International Law*, *in* JAMES HATHAWAY & M. FOSTER, THE LAW OF REFUGEE STATUS 1, 7 (2d ed. 1991).

'persecution.'"[60] The Ninth Circuit defined persecution as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive."[61] Judge Posner and the Seventh Circuit defined persecution as "punishment for political, religious, or other reasons that our country does not recognize as legitimate."[62] Persecution is an extreme conduct that goes beyond the annoyance and distress of mere harassment or discrimination.[63]

Persecution is generally the easiest piece to prove for domestic violence victims because of how heinous the abuse is that women often suffer. As one commentator has noted,

> The severity of pain and suffering that often result from domestic violence meets international standards for torture; the intimidation and coerciveness of domestic violence are characteristic of terroristic activities; and the use of violence to sanction deviations from desired behavior is precisely how slave-like situations are perpetuated.[64]

The United Nations has stated that violence against women is a fundamental abuse of their human rights.[65] Many methods of domestic violence—"beating with the hands or objects, biting, spitting, punching, kicking, slashing, stabbing, strangling, scalding, burning and attempted drowning"—resemble common methods of torture.[66] If a woman has been abused to the point that she flees to the United States for asylum, it is unlikely that the abuse she suffered would *not* equal persecution.

---

60. UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Jan. 1992, HCR/1P/4ENG/REV. 3, ¶ 51 (Persecution "may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership in a particular social group is always persecution. Other serious violations of human rights . . . would also constitute persecution.").

61. Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995).

62. Osaghae v. INS, 942 F.2d 1160, 1163 (7th Cir. 1991).

63. *See* Ghaly, 58 F.3d at 1431 ("We have cautioned that 'persecution is an extreme concept that does not include every sort of treatment our society regards as offensive.'"); Ivanishvili v. Gonzales, 433 F.3d 332, 340 (2d Cir. 2006) ("Persecution . . . does include violent conduct that generally goes beyond the mere annoyance and distress that characterize harassment.").

64. Patricia A. Seith, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 96 COLUM. L. REV. 1804, 1809 (1997).

65. U.N.G.A., Resolution Adopted by the General Assembly on 22 December 2003: Elimination of Domestic Violence Against Women, A/RES/58/147, Feb. 19, 2004 ("[D]omestic violence against women and girls is a human rights issue. . . . [it is one of the] most common and least visible forms of violence against women.") [hereinafter Resolution on the Elimination of Domestic Violence Against Women]; *see also* Lori L. Heise, Alanagh Raikes, Charlotte H. Watts, & Anthony B. Zwi, *Violence Against Women: A Neglected Public Health Issue in Less Developed Countries*, 39 SOC. SCI. & MED. 1165, 1165 (1994).

66. Deborah Anker, Lauren Gilbert & Nancy Kelly, *Women Whose Governments are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709, 727, citing Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 123 (Rebecca J. Cook ed., 1994) [hereinafter Anker et al.].

## V. GOVERNMENT IS UNWILLING OR UNABLE TO CONTROL THE PRIVATE PARTY

Another aspect of persecution is not just the actual harm an applicant suffered, but that the government (or a government actor) is perpetuating the harm or, if a private actor is the abuser, the government is unwilling or unable to control the private actor.[67] Women fleeing domestic violence generally must prove a pattern of governmental indifference to domestic violence to show that the government is unwilling or unable to control a private party.[68] A woman needs to provide evidence that in her home country, there is either a tendency by law enforcement to dismiss domestic violence claims or the prevalence of laws or customs that endorse domestic violence behavior (or both).[69]

There are a variety of ways women can establish that the government is unwilling or unable to control a private party. The most obvious is actually reporting the abuse to law enforcement and showing that the government took no steps to stop the abuse.[70] However, in countries where the government is unwilling to intervene, the victims generally know that going to the police would be futile. Reporting the abuse will not protect the victim and will likely make the abuser angrier; therefore many women do not even try. The BIA has held that, in such circumstances, it is not always necessary to first go to the government for protection.[71] In lieu of proving that the abuse was reported, an asylum applicant can use country condition evidence, such as the U.S. State Department Country Reports on Human Rights Practices, to demonstrate the futility of reporting domestic abuse to the police to show that the government is unable or unwilling to control the abuser.[72]

Proving that a government is unwilling or unable to control the persecutor is not a struggle for most asylum applicants with domestic violence based claims, because these applications tend to come from countries where abused women cannot effectively get help from the authorities. The State Department Reports are usually candid about what protections are afforded to women, which laws protect them, whether those laws are actually enforced, and societal attitudes toward domestic and sexual violence against women.

---

67. *See, e.g.,* Pavlova v. I.N.S., 441 F.3d 82, 91 (2d Cir. 2006).

68. Anker et al., *supra* note 66, at 733-34 ("Evidence of a single violation or a single investigation without meaningful results does not establish state accountability.").

69. Anjana Bahl, *Home is Where the Brutal Lives: Asylum Law and Gender-Based Claims of Persecution*, 4 CARDOZO WOMEN'S L.J. 33, 72 (1997). This is demonstrated through the BIA's analysis in *Matter of A-R-C-G-*, where the record reflected that Guatemala is a country that has significant problems with machismo, family and sexual violence, and a lack of law enforcement protections for familial violence. Matter of A-R-C-G-, 26 I. & N. Dec. 388, 394 (BIA 2014).

70. This was done in three notable domestic violence asylum cases that will be discussed later. *Matter of R-A-*, *see infra* SectionVI.B.1; *Matter of L-R-*, *see infra* Section VI.B.2; and *Matter of A-R-C-G-*, *see infra* Section VI.B.3.

71. *In re* S-A-, 22 I. & N. Dec. 1328, 1335 (BIA 2000).

72. *See, e.g., In re* S-A-, 22 I. & N. Dec. at 1333 (Finding that the Guatemalan government was unwilling to control a father who beat his daughter, despite her failure to seek redress because the U.S. State Department Reports confirms that "few women report abuse to authorities because the judicial procedure is skewed against them . . ."). In its recent decision, *Matter of A-R-C-G-*, the BIA specifically cited to Guatemalan Country Reports on Human Rights Practices when finding that the Guatemalan government was unwilling or unable to control a man abusing his wife. Matter of A-R-C-G-, 26 I. & N. Dec. at 393.

