FEDERAL BAR ASSOCIATION'S 2018 ANNUAL MEETING AND CONVENTION (Austin, Texas / May 17-18, 2019)

Professor Deborah Anker
Founder and Director, Harvard Immigration and Refugee Clinical Program
Harvard Law School

Panel Materials

SATURDAY, MAY 18 , 2019 (1:15-2:30 PM)

Panel PARTICULAR SOCIAL GROUP

Note: The four unpublished B.I.A. decisions included below are available through the "Index of Unpublished Decisions of the Board of Immigration Appeals," a monthly publication of the Immigration & Refugee Appellate Center, LLC that is available by annual subscription. For more information regarding this resource, please see: http://www.irac.net/unpublished/index/. Special thanks to Ben Winograd and IRAC for allowing reprinting of these documents here. IRAC is an invaluable resource.

8. Deborah E. Anker, *Legal Change From the Bottom Up: The Development of Gender Asylum Jurisprudence in the United States, in* **Gender in Refugee Law: From the Margins to the Centre** 46 (Efrat Arbel, Catherine Dauvergne & Jenni Millbank eds., 2014).
Note: this article was written in 2014 before the Board of Immigration Appeals published the landmark decision in the Matter of A-R-C-G-, and before the Attorney General, in 2018, vacated that decision in *Matter of A-B-* .

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U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: A[redacted], M[redacted] D... **A [redacted]-053**
Riders:[redacted]

Date of this notice: 2/14/2019

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
O'Connor, Blair

[illegible]
Userteam: Docket

Files: A[redacted]-053 – Los Angeles, CA

Date: FEB 14 2019

In re: M[redacted] D[redacted] A[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Eloy A. Aguirre, Esquire

APPLICATION: Asylum; withholding of removal: Convention Against Torture

The lead respondent, a native and citizen of El Salvador, appeals from the Immigration Judge's September 14, 2017, decision denying her application for asylum and withholding of removal, and her request for protection under the Convention Against Torture.[1] *See* sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. §§ 1208.13, 1208.16-.18. The record will be remanded to the Immigration Judge for further proceedings consistent with this opinion.

The respondent's removability is undisputed. Therefore, the issue on appeal is whether the Immigration Judge properly denied her applications for asylum, withholding of removal, and protection under the Convention Against Torture. In support of those applications, the respondent credibly testified that she suffered abuse at the hands of a step grandmother, and the sons of a family friend that she lived with from the age of 7 years until she married at the age of 22 (IJ at 3-4; Tr. at 29-46). Her husband physically and mentally abused her (IJ at 4-5; Tr. at 48-61). After her husband died in 2015, gang members came to her house to continue the extortion that they began with her husband, threatening the lives of her and her children if she did not pay the $10,000 they claimed was owed to them by her husband (IJ at 5; Tr. at 66-70). Based on the foregoing facts, the respondent argues that she suffered past persecution and has a well-founded fear of persecution in El Salvador on account of her membership in the particular social groups she defines as "the family of her deceased husband" and "women in El Salvador" (IJ at 6-7; Respondent's Br. at 6-10).[2]

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[1] The respondent's children are derivatives of her asylum application. Hereinafter references to "the respondent" will refer to the adult respondent.

[2] The respondent on appeal does not challenge the Immigration Judge's determinations that she did not establish that the proposed particular social group defined as "domestic familial relationships in the homes in which she lived as a child" is cognizable under the Act, and that she did not establish membership in the group she defines as "married El Salvadoran women who could not leave their domestic relationship" (IJ at 6-9).

This Board must defer to the Immigration Judge's factual findings, including findings as to the credibility of testimony, unless they are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

First, even assuming that the respondent established membership in a legally cognizable particular social group defined by her husband's family, the Immigration Judge correctly determined that the single threat she received from gang members about the monies her husband owed them was not sufficiently egregious to constitute past persecution (IJ at 10). *See Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (unfulfilled threats "constitute[d] harassment rather than persecution"); *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000) ("Threats standing alone constitute past persecution in only a small category of cases, and 'only when the threats are so menacing as to cause significant actual suffering or harm.'") (citing *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997)). The respondent's appellate arguments to the contrary do not persuade us that the Immigration Judge's decision was erroneous in this respect (Respondents' Br. at 4-6).[3]

Moreover, we agree with the Immigration Judge that the respondent's fear of future persecution on account of her particular social group, defined as "the family of her deceased husband," is not objectively reasonable (IJ at 11-12). The Immigration Judge found, without clear error, that there is no evidence that the gang members have made any inquiries about the respondent since her departure, and that the respondent's mother and son remain in El Salvador (IJ at 12). On appeal, the respondent has not identified clear error in those findings. *See Mondaca-Vega v. Lynch*, 808 F.3d 413, 426 (9th Cir. 2015) (en banc) (determining that a finding is not clearly erroneous unless, based on the entire evidence, the reviewing court is "'left with the definite and firm conviction that a mistake has been committed'" (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985)).

The Immigration Judge also found that the respondent did not establish that the particular social group defined as "women in El Salvador" was cognizable under the Act (IJ at 7-8). To establish that this group is cognizable under the asylum and withholding of removal statutes, the respondent must prove that the group is: "'(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within [Salvadoran] society....'" *Matter of A-B-*, 27 I&N Dec. 316, 319 (A.G. 2018) (quoting *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014)); *see also Matter of W-G-R-*, 26 I&N Dec. 208, 212-18 (BIA 2014), *aff'd in pertinent part and vacated and remanded in part on other grounds sub nom. by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied sub nom. Reyes v. Sessions*, 138 S. Ct. 736 (2018).

The Immigration Judge found that, although "women in El Salvador" satisfies the foregoing immutability requirement, it lacks "particularity" as it does not have defining characteristics and it would "entail more than 50 percent of the population of a particular country" (IJ at 7-8). The

[3] We note that the cases the respondent relies upon to argue that death threats made in the presence of weapons can constitute past persecution involve significantly more egregious facts than those present in her case. *See* Respondents' Br. at 5 (citing *Boer-Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005); *Ruano v. Ashcroft*, 301 F.3d 1155 (9th Cir. 2002).

Immigration Judge also found there is insufficient evidence that Salvadoran society perceives women as a socially distinct group (IJ at 8). However, in rejecting the respondent's proposed social group as too broad to satisfy the particularity requirement, the Immigration Judge failed to recognize the Ninth Circuit's decision in *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010), and its rejection of the "notion that a persecuted group may simply represent too large a portion of a population to allow its members to qualify for asylum." *See also Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) ("[T]he 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.") (internal parentheses omitted).

As the requirements of particularity and social distinction involve fact-finding that we cannot do in the first instance, remand to the Immigration Judge is necessary. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of D-I-M-*, 24 I&N Dec. 448, 451 (BIA 2008). In evaluating the particularity and social distinction of the claimed group of "women in El Salvador," the Immigration Judge should consider *Perdomo v. Holder* and similar Ninth Circuit cases. *See Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc). *Accord Ticas-Guillen v. Whitaker*, 744 F. App'x 410 (9th Cir. Nov. 30, 2018). Remand will allow the Immigration Judge to conduct additional fact-finding that may be necessary for the required "evidence-based inquiry" as to whether the social group of women in El Salvador meets the requirements of particularity and whether Salvadoran society recognizes the respondent's proposed social group. *See Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014). If the respondent's proposed social group is found to be cognizable under the Act, the Immigration Judge should consider whether the respondent has demonstrated a nexus between her particular social group and the past harm she suffered or future harm she fears. We express no opinion regarding the ultimate outcome of the respondent's case.[4]

Accordingly, the following order is entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

[4] Our present order contemplates further consideration of the respondent's applications for asylum and withholding of removal. To avoid piecemeal review, we reserve judgment at this time with respect to the respondent's eligibility for protection under the Convention Against Torture.

U.S. Department of Justice

Executive Office for Immigration Review

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Name: P[redacted] C[redacted], S[redacted] R[redacted] **A [redacted]-056**

Date of this notice: 12/20/2018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Crossett, John P.
Wendtland, Linda S.
Greer, Anne J.

Userteam: Docket

File: A[redacted]-056 – Tucson, AZ

Date: DEC 20 2018

In re: S[redacted] R[redacted] P[redacted] O[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rachel Wilson, Esquire

ON BEHALF OF DHS: Gilda M. Terrazas
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's decision dated August 2, 2017, denying her applications for asylum, withholding of removal, and protection under the Convention Against Torture. Sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3)(A); 8 C.F.R. §§ 1208.13(b)(1), 1208.16(a), 1208.18. The Department of Homeland Security has submitted a brief in opposition to the appeal. The record will be remanded to the Immigration Judge for further proceedings consistent with this opinion.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent's removability is undisputed. Therefore, the issue on appeal is whether the Immigration Judge properly denied her applications for asylum, withholding of removal, and protection under the Convention Against Torture. In support of those applications, the respondent credibly testified that on August 18, 2016, she was abducted and blindfolded in Mexico by unknown individuals, and then held for 2 or 3 days in an unknown location where she was repeatedly raped (IJ at 2-3, 9; Tr. at 124, 127-34). The respondent further testified that immediately following this incident, she went to a hospital where she obtained medical treatment for her injuries, and also went to the police, but a report was not filed because the respondent believes that the authorities were not taking her seriously (IJ at 3; Tr. at 139-43).

Based on the foregoing facts, the respondent argues that she suffered past persecution in Mexico, and also has a well-founded fear of future persecution there, on account of her membership in either of two "particular social groups," which she defines as "Mexican women" and "Mexican women who are victims or potential victims of gender-motivated violence." Although the Immigration Judge agreed with the respondent that the harm she experienced in Mexico was severe enough to rise to the level of past "persecution" (IJ at 13), he determined that the respondent was not eligible for asylum or withholding of removal because neither of her claimed "particular social groups" was cognizable (IJ at 11-13). The respondent challenges that determination on appeal (Respondent's Br. at 4-7).

As previously stated, the respondent asserts that she belongs to two particular social groups, comprised of "Mexican women" and "Mexican women who are victims or potential victims of gender-motivated violence." To establish that these groups are cognizable under the asylum and withholding of removal statutes, the respondent must prove that the groups are: "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within [Mexican] society...." *Matter of A-B-*, 27 I&N Dec. 316, 319 (A.G. 2018) (quoting *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014)); *see also Matter of W-G-R-*, 26 I&N Dec. 208, 212-18 (BIA 2014), *aff'd in pertinent part and vacated and remanded in part on other grounds sub nom. Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied sub nom. Reyes v. Sessions*, 138 S. Ct. 736 (2018).

The Immigration Judge found that although "Mexican women" satisfies the foregoing immutability and social distinction requirements, it lacks "particularity" because it defines a "demographic unit" of great diversity rather than a discrete group, and is "exceedingly broad because it would conceivably include a majority of the population of Mexico" (IJ at 12). The Immigration Judge also found that the group "Mexican women who are victims or potential victims of gender-motivated violence" is not cognizable because it is circular (IJ at 12-13).