## VI. THE NEXUS REQUIREMENT—"ON ACCOUNT OF" ENUMERATED GROUPS

The most difficult aspect of an asylum case for a domestic violence applicant is the nexus requirement: establishing that the persecution the applicant suffered was "on account of" one of the five enumerated grounds: race, religion, nationality, membership in a particular social group, or political opinion.[73]

> The nexus between the persecution suffered or feared and the ground often is framed in terms of motives, so that the applicant must establish that the persecutor is motivated by a cognizable ground inflicting the harm on the applicant, and that the harm is directed at the applicant because of her protected characteristics.[74]

This is difficult for domestic violence victims because an abuser likely will not articulate a reason for his abuse or actions that will fit neatly within the requirements of asylum,[75] making it difficult for an applicant to prove that she meets the nexus requirement.

Fortunately, the BIA has recognized that it is not necessary to prove that the persecution occurred exclusively because of an enumerated ground. Persecutors often act with mixed motives. The BIA has stated that, in cases where there is a mixed motive behind the persecution, "an asylum applicant is not obliged to show conclusively *why* persecution has occurred or may occur."[76] All an applicant is required to establish is reasonable grounds for believing that the persecution was motivated at least in part by a protected ground.[77] The REAL ID Act added that it is the applicant's burden to show that an enumerated ground "was at least one central reason" for the persecution, as opposed to a merely incidental or tangential part of the motivation.[78]

Therefore, domestic violence victims must establish reasonable grounds for believing that at least one central reason for their abuse was one of the grounds listed in the Refugee Act. Since gender is not an enumerated reason, they are

---

73. 8 C.F.R. § 208.13(b)(1) (2014) ("An applicant shall be found to be a refugee on the basis of past persecution if they applicant can establish that he or she has suffered persecution . . . *on account of* race, religion, nationality, membership in a particular social group, or political opinion . . . .") (emphasis added).

74. Anker et al., *supra* note 66, at 740.

75. MARTIN ET AL., *supra* note 3, at 422.

76. *In re* S-P-, 21 I. & N. Dec. 486, 486 (BIA 1996) (emphasis added).

77. *See, e.g.*, *In re* T-M-B-, 21 I. & N. Dec. 775, 777 (BIA 1997) ("[T]he applicant must produce evidence from which it is reasonable to believe that the harm was motived, *at least in part*, by an actual or imputed protected ground.") (emphasis added); Tan v. U.S. Atty. Gen., 446 F.3d 1369, 1375 (11th Cir. 2006) ("If the applicant can show that the persecution was, at least in part, motivated by a protected ground, then the applicant can establish eligibility for withholding of removal").

78. 8 U.S.C. § 1158(3)(B)(i) (2012). *See also* Paruissimova v. Mukasey, 555 F.3d 734, 740 (9th Cir. 2008) ("The Act requires that a protected ground serve as '*one* central reason' for the persecution, naturally suggesting that a persecutory act may have multiple causes.") (emphasis in original); *In re* J-B-N- & S-M-, 24 I. & N. Dec. 208, 212-13 (BIA 2007) ("Congress purposely did not require that the protected ground be *the* central reason for the actions of the persecutors . . . . [The] 'at least one central reason' . . . language thus confirms that aliens whose persecutors were motivated by more than one reason continue to be protected under section 208 of the Act if they can show a nexus to a protected ground.") (emphasis in original).

generally left with two options: political opinion or membership in a particular social group.

*A. Political Opinion*

Some domestic violence victims have attempted to show that political opinion was a basis for their persecution. However, this argument has gained little traction in courts, likely due to the Board of Immigration Appeals' holding in the *Matter of R-A-*.[79] *R-A-* was the BIA's first precedential decision concerning domestic violence and asylum, and it denied relief to the applicant. It will be discussed in more detail later in the paper.[80] Although vacated by the Attorney General, the BIA's reasoning in *R-A-* regarding political opinion still holds significant weight. R-A- argued that her husband had imputed the political opinion that women should not be controlled and dominated by men onto her because she resisted the abuse, and that he punished her for that opinion. [81] The BIA did not find her argument persuasive,[82] reasoning that

> nowhere in the record does [R-A-] recount her husband saying anything relating to what he thought her political views to be, or that the violence towards her was attributable to her actual or imputed beliefs. Moreover, this is not a case where there is meaningful evidence that [R-A-] held or evinced a political opinion, unless one assumes that the common human desire not to be harmed or abused is in itself a 'political opinion.'[83]

R-A-'s argument,[84] according to the BIA, would allow "virtually any victim of repeated violence who offers some resistance [to] qualify for asylum, particularly where the government did not control the assailant."[85] The BIA's analysis of why a domestic violence victim's persecution is not on account of her political opinion has proven persuasive to immigration judges and has prevented political opinion from being a useful nexus ground for the majority of domestic violence victims.

---

79. 22 I. & N. Dec. 906 (BIA 1999), *vacated*, 22 I. & N. Dec. 906 (A.G. 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded*, 24 I. & N. Dec. 629 (A.G. 2008).

80. *See infra* Section VI.B.1.

81. *In re* R-A-, 22 I. & N. Dec. at 917.

82. *In re* R-A-, 22 I. & N. Dec. at 917. ("Even accepting the premise that he might have believed that the respondent disagreed with his views of women, it does not necessarily follow that he harmed the respondent because of those beliefs, rather than because of his own personal or psychological makeup coupled with his troubled perception of her actions at times.").

83. *In re* R-A-, 22 I. & N. Dec.at 914. "[I]t is difficult to conclude on the record before us that there is any 'opinion' the respondent could have held, or convinced her husband she held, that would have prevented the abuse she experienced." *In re* R-A-, 22 I. & N. Dec. at 917.

84. R-A- argued that "her husband . . . imputed to her the view that she believed women should not be controlled and dominated by men." *In re* R-A-, 22 I. & N. Dec. at 916.

85. *In re* R-A-, 22 I. & N. Dec. at 916.

*B. Membership in a Particular Social Group*

The vast majority of domestic violence asylum applicants have argued that their persecution was based on "membership in a particular social group." Membership in a particular social group is the most ambiguous of the statutory grounds for asylum, and has the most case law dedicated to it. The Board of Immigration Appeals has developed a series of convoluted requirements that must be met to establish that a group qualifies for protection.

The BIA first defined "membership in a particular social group" in the seminal case *Matter of Acosta*, holding that:

> "Persecution on account of membership in a particular social group" refers to persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience . . . . [W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.[86]

The *Acosta* test poses significant challenges for women in abusive situations. Domestic violence victims share few characteristics except their gender and the fact that they have been abused.

Courts have held that social groups cannot be circular: the defining characteristic of the social group cannot be the persecution.[87] Therefore, "women who are abused by their partners" is too circular to be considered a particular social group for asylum because the persecution is what defines the group, as opposed to the persecution occurring *because of* the victim's membership in the group.