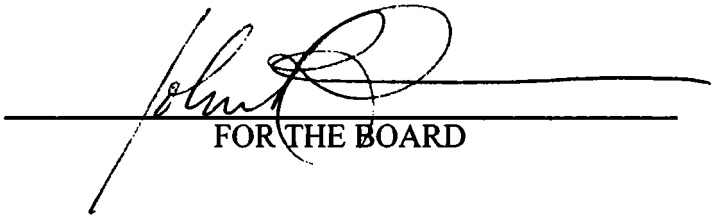
We agree with the Immigration Judge's decision as it relates to "Mexican women who are victims or potential victims of gender-motivated violence." To be cognizable, a particular social group must exist independently of the harm claimed by its members. *Matter of A-B-*, 27 I&N Dec. at 317, 334-35; *Matter of W-G-R-*, 26 I&N Dec. at 215; *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007). The respondent's alternative group does not satisfy that requirement because it is defined by reference to the persecution (i.e., "gender-motivated violence") its members claim to suffer (or fear).

Following the Immigration Judge's decision and during the pendency of this appeal, the Attorney General issued a precedential decision *in Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), clarifying the criteria required to establish an asylum claim based on membership in a particular social group. In light of this intervening precedent decision, we will remand the record to allow the Immigration Judge to supplement his decision and reconsider the respondent's asylum and withholding of removal claims insofar as they are based on her claimed membership in a particular social group comprised of "Mexican women." In evaluating the "particularity" of the claimed group, the Immigration Judge should consider *Matter of A-B-* as well as pertinent portions of *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1093–94 (9th Cir. 2013), and *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010). *Accord Ticas-Guillen v. Whitaker*, --- F. App'x ----, No. 16-72981 (9th Cir. Nov. 30, 2018), *available at* 2018 WL 6266766. On remand, the Immigration Judge should also consider whether the respondent has demonstrated a nexus between her proposed particular social group and the past harm she suffered or future harm she fears and whether the Mexican government was (or will be) unable or unwilling to control her persecutors. *See Matter of A-B-*, 27 I&N Dec. at 320, 343-44; *see also Ochoa v. Gonzales*, 406 F.3d 1166, 1170 (9th Cir. 2005) (explaining that asylum and withholding of removal require proof of persecution

by a "government official or persons the government is unable or unwilling to control"). We express no opinion regarding the ultimate outcome of the respondent's case.[1]

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD

[1] Our present order contemplates further consideration of the respondent's applications for asylum and withholding of removal. To avoid piecemeal review, we reserve judgment at this time with respect to the respondent's eligibility for protection under the Convention Against Torture.

U.S. Department of Justice

Executive Office for Immigration Review

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Name: C[redacted]-D[redacted], X[redacted] C[redacted]... **A [redacted]-474**

Date of this notice: 12/11/2018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
O'Connor, Blair
Crossett, John P.

Userteam: Docket

File: A[redacted]-474 - Seattle, WA

Date: DEC 1 1 2018

In re: X[redacted] Q[redacted] C[redacted]-D[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James J. Stratton, Esquire

ON BEHALF OF DHS: Mark Hardy
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico, appeals from the decision of the Immigration Judge, dated August 16, 2017, denying her applications for asylum and withholding of removal pursuant to sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), and protection under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.16-.18. The Department of Homeland Security has submitted a brief in opposition to the appeal. The record will be remanded.

We review the findings of fact made by the Immigration Judge, including determinations as to credibility and the likelihood of future events, for clear error. 8 C.F.R. § 1003.1(d)(3)(i*); see also Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent's removability is undisputed. Therefore, the issue on appeal is whether the Immigration Judge properly denied her applications for asylum, withholding of removal, and protection under the Convention Against Torture. The respondent claims that she experienced two types of harm prior to departing Mexico. First, she claims that she was sexually abused on five occasions (IJ at 4-5). The respondent testified that she was twice assaulted by her uncle as a child, once by her manager at her place of employment, and once by a romantic partner of her mother, and lastly by another uncle just prior to leaving Mexico (IJ at 4-5). The respondent claims that she experienced this harm on account of her membership in a particular social group of "women in Mexico." Second, she claims to have been extorted by a criminal gang in relation to her employment at a furniture store (IJ at 3-4). The respondent asserts that she experienced this harm on account of her membership in a particular social group of "imputed business owners." She fears she will be subjected to additional harm if she returns to Mexico. The respondent also asserts that she is eligible for protection under the Convention Against Torture.

The Immigration Judge concluded that the respondent did not establish eligibility for asylum or withholding of removal under the Act because she did not establish a nexus between the harm she experienced and fears and a ground protected under the Act (IJ at 5-6). With regard to protection under the Convention Against Torture, the Immigration Judge concluded that the

respondent did not establish that any public official has or will acquiesce in the harm she experienced and fears in Mexico (IJ at 6).

As previously stated, the respondent asserts that she belongs to two particular social groups, comprised of "women in Mexico" and "imputed business owners." To establish that these groups are cognizable under the asylum and withholding of removal statutes, the respondent must prove that the groups are: "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within [Mexican] society...." *Matter of A-B-*, 27 I&N Dec. 316, 319 (A.G. 2018) (quoting *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014)); *see also Matter of W-G-R-*, 26 I&N Dec. 208, 212-18 (BIA 2014), *aff'd in pertinent part and vacated and remanded in part on other grounds sub nom. Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied sub nom. Reyes v. Sessions*, 138 S. Ct. 736 (2018).