Over twenty years after *Acosta*, the BIA further narrowed its social group definition, requiring social groups to be particular and socially visibile.[88] Particularity is whether "the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."[89] The key factors to particularity is that the group not be too amorphous and that the boundaries of the group are easily understood.[90] For example, the BIA has held that "wealthy Guatemalans" did not

---

86. Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985).

87. *See* Matter of M-E-V-G-, 26 I. & N. Dec. 227, 242 (BIA 2014) ("a social group cannot be defined exclusively by the fact that its members have been subjected to harm."); *see also* Rreshpja v. Gonzales, 420 F.3d 551, 556 (6th Cir. 2005) ("[A] social group may not be circularly defined by the fact that it suffers persecution. The individuals must share a narrowing characteristic other than their risk of being persecuted.").

88. Matter of S-E-G, 24 I. & N. Dec. 579, 582 (BIA 2008). The term social visibility was changed to social distinction. Matter of M-E-V-G-, 26 I. & N. Dec.at 242.

89. Matter of S-E-G, 24 I. & N. Dec. at 584.

90. Matter of S-E-G, 24 I. & N. Dec. at 584, citing Matter of A-M-E & J-G-U, 24 I. & N. Dec. 69, 76 (BIA 2007) ("[T]he key question is whether the proposed description is sufficiently 'particular' or 'too amorphous . . . to create a benchmark for determining group membership.").

meet the particularity requirement because wealth was "too amorphous to provide an adequate benchmark for determining group membership,"[91] because it can mean different things to different people. Likewise, the BIA held that Salvadoran youth who resisted membership in MS-13 and opposed the gang lacked particularity because they comprise a "potentially large and diffuse segment of society."[92] Particularity can be a major impediment for domestic violence victims because it is difficult to find tangible characteristics common to domestic violence victims alone, without reference to their abuse, which would be sufficiently particular and not comprise a large and diffuse segment of the population.

Social visibility is "the extent to which members of a society perceive those with the characteristic in question as members of a social group."[93] In February 2014, the BIA updated the definition of social visibility, stating that courts had applied the concept too literally, and changed the term to "social distinction."[94] This renaming was meant to clarify that social distinction does not require ocular visibility.[95] "Society can consider persons to comprise a group without being able to identify the group's members on sight."[96] Rather, what is required is that the group is *perceived* by society as a group.[97] While changing the term from social visibility to social distinction is helpful to domestic violence victims—rarely are domestic violence victims literally visible to others—it still places further burdens on domestic violence victims when formulating a social group because they are not necessarily perceived as a group by society.

### *1.* Matter of R-A- *and the Failure to Show a Nexus in Domestic Violence Claims*

The first precedential decision the Board of Immigration Appeals issued regarding asylum and domestic violence was *Matter of R-A-*.[98] R-A was a Guatemalan woman whose husband spent years brutally beating and raping her.[99] She attempted to gain police and court protection in Guatemala, but they refused to intervene.[100] She attempted to run away to different areas of Guatemala, but her husband not only found her but he also beat her unconscious in front of their two

91. Matter of A-M-E & J-G-U, 24 I. & N. Dec. at 76.

92. The specific social group proposed was "Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities." Matter of S-E-G, 24 I. & N. Dec. at 581.

93. Matter of E-A-G-, 24 I. & N. Dec. 591, 595 (BIA 2008).

94. Matter of M-E-V-G-, 26 I. & N. Dec. 227, 240 (BIA 2014).

95. *Id.* (emphasis added).

96. *Id.*

97. *Id.*

98. 22 I. & N. Dec. 906 (BIA 1999), *vacated*, 22 I. & N. Dec. 906 (A.G. 2001), *remanded*, 23 I. & N. Dec. 694 (A.G. 2005), *remanded*, 24 I. & N. Dec. 629 (A.G. 2008).

99. *Id.* at 908.

100. *Id.* at 909 (R-A-'s "pleas to Guatemalan police did not gain her protection. On three occasions, police issued summons for her husband to appear, but he ignored them, and the police did not take further action. Twice, [R-A-] called the police but they never responded. When [she] appeared before a judge, he told her he would not interfere in domestic disputes. Her husband told [her] that, because of his former military service, calling the police would be futile as he was familiar with law enforcement officials.").

children.[101] When she finally was able to escape to the United States, she spent years attempting to gain asylum. An immigration judge originally granted her asylum, but the BIA reversed that decision in 1999, holding that R-A- was unable to show any nexus to an enumerated ground of persecution.[102] The BIA acknowledged that the violence she suffered was "egregious"[103] and that the injuries her husband inflicted on her "were sufficient (and more than sufficient) to constitute 'persecution.'"[104] However, the BIA held that the social group she proposed—"Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination"—was not a cognizable social group.[105] The BIA explained that the social group seemed to have been created solely for the purpose of R-A-'s asylum case, and there was nothing in the record to support whether anyone in Guatemala perceived that this group even existed.[106] R-A- was unable to show that victims of abuse view themselves as members of this group, "nor, most importantly, that their male abusers see their victimized companions as part of this group."[107]

The BIA further held that even if they found the social group to be cognizable, R-A- failed to demonstrate that she was persecuted on account of her membership in that group. R-A-'s abuser only targeted R-A-, but "if group membership were the motivation behind his abuse, one would expect to see some evidence of it manifested in actions toward other members of the same group."[108]

The BIA, although expressing their sympathy toward R-A-,[109] concluded that she failed to meet the nexus requirement for asylum. The decision received widespread criticism,[110] and in 2001, Attorney General Janet Reno vacated it, with an order to remand to the BIA when the Department of Justice finalized its proposed regulations regarding asylum, including gender claims.[111] Those regulations never came to fruition, but after a series of remands, an Immigration

---

101. *Our Work: Matter of R-A-*, CTR. FOR GENDER & REFUGEE STUDIES (last visited Apr. 15, 2014), http://cgrs.uchastings.edu/our-work/matter-r [hereinafter *CGRS Matter of R-A-*].

102. *In re* R-A-, 22 I. & N. at 909.

103. *In re* R-A-, 22 I. & N. at 910.

104. *In re* R-A-, 22 I. & N. at 906.

105. *In re* R-A-, 22 I. & N. at 917. The BIA's reasons for concluding that R-A- had not been persecuted on account of her political opinion has already been discussed. *See infra* Section VI.A.

106. *In re* R-A-, 22 I. & N. at 918 ("[T]he group is defined largely in the abstract. It seems little or no relation to the way in which Guatemalans might identify subdivisions within their society or otherwise might perceive individuals either to possess or to lack an important characteristic or trait.").

107. *In re* R-A-, 22 I. & N. ("[W]e believe there must also be some showing of how the characteristic is understood in the alien's society, such that we, in turn, may understand that the potential persecutors in fact see persons sharing the characteristic as warranting suppression or the infliction of harm.").

108. *In re* R-A-, 22 I. & N. at 921.

109. *In re* R-A, 22 I. & N. at 914 ("It is not possible to review this record without having great sympathy for the respondent and extreme contempt for the actions of her husband.").

110. 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*, 29 REFUGEE SURVEY QUARTERLY 46, 58 (2010) [hereinafter *A Short History of Gender Asylum*].

111. 22 I. & N. Dec. 906 (A.G. 2001).

Judge finally granted R-A- asylum, in large part based on an influential brief the government filed in another domestic violence asylum claim—*Matter of L-R-*.[112]

### *2.* Matter of L-R- *and the Beginning of Recognizing Domestic Violence as a Social Group*

A few years after *R-A-* came another brutal domestic violence case—*Matter of L-R-*. L-R- was a Mexican woman who, at nineteen years old, was raped at gunpoint by her thirty-three year old sports coach.[113] For the next two decades, he used physical force, beatings, and death threats against her and her family to prevent her from leaving, keeping her in virtual captivity.[114] He regularly raped L-R-, brutally punishing her any time she attempted to escape, and mentally and verbally tortured her.[115] The police did not help, and when the abuse prevented L-R- from seeing her three children (the abuser's by way of rape), the judge from whom she attempted to get help told her he would only help her if she had sex with him.[116] She was finally able to escape to the United States with her children in 2004.[117]

L-R- applied for asylum in 2005. An immigration judge denied asylum because she missed the one-year deadline, there was no cognizable social group, and the persecution she suffered was not on account of an enumerated ground.[118] She then appealed to the BIA. Originally, the Department of Homeland Security (DHS)[119] filed a brief defending the Immigration Judge's ruling that there was neither a cognizable gender-defined social group nor any nexus ground.[120] However, in April 2009, with the change from the Bush Administration to the Obama Administration, DHS wrote a different supplemental brief in which they suggested alternative "particular social group" formulations "that could, in appropriate cases, qualify aliens for asylum."[121] DHS posited two possible social groups that domestic violence victims could use for asylum claims: (1) "Mexican women in domestic relationships who are unable to leave" and (2) "Mexican

---

112. *A Short History of Gender Asylum*, *supra* note 110, at 60. The Department of Homeland Security also wrote in regards to R-A-'s case, saying that R-A- defined her group too circularly, but "Guatemalan women in domestic relationships who are unable to leave" or "Guatemlan women who are viewed by property by virtue of their positions within a domestic relationship" could be cognizable social groups—identical groups DHS advocated for in the *Matter of L-R-* brief. Department of Homeland Security's Position on Respondent's Eligibility for Relief at 12, *In re* R-A-, 22 I. & N. Dec. 906 (filed Feb. 19, 2004). For more information on the *Matter of L-R-* brief, *see infra* Section VI.B.2.

113. *CGRS: Matter of L-R-*, *supra* note 40.

114. *CGRS: Matter of L-R-*, *supra* note 40.

115. *CGRS: Matter of L-R-*, *supra* note 40.

116. *CGRS: Matter of L-R-*, *supra* note 40.

117. *CGRS: Matter of L-R-*, *supra* note 40.

118. *CGRS: Matter of L-R-*, *supra* note 40.

119. The Department of Homeland Security is the department that controls immigration. In cases that go before an Immigration Judge, a representative from the Department of Homeland Security takes a prosecutorial role in advocating against the applicant. THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHO MOTOMURA, MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 239 (7th ed. 2012).

120. *CGRS: Matter of L-R-*, *supra* note 40.

121. Department of Homeland Security's Supplemental Brief at 5, Matter of L-R-, (filed Apr. 13, 2009), *available at* http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf [hereinafter *DHS Brief Re: L-R-*].

women who are viewed as property by virtue of their positions within a domestic relationship."[122]

DHS explained that these formulations can meet the *Acosta* test because "there are circumstances in which an applicant's status within a relationship is immutable . . . ."[123] It noted that there could be "economic, social, physical or other constraints" that could make it impossible for a woman to leave the relationship during the persecution.[124]

DHS argued that these social groups can also meet the social distinction test—explaining that, in certain cultural situations (for example, in Mexico), women in domestic relationships will not be given protection from domestic violence, and therefore it could indeed be the kind of important characteristic that results in a significant social distinction being drawn in terms of who will receive protection from harm.[125] Here, DHS seems to be conflating the social distinction test with whether the government is unwilling or unable to protect victims, a separate aspect of the refugee definition that applicants must prove.

In regards to particularity, DHS stated that the proffered social groups are acceptable because, although it may require complex fact inquiries, a fact finder would be able to clearly determine whether an applicant is a member of the group.[126] DHS explained that there is already a legal framework for conceptualizing domestic relationships under U.S. immigration law.[127] DHS also argued that a similar conceptualization of domestic relationships would satisfy the particularity requirement for the purpose of "membership in a particular social group."[128]

The brief submitted by DHS was careful to make sure that it was not blatantly endorsing a social group for all victims of domestic violence. It stated that while

> DHS accepts that in some cases, a victim of domestic violence *may* be a member of a cognizable particular social group and *may* be able to show that her abuse was or would be persecution on account of such membership this *does not mean* . . . that *every* victim of domestic violence would be eligible for asylum.[129]

---

122. *Id.* at 14.
123. *Id.* at 16.
124. *Id.*
125. *Id.* at 18.
126. *Id.* at 19. DHS explains that although the term "domestic relationship" could be somewhat amorphous, there is precedent in immigration law for conceptualizing domestic relationships. *Id.* at 20.
127. The Immigration and Nationality Act defines "crime of domestic violence" to include offenses "against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs." Immigration and Nationality Act § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) (2012).
128. *DHS Brief Re: L-R-*, *supra* note 121, at 19.
129. *DHS Brief Re: L-R-*, *supra* note 121, at 12 (emphasis added).