We first affirm, as not clearly erroneous, the Immigration Judge's determination that, even assuming "imputed business owners" is a cognizable particular social group, the respondent has not established a nexus between the harm she experienced and fears and that membership (IJ at 5). *See Matter of N M-*, 25 I&N 526, 529 (BIA 2011) (holding that the motive of a persecutor is a finding of fact to be determined by the Immigration Judge and reviewed for clear error); *see also Ayala v. Holder*, 640 F.3d 1095, 1097 (9th Cir. 2011) (even if membership in a particular social group is established, an applicant must still show that "persecution was or will be on account of his membership in such group"). The respondent's statement on appeal does not convince us of clear error in the Immigration Judge's finding that the perpetrators of the extortion and other related crimes were motivated by a desire to obtain money, rather than a desire to overcome a protected characteristic, such as membership in the particular social group of "imputed business owners" or any other basis protected under the Act. *See Ayala v. Sessions*, 855 F.3d 1012, 1020-21 (9th Cir. 2017) (noting that extortion qualifies as past persecution only when the extortion is motivated by a protected ground); *Zetino v. Holder*, 622 F.3d 1007 (9th Cir. 2010) ("An alien's desire to be free from harassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground"); *see also Matter of M-E-V-G-*, 26 I&N Dec. at 235 ("[A]sylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions.").

However, we conclude that remand is warranted for additional consideration of the respondent's claim based on her asserted membership in the particular social group of "women in Mexico." Specifically, we conclude that remand is warranted for the Immigration Judge to (1) determine whether "women in Mexico" is a cognizable particular social group under the pertinent legal authority in light of the record presented here;[1] (2) determine whether the record establishes

[1] Following the Immigration Judge's decision and during the pendency of this appeal, the Attorney General issued a precedential decision in *Matter of A-B-*, 27 I&N Dec. 316, clarifying the criteria required to establish an asylum claim based on membership in a particular social group. Moreover, the Immigration Judge should specifically apply the analytical framework set forth by the Board in *Matter of M-E-V-G-*, 26 I&N Dec. 227 and *Matter of W-G-R-*, 26 I&N Dec. 208, and reaffirmed in *Matter of A-B-*. Finally, the Immigration Judge should also consider the guidance provided in *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010) (holding Guatemalan women may

that the harm the respondent experienced and fears has a nexus to her actual (or assumed) membership in the social group of "women in Mexico;"[2] (3) make sufficient findings of fact regarding the nature of the sexual abuse (and other gender-based harm) the respondent claims to have experienced in Mexico and assess whether this harm is of sufficient severity to constitute persecution; and (4) consider whether the respondent has demonstrated the Mexican government was or is unable or unwilling to control the people who have harmed or may harm her. *See Matter of A-B-*, 27 I&N Dec. at 320, 343-44; *see also Ochoa v. Gonzales,* 406 F.3d 1166, 1170 (9th Cir. 2005) (explaining that asylum and withholding of removal require proof of persecution by a "government official or persons the government is unable or unwilling to control").

We also conclude that the Immigration Judge's consideration of the respondent's application for protection under the Convention Against Torture is insufficient and legally incorrect. The Immigration Judge concluded that the respondent did not establish eligibility for protection under the Convention Against Torture solely on the basis that she did not show that the government of Mexico would acquiesce in the harm she fears by private actors (IJ at 6). 8 C.F.R. §§ 1208.18(a)(1), (7).

In arriving at this conclusion, the Immigration Judge relied on two factors. First, the Immigration Judge noted that there is no evidence that collusion between government officials and private actors engaging in extortion schemes is a government policy (IJ at 6). Second, the Immigration Judge reasoned that the fact that local police refused to investigate the respondent's report of being sexually assaulted does not establish that the entire government acquiesces to this harm (IJ at 6).

Both aspects of the Immigration Judge's analysis are legally incorrect. An applicant for protection under the Convention Against Torture does not need to establish that a government official who engages in torture or acquiesces to torture is doing so in furtherance of official governmental policy. *Barajas-Romero v. Lynch*, 846 F.3d at 360-65. Additionally, an applicant for protection under the Convention Against Torture does not need to show that the entire foreign government would consent to or acquiesce in her torture. *Tapia-Madrigal v. Holder*, 716 F.3d 499, 509-10 (9th Cir. 2013).

In light of the foregoing, we conclude that remand for additional consideration of the respondent's application for protection under the Convention Against Torture is warranted. In the remanded proceedings, the Immigration Judge should: (1) clearly articulate what harm, if any, the respondent is likely to experience upon her return to Mexico; (2) how likely the respondent is to

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constitute a cognizable social group). *Accord Ticas-Guillen v. Whitaker*, No. 16-72981, -- F. App'x – (9th Cir., Nov. 30, 2018), *available at* 2018 WL 6266766.

[2] In considering this issue, the Immigration Judge should apply the appropriate standard applicable to the respective forms of relief. *See Parussimova v. Mukasey*, 555 F.3d 734, 740 41 (9th Cir. 2009) (stating that the REAL ID Act requires that a protected ground represent "one central reason" for an asylum applicant's persecution); *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017) (holding that a ground protected under the Act must be "a reason" for the persecution in order to establish a nexus for purposes of withholding of removal under section 241(b)(3) of the Act).

experience such harm; (3) whether the respondent could avoid being harmed by internally relocating in Mexico; (4) whether any harm the respondent is likely to experience is "torture" as a matter of law; and (5) whether any public official would commit or acquiesce to the harm under the pertinent legal standards. 8 C.F.R. §§ 1208.16(b)(2), 1208.18(a); *see also Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012) (holding that what is likely to happen to an alien upon removal is a question of fact but whether that harm is torture is a question of law). We express no opinion on the ultimate outcome of these proceedings.

Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceeding consistent with the forgoing opinion and for the issuance of a new decision.

FOR THE BOARD

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
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Orlando, FL 32803

Name: C[redacted]-S[redacted], H[redacted] A[redacted]... **A [redacted]-247**

Date of this notice: 5/22/2018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.

SchwarzA
Userteam: Docket

File: A[redacted] 247 – Orlando, FL

Date: MAY 22 2018

In re: H[redacted] A[redacted] C[redacted]-S[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ariatna Villegas Vazquez, Esquire

ON BEHALF OF DHS: M. Diane Checchio
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Honduras, appeals from the Immigration Judge's decision dated September 7, 2017, denying her applications for asylum and withholding of removal pursuant to sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), and protection under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.16-.18. The Department of Homeland Security ("DHS") opposes the appeal. The record will be remanded.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent, a 20-year-old native and citizen of Honduras, was determined to be an unaccompanied alien child after entering the United States in May 2014. Her asylum application was initially considered by U.S. Citizenship and Immigration Services, but it was referred to the Immigration Judge on April 17, 2015.

The respondent fears that if she returns to Honduras, she will be harmed by a drug trafficker, [redacted], who raped and harassed her in 2013. When she was 15 years old, she was approached by four older men who told her that she was to go on a "date" with their boss, Mr. [redacted] (IJ at 3-4; Tr. at 21-23). After she refused, they threatened to kill her siblings and, after several more encounters, she agreed to meet Mr. [redacted] to protect her siblings (IJ at 4; Tr. at 24-25). After being picked up by three men and taken to various locations by Mr. [redacted] and his armed bodyguards, he raped her (IJ at 5; Tr. at 26-32). He also offered her cocaine and money, and asked her to work for him and be "his woman," all of which she refused (IJ at 5; Tr. at 32-33). After letting her go, he threatened to harm her if she told the police and she did not report the incident because she was afraid (IJ at 5-6; Tr. at 34). That same day, she noticed she was being followed by a man carrying a knife (IJ at 6; Tr. at 34-35). Approximately 3 months later, she began a romantic relationship with another man and became pregnant (IJ at 6; Tr. at 38). She continued to see Mr. [redacted] at various times, including on her way to her prenatal appointments, when he asked if he was the father of her child (IJ at 6-7; Tr. at 38, 40). He again asked her to be "his woman" and work for him, and she refused (IJ at 7; Tr. at 40). She left for the United States soon after.

We will remand the record for additional fact finding and analysis regarding whether the respondent experienced past persecution, or has a well-founded fear of future persecution, on account of a protected ground. Under the REAL ID Act, the respondent must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for her persecution. *See* section 208(b)(1)(B)(i) of the Act; *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010). The respondent argues that she is a member of a particular social group consisting of "young women in Honduras" (IJ at 8; Tr. at 55).

An applicant for asylum or withholding of removal based on membership in a particular social group must establish that the group is: (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208, 212-18 (BIA 2014), *aff'd in part and vacated and remanded in part on other grounds, by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied sub nom. Reyes v. Sessions*, 138 S. Ct. 736 (2018); *see also see Gonzalez v. U.S. Att'y Gen.*, 820 F.3d 399, 404-05 (11th Cir. 2016) (deferring to this Board's interpretation of "particular social group"). To satisfy the particularity requirement, a group must be discrete and have definable boundaries. *See Matter of W-G-R-, supra*, at 214. Social distinction (formerly known as social visibility) means that the group must be perceived as a group by society, regardless of whether society can identify the members of the group by sight. *Id.* at 216-17. To demonstrate social distinction, an applicant must provide evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group. *Id.* at 217 ("Although the society in question need not be able to easily identify who is a member of the group, it must be commonly recognized that the shared characteristic is one that defines the group."). In addition to establishing the existence of a cognizable particular social group, the applicant for asylum or withholding of removal must also demonstrate a nexus between the persecution and his or her membership in the specified social group. *Id.* at 223.

The Immigration Judge concluded that the respondent's proposed particular social group lacked particularity solely because it was too large of a group, consisting of a major segment of the population (IJ at 8-9). However, we have stated that, in assessing particularity, the focus is "whether the group is discrete or is, instead, amorphous," and that "[s]ocietal considerations will necessarily play a factor in that determination." *Matter of W-G-R-*, 26 I&N Dec. at 214; *see also Matter of M-E-V-G-*, 26 I&N Dec. at 241 ("Societal considerations have a significant impact on whether a proposed group describes a collection of people with appropriately defined boundaries and is sufficiently 'particular.'"). Additionally, the Immigration Judge found that the respondent's particular social group lacked social distinction, but made no findings based on the country conditions evidence regarding whether Honduran society perceives, considers, or recognizes "young women in Honduras" to be a distinct group (IJ at 9; Exhs. 3, 4). *See Matter of M-E-V-G-*, 26 I&N Dec. at 241 ("Similarly, societal considerations influence whether the people of a given society would perceive a proposed group as sufficiently separate or distinct to meet the 'social distinction' test.").

Given our precedent, which requires analysis of particularity and social distinction in the context of the society in question, we conclude that a remand is necessary for the Immigration Judge address the requirements particularity and social distinction with reference to the relevant

country conditions evidence in the record (Exhs. 3, 4). The parties may supplement the record on remand. If, on remand, the Immigration Judge determines that the respondent's proposed social group is legally cognizable, the Immigration Judge will determine whether the respondent has shown that her membership in this group was or will be at least one central reason for her persecution. *See* section 208(b)(1)(B)(i) of the Act; *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010).