L-R- was granted asylum due to a stipulation of both parties, therefore her case never resulted in a precdential decision from the BIA.[130] Regardless, the American government's acknowledgment that there are cases where domestic violence, and status in a relationship, could qualify an applicant for asylum represented a huge step forward. For a while, though, the impact of the *Matter of L-R-* brief, which had no precedential force, was limited. Some immigration judges denied domestic violence victims asylum even if they defined their social group to be virtually identical to what was endorsed by DHS, because the proffered group was "insufficiently visible."[131] Finally, in 2014, the BIA released a precedential decision regarding women escaping domestic violence, which identified a particular social group that could succeed.

### *3.* Matter of A-R-C-G-*: A Precedential Decision Regarding a Particular Social Group*

The respondents in *Matter of A-R-C-G-* were a mother and her three minor children from Guatemala. She married her husband when she was seventeen, and he brutally beat and raped her frequently.[132] She contacted the police for help multiple times, but they refused to intervene in a marital relationship, considering it to be a private, not public, matter.[133] Her husband threatened to kill her each time she attempted to escape or go to the police.[134] During her hearing, the Immigration Judge found that she did not demonstrate that the abuse she suffered was persecution, as opposed to mere "criminal acts" that were "perpetrated 'arbitrarily' and 'without reason'" rather than because of her membership in a particular social group.[135]

The BIA analyzed each of the criteria for "membership in a particular social group" to decide whether her proffered social group—married women in Guatemala who are unable to leave the relationship—sufficiently met the requirements. First, they said that the proposed group did share an immutable characteristic: gender.[136] They further explained that marriage *can* be immutable if an individual cannot leave the marriage.[137] Whether someone can leave a relationship is dependent upon the particular facts and evidence in the case.[138] The BIA further specified that "a married woman's inability to leave the relationship

---

130. *CGRS: Matter of L-R-*, *supra* note 40.

131. For example, one immigration judge rejected the social group of "'Kenyan women in a domestic relationship who are unable to leave' because the problem of domestic violence is generally ignored in Kenya, and thus the group is not socially visible." Jessica Marsden, Note, *Domestic Violence Asylum after* Matter of L-R-, 123 YALE L. J. 2512, 2533 (2014).

132. Matter of A-R-C-G- et al., 26 I. & N. Dec. 388, 389 (BIA 2014).

133. *Id.*

134. *Id.*

135. *Id.* at 389-90. The particular social group A-R-C-G- advocated for was married women in Guatemala who are unable to leave the relationship. *Id.* at 389. This social group is virtually identical to the social group proffered by DHS in *Matter of L-R-*.

136. *Id.* at 392.

137. *Id.* at 392-93.

138. *Id.* at 393.

may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation."[139]

In regards to particularity, the BIA found (and DHS conceded) that the terms used to describe the group ("married" "women" and "unable to leave the relationship") have commonly accepted definitions in Guatemalan society.[140] The BIA explained that "unable to leave the relationship" was sufficiently well defined due to social and cultural factors that make ending a marriage unacceptable.[141] The decision left it unclear whether women have to be married in order to satisfy the "particularity" requirement.

When evaluating whether a proffered social group meets the test of social distinction, the BIA held that courts would need to look at country condition evidence to determine whether a society "makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave."[142] Evidence in the record showed that Guatemala has a culture of machismo, family violence, sexual violence (including spousal rape), and a lack of enforcement for domestic violence situations, despite laws on the books that were intended to protect victims.[143] The BIA reasoned that the fact that Guatemala recognizes that domestic violence victims should be protected to such an extent that laws were enacted for their protection demonstrates that they are viewed as a distinct group in Guatemalan society.[144] The BIA further found that the impunity with which men were able to harm their partners, and the sexist culture in Guatemala that perpetuated abuse, helped to show that "married women unable to leave their relationship" were a social group that met the criteria of social distinction.[145]

#### *4. The Better Formulation: A "Gender-Plus" Social Group*

With *Matter of A-R-C-G-*, the BIA finally endorsed a social group that may be applied in domestic violence cases which, in the BIA's view, meets all of the "membership in a particular social group" criteria. However, the social group that the BIA endorsed is convoluted at best, and circular at worst. The BIA makes "inability to leave the relationship" one of the boundaries of particularity and social distinction, focusing on how, in Guatemala, inability to leave the marriage

139. *Id.*, citing Matter of W-G-R-, 26 I. & N. Dec. 208, 214 (BIA 2014).

140. *Id.* at 393.

141. *Id.*

142. *Id.* at 394 ("Such evidence would 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.").

143. *Id.*

144. *Id.*; *see also Domestic Violence-Based Asylum Claims*, CGRS PRACTICE ADVISORY 14 (Sept. 12, 2014), *available at* https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Domestic%20Violence-Based%20Asylum%20Claims%20%28Sept%2012,%202014%29.pdf ("The enactment of special laws directed at violence against women—such as Guatemala's law against femicide (or gender-motivated killings)—are especially pertinent, as enactment of such laws indicates the group's distinct status, because laws directed at the general public are not enough to protect group members who are in need of special protection.").

145. Matter of A-R-C-G-, 26 I. & N. Dec. at 394.

relationship is often a result of societal expectations of gender and legal constraints.[146] The problem is that the BIA overlooks the reason many women in A-R-C-G-'s position were unable to leave the relationship: abuse. It is unclear from the *A-R-C-G-* opinion whether a woman must prove the existence of societal and legal constraints that prevent her from leaving the relationship in order to be a member of the social group. Many women in domestic violence situations are unable to leave the relationship, but it because of the abuse, as opposed to societal constraints regarding marriage, divorce, and women living alone. Therefore, for these women, one of the main features of the *A-R-C-G-* social group is the persecution (the abuse). This is problematic because a social group cannot be defined around the persecution,[147] yet by making one of the defining characteristics of the group "inability to leave the relationship" the BIA posits a social group that may more easily be defined by the abuse than societal constraints.

There is a better way that has been hinted at by some courts of appeals that would simplify the "membership in a particular social group" analysis for domestic violence victims and make the process far less convoluted: a "gender-plus" social group. This social group would be defined by gender plus some sort of geographic or tribal identity (for example, gender plus nationality).

This gender-plus formulation meets all of the tests the BIA has set out for social groups. First, in *Matter of Acosta*, the BIA specifically lists sex as an example of an immutable shared characteristic that may define a particular social group.[148] Gender is something that is not only fundamental to identity, but also something that cannot be changed.[149] Nationality or tribal identity is similarly immutable—a person is born with their nationality or tribal identity, and generally cannot change it, nor should they be expected to change it.