Finally, while the Immigration Judge stated that there was no "real evidence" in this case to show a clear likelihood that the respondent more likely than not be tortured with the consent or acquiescence of a public official, he did not make any findings regarding the voluminous country conditions evidence regarding sexual and other violence against women in Honduras (particularly by organized crime) and the Honduran government's response to this violence (Exhs. 3, 4). On remand, the Immigration Judge will conduct additional fact finding and analysis with regard to the respondent's eligibility for protection under the Convention Against Torture. We express no opinion as to the ultimate result in this case.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
Arlington Immigration Court
1901 South Bell Street, Suite 200
Arlington, VA 22202

IN THE MATTERS OF:	**IN REMOVAL PROCEEDINGS**
[redacted], Lead Respondent;	**File No.:** A [redacted]
[redacted], Rider Respondent;	**File No.:** A [redacted]
[redacted], Rider Respondent.	**File No.:** A [redacted]

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "Act"), as amended, as an immigrant present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATIONS: Asylum, pursuant to INA § 208; withholding of removal, pursuant to INA § 241(b)(3); and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Convention Against Torture" or "CAT"), pursuant to 8 C.F.R. §§ 1208.16-.18 (2018).

APPEARANCES

ON BEHALF OF THE RESPONDENTS:
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ON BEHALF OF THE DHS:
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DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The respondents are citizens and nationals of Honduras. Exhs. 1-1B. They entered the United States at or near [redacted], on or about [redacted]. Exhs. 1-1B. On

[redacted], the Department of Homeland Security ("DHS") served the respondents with Notices to Appear ("NTA"), charging them with inadmissibility pursuant to section 212(a)(6)(A)(i) of the Act. *See* Exhs. 1-1B. At a master calendar hearing on [redacted], the respondents, through counsel, admitted the factual allegations in their respective NTAs and conceded inadmissibility as charged. Accordingly, the Court finds inadmissibility has been established. *See* 8 C.F.R. § 1240.10(c).

On [redacted], the respondent filed an Application for Asylum and for Withholding of Removal ("Form I-589"), seeking asylum and withholding of removal under the Act and protection under the CAT. *See* Exh. 2. The rider respondents were listed as a derivative applicants on the respondent's Form I-589. *See id.* The Court heard the merits of the respondent's applications for relief on [redacted]. For the following reasons, the Court grants the respondents' applications for asylum.

II. SUMMARY OF THE EVIDENCE

A. Documentary Evidence

Exhibit 1: NTA for the respondent, served on [redacted], filed [redacted];
Exhibit 1A: NTA for the rider respondent, [redacted], served on [redacted], filed [redacted];
Exhibit 1B: NTA for the rider respondent, [redacted], served on [redacted], filed [redacted];
Exhibit 2: Form I-589 for the respondent, including rider respondents as derivative applicants, filed [redacted];
Exhibit 3: The respondent's exhibits in support of the respondent's Form I-589, including Tabs A-Q, filed [redacted].

B. Testimonial Evidence

The Court heard testimony from the respondent on [redacted]. The testimony provided in support of the respondent's applications, although considered by the Court in its entirety, is not fully repeated herein, as it is part of the record. Rather, the claims raised during the testimony are summarized below to the extent they are relevant to the Court's subsequent analysis.

[redacted]

In the Matters of [redacted];
A [redacted]

[redacted]

[redacted]

III. LAW, ANALYSIS, AND FINDINGS

A. Credibility and Corroboration

The provisions of the REAL ID Act of 2005 govern cases in which the applicant filed for relief on or after May 11, 2005. *See Matter of S-B-*, 24 I&N Dec. 42, 44 (BIA 2006). The applicant has the burden of proof in any application for relief. INA § 240(c)(4)(A). Her credibility is important and may be determinative. Generally, to be credible, testimony must be detailed, plausible, and consistent; it should satisfactorily explain any material discrepancies or omissions. INA § 240(c)(4)(C). In making a credibility determination, the Immigration Judge considers the totality of the circumstances and all relevant factors. *Id.*; *See also Matter of J-Y-C-*, 24 I&N Dec. 260, 262 (BIA 2007). The Court may base a credibility determination on the witness' demeanor, candor, or responsiveness, and the inherent plausibility of her account. INA § 240(c)(4)(C). Other factors include the consistency between written and oral statements, without regard to whether an inconsistency goes to the heart of the applicant's claim. *Id.*; *J-Y-C-*, 24 I&N Dec. at 263-66. An applicant's own testimony, without corroborating evidence, may be sufficient proof to support a fear-based application if that testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for her fear of persecution. *Matter of Mogharrabi,* 19 I&N Dec. 439, 445 (BIA 1987); 8 C.F.R. § 1208.13(a).

Considering the totality of the circumstances and all relevant factors, the Court finds the respondent credible. Her testimony was candid, detailed, and internally consistent. Additionally,

her account of what happened in Honduras is plausible and consistent with record evidence. *See* Exh. 2 (Form I-589); 3, Tab D ([redacted]'s birth certificate listing [redacted] as the father), Tab E (police complaint filed by the respondent), Tab F (Honudran newspaper article documenting [redacted]'s escape from prison). Moreover, the DHS conceded that the respondent testified credibly. Accordingly, the Court finds the respondent credible.