A gender plus nationality social group can also meet the requirements of social distinction and particularity. "Women of a certain nationality" is a group that society is aware of and perceives as socially distinct. Regarding particularity, while making a social group that includes all the women of one country may seem overbroad, there is precedent that this is not unacceptable: the Second Circuit said that a large group can meet the requirements of "particular social group" and went so far as to say that a group's size does not provide sound reason for finding lack of particularity. "The BIA must not mean that a group's size can itself be a sound reason for finding lack of particularity."[150] The Second Circuit rejected a particular social group of "wealthy Guatemalans" not because of the group's potential size but because "the concept of wealth is so indeterminate" and the boundaries of the group were subjective.[151] The gender plus formulation has very clear boundaries: women of a certain nationality. It is very clear who belongs to the group, and the

---

146. Matter of A-R-C-G-, 26 I. & N. Dec. at 393.

147. Matter of M-E-V-G-, 26 I. & N. Dec. 227, 242 (BIA 2014).

148. Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985) ("The shared characteristic might be an innate one such as sex . . . .").

149. *Id.*; *see also* Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005) ("[T]he BIA listed gender as an example of a prototypical immutable characteristic that could form the basis for a social group.").

150. Ucelo-Gomez v. Muksaey, 509 F.3d 70, 73 n.2 (2007) ("[T]he BIA must not mean that a group's size can itself be a sound reason for finding lack of particularity.").

151. *Id.*

boundaries are not subjectively based on each person's specific definition, as opposed to "wealthy Guatemalans" which can have very different meanings to different persons. Furthermore, the four other grounds for asylum—race, religion, nationality, and political opinion—can cover huge segments of the population and are not criticized as being "too broad."

There is support in the Courts of Appeals specifically for a gender plus formulation. The Ninth Circuit held that the BIA erred when finding that "women in Guatemala" could not be a cognizable social group when determining whether a woman fearing rampant femicide in Guatemala met the qualifications for asylum.[152] The Second Circuit, in the context of a claim based on female genital mutilation, stated that "it appears to us that petitioner's gender—combined with their ethnicity, nationality, or tribal membership—satisfies the social group requirement."[153] The Tenth Circuit similarly held that "female members of a tribe would be a social group" under *Acosta* because "[b]oth gender and tribal membership are immutable characteristics that can define a social group."[154]

Although the cases before the Second and Tenth Circuits were focused on female genital mutilation, as opposed to domestic violence, the same idea beyond the social group still applies: domestic violence, female genital mutilation, and other gender-based crimes occur *on account of* the victim's gender and their nationality or tribal membership, which allows for women to be harmed with impunity. Instead of trying to create a convoluted social group, a gender plus social group gets to the heart of the issue: that women from these countries have fled to the United States because their home country perpetuates sexist and abusive behavior and allows for women to be so abused.[155] In cultures all over the world, women are presumed to be the property of men, who can harm and dominate women as they see fit.[156] In some countries, the idea that "wife-beating" is a "corrective" measure to punish women for any transgression her husband or partner

---

152. Perdomo v. Holder, 611 F.3d 662, 663 (9th Cir. 2010). The Ninth Circuit did not definitively hold whether "women in Guatemala" was an acceptable social group formulation, and instead remanded back to the BIA for further analysis. *Id.*

153. Bah v. Mukasey, 529 F.3d 99, 119 (2d Cir. 2008).

154. Niang v. Gonzales, 422 F.3d 1186, 1199-1200 (10th Cir. 2005).

155. *See* Binder, *supra* note 11, at 167 ("Women [are often] being persecuted *because* they are women."); *see, e.g.,* Matter of A-R-C-G-, 26 I. & N. Dec. at 394 (explaining that Guatemala has a culture of "machismo and family violence" and that the police fail to respond to requests for help by domestic violence victims); Carl Meacham & Johanna Mendelson Forman, *In Latin America, Women Still Confront Violence*, CSIS (Mar. 8, 2013), http://csis.org/publication/latin-america-women-still-confront-violence ("Numerous countries . . . are places where impunity for the perpetrators of crimes against women remains the norm.").

156. Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104, at ¶ 6 (Dec. 20, 1993) ("Violence against women is a manifestation of historically unequal power relations between men and women, which have led to the domination over and discrimination of women by men . . . ."); *Femicide and Impunity, A Humanitarian Crisis in Central America, and a Growing Problem Worldwide*, LA VIA CAMPESINA (Dec. 16, 2014), http://viacampesina.org/en/index.php/main-issues-mainmenu-27/women-mainmenu-39/1715-femicide-and-impunity-a-humanitarian-crisis-in-central-america-and-a-growing-problem-worldwide [hereinafter *Femicide and Impunity*] (There is a "prevailing history of patriarchal norms that have existed for centuries in almost all of our societies across the globe that presume that women are the property of men to be treated and disposed of according to the whims of men.").

sees fit is acceptable, normal, and held by both genders.[157] In such cultures, "inability to leave a relationship" may describe a violent relationship, but it largely ignores the societal construction of women as less than men[158] that creates the main problem of countries where domestic violence is ignored by society, government, and law enforcement—allowing women to be harmed with impunity.

The BIA, in *Matter of R-A-*, when rejecting the applicant's social group argument,[159] stated that the abuser targeted only the respondent, and was not interested in any member of this group other than R-A- herself.[160] "If group membership were the motivation behind his abuse, one would expect to see some evidence of it manifested in actions toward other members of that group."[161] However, in *Matter of A-R-C-G-*, there was no evidence that the abuser harmed anyone but the applicant in the social group yet the BIA held it to be cognizable.[162] As the Seventh Circuit stated, "the statute makes eligible a person persecuted because of his membership in a protected category; it does not require that all members of that category suffer the same fate."[163] Therefore, while an abuser may only abuse his wife or partner, it does not change the fact that she is abused on account of her gender—any woman he married or lived with would have been treated to the same abuse. The victim's gender and nationality is the cause of the abuse and the victim's inability to escape.

A gender plus formulation still requires an applicant to demonstrate that, in the country or tribe she comes from, societal norms allow for abuse to occur with societal indifference (or even assent), and men are allowed to abuse their partners with impunity. But, using this gender plus formulation is better than the cumbersome "[married] women of [country] who are unable to leave their relationship" because it focuses on the actual cause of the abuse: gender and the society a woman lives in that allows her to be so abused.

---

157. *See, e.g.,* Manju Rani, Sekhar Bonu, & Nafissatou Diop-Sidibe, *An Empirical Investigation of Attitudes towards Wife-Beating among Men and Women in Seven Sub-Saharan African Countries*, 8 AFR. J. REPRODUCTIVE HEALTH 116, 117 (2004) ("A troubling aspect of wife-beating is its benign social and cultural acceptance in several parts of the world as a means of physical chastisement of women the husband's right to 'correct' an erring wife. Preliminary evidence from Egypt, Brazil, Ghana and Chile suggest that both men and women share the notion of men having a right to discipline their wives by use of force.").

158. *See, e.g.,* Charlotte Bunch, *The Intolerable Status Quo: Violence Against Women and Girls*, THE PROGRESS OF NATIONS 40, 44 (1997), *available at* https://www.amherst.edu/system/files/media/0049/the%2520intolerable%2520status%2520quo.pdf (The perception "that women are fundamentally of less value than men" is "so deep-seated it is often unconscious.").

159. Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination. *See In re* R-A-, 22 I. & N. Dec. 906, 920 (BIA 1999).

160. *Id.* ("The record indicates that [the abuser] has targeted only the respondent. The respondent's husband has not shown an interest in any member of this group other than the respondent herself.").

161. *Id.*

162. Matter of A-R-C-G-, 26 I. & N. Dec. 388 (BIA 2014).

163. R.R.D. v. Holder, 746 F.3d 807, 809 (7th Cir. 2014).

## VII. PRESUMPTION OF A WELL-FOUNDED FEAR

If an asylum applicant succeeds in showing that she has been persecuted on account of an enumerated ground and the government was unwilling or unable to help her, she meets the statutory definition of a refugee, but under regulations issued by the Attorney General, she nonetheless will generally be denied asylum unless she also has a well-founded fear of further persecution in the future.[164] But, if past persecution has been found, then the applicant has a presumption of a well-founded fear.[165] The government is able to defeat this presumption by showing by a preponderance of the evidence that there has been a fundamental change in circumstances in the home country or that internal relocation to another area in the country would be safe and reasonable.[166]

### *A. Fundamental Change in Circumstances*

If there has been "a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality,"[167] this will rebut the presumption of a well-founded fear of future persecution. The government has to show how the change specifically altered the circumstances that the individual fled and that it eliminated any reasonable possibility of persecution.[168] Unlike in many other types of asylum cases, there is little chance that political changes in the country will eliminate the risk of domestic violence. The culture that allows for violence against women is generally systemic and deeply ingrained in all facets of the society—from the government to individual families.

A fundamental change in circumstances for domestic violence victims that is strong enough to rebut the presumption of a well-founded fear of future persecution would likely require something to happen to the abuser—for example, if he dies. The argument then becomes far more difficult for an applicant, because her persecutor is no longer capable of persecuting her. However, if violence against women is committed with significant impunity, an applicant may be able to demonstrate that she is likely to be abused again, just by a different persecutor.

---

164. 8 C.F.R. § 1208.13(b) (2014). If the past persecution was severe, an applicant may be granted humanitarian asylum even if she lacks a well-founded fear of future persecution. *See infra* Section VIII.

165. 8 C.F.R. § 1208.13(b)(1) (2014).

166. 8 C.F.R. § 1208.13(b)(1)(i) (2014).

167. 8 C.F.R. § 1208.13(b)(i)(A) (2014).

168. *See, e.g.,* Chand v. I.N.S., 222 F.3d 1066, 1079 (9th Cir. 2000) ("[W]e have long held that the determination of whether or not a particular applicant's fear is rebutted by general country conditions information requires an individualized analysis that focuses on the specific harm suffered and the relationship to it of the particular information contained in the relevant country reports."). *See also* Tambadou v. Gonzales, 446 F.3d 298, 304 (2d Cir. 2006) (The Second Circuit said that because the BIA did not engage in an "individualized analysis" of the change in country conditions, its decision was not supported by the required "reasonable, substantial and probative evidence . . . .").

*B. Relocation*

Even if there is no fundamental change in circumstances, the government can still rebut the presumption of a well-founded fear by showing that the applicant could reasonably avoid the risk of persecution by relocating to a different part of the home country.[169] Unlike applicants persecuted by the government—where it is generally understood that the persecution would occur nationwide[170]—domestic violence victims generally fear one specific person, and logically, if a victim is able to escape the abuser and move to another part of the country, she would be safe.[171] However, abusers often are willing to travel to punish women who try to leave them, and the ability of the government and the police throughout the country to protect the applicant from the abuser must be considered. If the applicant is in danger from the abuser even if she relocates because of lack of police protection, the possibility of internal relocation does not rebut her presumption of a well-founded fear of future persecution.

Additionally, the government must show not only that the applicant can escape persecution by internal relocation, but that "under all circumstances, it would be reasonable to expect the applicant to do so."[172] When deciding whether relocation would be reasonable,

> adjudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.[173]

Whether relocation is reasonable requires investigation into the individual circumstances of each applicant, including the social and cultural constraints of the country. This can be important for women fleeing domestic violence situations. For example, in many cultures, it is not culturally acceptable for a woman to live by herself[174]—and that could make her a target for future abuse[175]—so she cannot

---

169. 8 C.F.R. § 1208.13(b)(i)(B) (2014).

170. Allison W. Reimann, Comment, *Hope for the Future? Asylum Claims of Women Fleeing Sexual Violence*, 157 U. PA. L. REV. 1199, 1227 (2009) (Reasonability or relocation "is particularly likely to be an issue in cases where the persecutor is a non-state actor, who may not have the means of nationwide persecution that a government potentially could have.").

171. This assumption, although logical, is oftentimes incorrect in regards to domestic violence. The situation in *In re R-A-,* where the applicant's husband threatened to find her wherever she went, is all too common for domestic violence victims. *In re* R-A-, 22 I. & N. Dec. 906, 909 (BIA 1999).

172. 8 C.F.R. § 1208.13(b)(1)(B) (2014).

173. 8 C.F.R. § 1208.13(b)(3) (2014).

174. *See, e.g.,* Larisa Epatko, *"To Kill a Sparrow" Shows Afghanistan's Double Standard on Adultery*, PBS NEWSHOUR (Apr. 4, 2014), http://www.pbs.org/newshour/updates/kill-sparrow/ ("In Afghanistan as a woman, you can't really live alone. There is no way to see that an Afghan woman can live on her own without family or without a main member of the family.").

175. *See, e.g., NGO Report on Violence Against Women in Burundi*, CEDAW, 4 (January 2008), *available at* http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/acatomctburundi.pdf ("[S]exual violence and especially rape is also widespread. For exemple [sic]: rape by closed [sic] friends and neighbors, especially of young girls or women living alone."); *see also* Reimann, *supra* note 170, at

reasonably be expected to relocate. In many countries, even if a woman may technically live by herself, she needs her family's support network to survive, and if she were forced to relocate, that would be taken away from her.