B. Asylum

An applicant for asylum must demonstrate that she is a "refugee" within the meaning of INA § 101(a)(42). *See* INA § 208(a). To satisfy the "refugee" definition, the applicant must demonstrate a reasonable probability either that she suffered past persecution or that she has a well-founded fear of future persecution in her country of origin on account of one of the five statutory grounds—race, religion, nationality, membership in a particular social group, or political opinion. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987); 8 C.F.R. § 1208.13(a). The applicant must show that she fears persecution by the government or an agent that the government is unwilling or unable to control. *See Matter of A-B-*, 27 I&N Dec. 316, 317 (A.G. 2018); *Matter of S-A-*, 22 I. & N. Dec. 1328, 1335 (BIA 2000). The applicant also must demonstrate that one of the five statutory asylum grounds was or will be at least one central reason for her persecution. INA § 208(b)(1)(B)(i); *A-B-*, 27 I&N Dec. at 317. Finally, in addition to establishing statutory eligibility, the applicant must demonstrate that a grant of asylum is warranted in the exercise of discretion. INA § 208(b)(1)(A); 8 C.F.R. § 1208.14(a).

1. One Year Deadline

As a threshold issue, the respondent must show by clear and convincing evidence that she applied for asylum within one year of her last arrival to the United States or that she qualifies for an exception to the one-year deadline. 8 C.F.R. § 1208.4(a)(2). Here, the DHS conceded that the Respondent filed her application within one year of her last arrival to the United States. *See* Exhs. 1; 2. The Court therefore finds the respondent's application timely filed.

2. Past Persecution

To establish a claim for asylum, the applicant must show the harm she suffered or fears she will suffer rises to the level of persecution. Persecution entails harm or suffering inflicted upon an individual to punish her for possessing a belief or characteristic the persecutor seeks to overcome. *See Acosta*, 19 I&N Dec. at 222-23. Persecution includes the "threat of death, torture, or injury to one's person or freedom." *Cordova v. Holder*, 759 F.3d 332, 337 (4th Cir. 2014); *see also Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) ("[W]e have expressly held that 'the threat of death qualifies as persecution.'") (quoting *Crespin-Valladares*, 632 F.3d at 126).

a. Past Harm

The DHS conceded that the respondent suffered harm rising to the level of persecution, and the Court finds that the respondent has demonstrated that she suffered past persecution. *See Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005) ("Persecution involves the threat of death,

torture, or injury to one's person or freedom.") (internal quotations omitted); *see also Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998) (noting that court must consider events cumulatively).

b. Government Unable or Unwilling to Control

The DHS also conceded that the Honduran police was unable or unwilling to protect the respondent from [redacted] and [redacted]. Accordingly, the Court finds that the respondent established she suffered harm at the hands of individuals from whom the Honduran government is unwilling or unable to protect her. *See A-B-*, 27 I&N Dec. at 330 (stating that the applicant "bears the burden of showing that . . . [her] home government was 'unable or unwilling to control' the persecutors") (quoting *Matter of W-G-R-*, 26 I&N Dec. 208, 224 & n.8 (BIA 2014)); *see also Acosta*, 19 I&N Dec. at 222; *Mulyani v. Holder*, 771 F.3d 190, 197-98 (4th Cir. 2014).

3. Nexus to a Protected Ground

The respondent must, through direct or circumstantial evidence, prove that a protected ground was or would be "at least one central reason" for the persecution. *Matter of C-T-L-*, 25 I&N Dec. 341, 348 (BIA 2010); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 213 (BIA 2007). The protected ground need not be the sole reason for persecution, but it must have been more than an "incidental, tangential, superficial, or subordinate" reason. *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 247 (4th Cir. 2017).

c. Women in Honduras

The Court finds that "women in Honduras" are members of a cognizable particular social group. The Board of Immigration Appeals ("Board" or "BIA") has instructed that the phrase "membership in a particular social group" is "not meant to be a 'catch all' that applies to all persons fearing persecution." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 234-35 (BIA 2014). For a particular social group to be legally cognizable under the Act and thus, constitute a protected ground, the group must be (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *See A-B-*, 27 I&N Dec. at 317; *W-G-R-*, 26 I&N Dec. 208; *Matter of C-A-*, 23 I&N Dec. 951, 959-61 (BIA 2006); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008)). The Court determines whether a proposed particular social group is legally cognizable on a case-by-case basis. *M-E-V-G-*, 26 I&N Dec. at 231; *Acosta*, 19 I&N Dec. at 233. The shared characteristic "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." *See M-E-V-G-*, 26 I&N Dec. at 231; *see also Acosta*, 19 I&N Dec. at 233. A group is socially distinct if the society in question perceives or recognizes the proposed group as a group. *M-E-V-G-*, 26 I&N Dec. at 238. A group is particularly defined if it is "discrete," has "definable boundaries," and is not "amorphous, overbroad, diffuse, or subjective," and "provide[s] a clear benchmark for determining who falls within the group." *Id.* at 239. Additionally, the group must exist "independently of the alleged underlying harm." *A-B-*, 27 I&N Dec. at 317.

First, the respondent's particular social group is comprised of members sharing a common immutable characteristic. Members of the group all share "a characteristic that . . . so fundamental to individual identity or conscience that it ought not to be required to be changed"—their sex. *Acosta*, 19 I&N Dec. at 233. A person's sex is fundamental to his or her identity, making it an immutable characteristic as it is generally unchangeable, and is certainly a characteristic that one should not be required to change. The Board went so far as to state as much in *Acosta*, concluding that one's "sex" is a "shared characteristic" on which particular social group membership can be based. *Id.* (stating that "[t]he shared characteristic might be an innate one such as sex, color, [or] kinship ties").