Another consideration regarding the reasonableness of relocation is the general prevalence of gender-based violence in other parts of the country. Even if the victim could be safe from the abuser, but is in danger of different types of gender-based violence due to relocation, relocation would be considered unreasonable.

## VIII. HUMANITARIAN ASYLUM

There is another option for domestic violence victims who are unable to prove that they still have a well-founded fear of future persecution: humanitarian asylum. Humanitarian asylum can be granted in cases where there has been past persecution based on a protected ground, and the applicant has either "demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution" or "has established that there is a reasonable possibility that [she] may suffer other serious harm upon removal to that country."[176]

The first type of humanitarian asylum is available only for atrocious forms of persecution.[177] To prove that an applicant has suffered atrocious persecution, she must "establish both the severe harm and the long-lasting effects of that harm."[178] Courts have looked at the degree of harm, the duration of the harm, and evidence of psychological trauma stemming from the harm.[179] Like the lack of concrete definition of persecution, there is no specific standard for what equals "atrocious persecution," but the BIA expects some sort of showing of long-lasting physical, emotional, or psychological effects of the harm.[180] For example, the BIA held that a man who, due to a series of severe beatings and emotional trauma, was physically debilitated, had to wear a hearing aid due to one of the beatings, and was suicidal suffered atrocious persecution with long-lasting effects and was eligible for

1228 ("[I]nternal relocation by the [applicant] simply may make her an easy target for further gender-based abuse . . . because she may lack her prior support system . . . .").

176. 8 C.F.R. § 1208.13(b)(1)(iii) (2014).

177. Matter of L-S-, 21 I. & N. Dec. 705, 714 (BIA 2012).

178. Jalloh v. Gonzles, 498 F.3d 148, 151-52 (2d Cir. 2007), quoting *In re* N-M-A-, 22 I. & N. Dec. 321, 336 (BIA 1998).

179. *In re* N-M-A-, 22 I. & N. Dec. at 336.

180. A mother and daughter who both suffered an aggravated form of female genital mutilation so that they have ongoing pain and discomfort from the procedure had long-lasting effects from persecution and therefore qualified for humanitarian asylum. Matter of S-A-K- & H-A-H, 24 I. & N. Dec. 464, 465 (BIA 2008). The Second Circuit has upheld the long-lasting effects test, holding that since an applicant "provided no evidence of long-lasting physical or psychological effects of the persecution he experienced, the BIA's decision to deny 'humanitarian' asylum was supported by substantial evidence. Jalloh v. Gonzales, 498 F.3d at 149. Similarly, the Fourth Circuit held that while an applicant "undoubtedly suffered greatly as a result of the mistreatment she endured during her incarcerations, the IJ and Board noted she presented no evidence demonstrating that she suffers from physical and psychological disabilities like those shown in *Matter of Chen*. Gebru v. U.S. I.N.S., 173 F.3d 424, (4th Cir. 1999) (per curiam) (unpublished). However, the Ninth Circuit has specifically rejected a showing on ongoing disability to qualify for humanitarian asylum. Lal v. I.N.S., 255 F.3d 998, 1008 (9th Cir. 2001).

humanitarian asylum.[181] For domestic violence victims, years of physical, emotional, and sexual abuse will very likely have severe psychological effects that continue to affect the victims long after they escaped their abusers.[182] An applicant such as L-R-, who was beaten, raped, and kept in captivity for twenty years, and now suffers PTSD,[183] would be a prime candidate for the atrocious persecution requirement of humanitarian asylum.

The second type of humanitarian asylum does not require an atrocious form of persecution, but it does require a reasonable possibility of the applicant suffering "other serious harm" if she is returned to her home country.[184] Other serious harmed is defined as "harm that is not inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but is so serious that it equals the severity of persecution."[185] The benefit of "other serious harm" over well-founded fear of future persecution is that it has no requirement to show that the persecution the applicant fears is because of an enumerated ground. "Other serious harm" can include "civil strife and extreme economic deprivation, as well as . . . potential for new physical or psychological harm that an applicant might suffer."[186] Therefore, for a domestic violence victim, if she comes from a country of severe civil unrest—if there is a civil war, or severe gang violence, for example—that can equal "other serious harm."[187] There has been far less guidance interpreting "other serious harm" than for the first prong of humanitarian asylum,[188] but plausible arguments for "other serious harm" can include femicide that is rampant in some countries,[189] strife from civil wars, and rampant rape.

## IX. Conclusion

There are significant challenges for domestic violence victims in successfully meeting the requirements of asylum. The one-year deadline and consistency standards can be extremely difficult for sufferers of PTSD to meet—something that many domestic violence victims suffer from. Although they oftened suffered abuse, torture, and slavery-like conditions, they have a harder fight to prove that they meet the asylum requirements. Most notably, the nexus ground on which domestic violence victims could claim asylum has presented an extremely difficult road for domestic violence victims. The BIA made great headway last year with its decision

181. Matter of Chen, 20 I. & N. Dec. 16, 20 (BIA 1989).
182. Jones et al., *supra* note 36, at 99.
183. *CGRS Matter of L-R-*, *supra* note 40.
184. 8 C.F.R. § 1208.13(b)(1)(iii) (2014).
185. 65 Fed. Reg. 76121-01, 76127 (Dec. 6, 2000).
186. Matter of L-S-, 25 I. & N. Dec. at 705.
187. *See, e.g.,* Mohammed v. Gonzales, 400 F.3d 785, 801 (9th Cir. 2005) (The Ninth Circuit stated that the applicant "might be at risk for other serious harm, because [her] clan has been *so decimated by violence*, leaving its female members particularly vulnerable. Moreover . . . the human rights situation in Somalia generally 'is poor, and serious human rights abuses continued throughout the year . . . Many civilian citizens were killed in factional fighting . . .").
188. Matter of L-S-, 25 I. & N. Dec., at 713 ("To date, there has been little legal guidance interpreting the meaning of 'other serious harm' under the regulation.").
189. *See, e.g., Femicide and Impunity*, *supra* note 156 (There is an "acute epidemic of femicide in El Salvador, Honduras, and Guatemala . . . .").

in *Matter of A-R-C-G-*. However, the definition of "particular social group" formulated by *Matter of A-R-C-G-* is unnecessarily convoluted and circular. A better formulation is a "gender plus" social group, so the focus is on the real reason domestic violence victims are applying for asylum in the United States: gender, and the ability of men to abuse women with impunity in certain countries (as opposed to the circular "inability to leave a relationship").