Second, the respondent's particular social group is socially distinct within the society in question. In *M-E-V-G-*, the Board explained that "[a] viable particular social group should be perceived within the given society as a sufficiently distinct group," and that "[t]he members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society." 26 I&N Dec. 227, 238; *see also W-G-R-*, 26 I&N Dec. 208, 217 (BIA 2014) (stating that "social distinction exists where the relevant society perceives, considers, or recognizes the group as a distinct social group"). Through her testimony and documentary evidence, the respondent has established that Honduran society perceives women as sufficiently distinct from society as a whole to qualify as a particular social group. The respondent submitted the 2016 State Department Human Rights Report on Honduras, which states that "[v]iolence against women and impunity for perpetrators continued to be a serious problem" and that "[r]ape was a serious and pervasive societal problem." Exh. 3, Tab G at 41. The report also states that the "UN special rapporteur on violence against women expressed concern that most women in [Honduras] remained marginalized, discriminated against, and at high risk of being subjected to human rights violations." *Id.* at 43. The report further states that the Honduran government "did not effectively enforce" laws governing sexual harassment. *Id.* Finally, the report states that, although women and men have the same legal rights in many respects in Honduras, "many women did not fully enjoy such rights." *Id.* at 44.

The rest of the respondent's country conditions documentation are consistent with the State Department's report. For example, the respondent submitted a 2015 *Irish Times* article, which notes that "Honduras is rapidly becoming one of the most dangerous places on Earth for women" as "the number of violent deaths of women increased by 263.4 per cent" between 2005 and 2013. Exh. 3, Tab J at 134. The other news articles report similar statistics, documenting the pervasive violence against women in Honduras. *Id.*, Tab I (describing the endemic violence against women in Honduras), Tab K (noting that girlfriends and female relatives are considered "valuable possessions" and are targeted for revenge killings); Tab L ("In Honduras, 471 women were killed in 2015—one every 16 hours."). Taken as a whole, the respondent's evidence establishes that cultural and legal norms in Honduras permit widespread violence and discrimination against women. Through this evidence, the respondent has shown that women in Honduras "are set apart, or distinct, from other persons within [Honduras] in some significant way," and are therefore socially distinct. *M-E-V-G-*, 26 I&N Dec. at 238.

Third, the respondent's particular social group is defined with particularity. The Board has explained a group is particularly defined if it has "definable boundaries," and is not "amorphous, overbroad, diffuse, or subjective." *M-E-V-G-*, 26 I&N Dec. at 238-39. Further, "[a] particular

social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group," and "be discrete and have definable boundaries." *Id.* at 239; *see also W-G-R-*, 26 I&N Dec. at 214. The particularity requirement "clarifies the point . . . that not every 'immutable characteristic' is sufficiently precise enough to define a particular social group." *M-E-V-G-*, 26 I&N Dec. at 239; *see also W-G-R-*, 26 I&N Dec. at 213. The Fourth Circuit similarly explained particularity as the need for a particular social group to "have identifiable boundaries." *Temu v. Holder*, 740 F.3d 887, 895 (4th Cir. 2014); *see also Zelaya v. Holder*, 668 F.3d 159, 165 (4th Cir. 2012) (stating that a particular social group must "be defined with sufficient particularity to avoid indeterminacy").

The particular social group of "women in Honduras" is defined with particularity. The boundaries of the group are precise, clearly delineated, and identifiable: women are members and men are not. *See M-E-V-G-*, 26 I&N Dec. at 239; *W-G-R-*, 26 I&N Dec. at 213-14; *Temu*, 740 F.3d at 895; *Zelaya*, 668 F.3d at 165. There is a clear benchmark for determining whether a person in Honduras is a member of the group: whether that person is a woman. *See M-E-V-G-*, 26 I&N Dec. at 238-39; *W-G-R-*, 26 I&N Dec. at 213-14. In *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007), the Board ruled that "affluent Guatemalans" are not members of a cognizable particular social group, holding that "[t]he terms 'wealthy' and 'affluent' standing alone are too amorphous to provide an adequate benchmark for determining group membership." Here, by contrast, the term "woman" is not too amorphous to provide such an adequate benchmark, as, in the vast majority of cases, a person either is a woman or is not. In *Temu*, 740 F.3d at 895, the Fourth Circuit commented that the group in *Matter of A-M-E- & J-G-U-*, "affluent Guatemalans," was not defined with particularity "because the group changes dramatically based on who defines it." The court stated that "[a]ffluent might include the wealthiest 1% of Guatemalans, or it might include the wealthiest 20%," and that the group therefore "lacked boundaries that are fixed enough to qualify as a particular social group." *Id.* The group of "women in Honduras" does not change based on who defines it, and it therefore has boundaries that are fixed enough to meet the particularity requirement.

The particular social group of "women in Honduras" is defined with particularity even though it is large. In *Matter of S-E-G-*, 24 I&N Dec. 579, 585 (BIA 2008), the Board stated, "While the size of the group may be an important factor in determining whether the group can be so recognized, the key question is whether the proposed definition is sufficiently particular or is too amorphous . . . to create a benchmark for determining group membership." 24 I&N Dec. 579, 585 (BIA 2008) (quotations omitted). Therefore, the "key question" relates not to the size of the group but to whether the group's definition provides an adequate benchmark for determining which people are members and which people are not. In the respondent's case, as discussed above, the group's definition provides such an adequate benchmarks: women are members and men are not.

In addition, the Board has routinely recognized large groups as defined with particularity. Most obviously, the Board has long held that gay and lesbian people in various countries can qualify as members of particular social groups. *See Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990) (recognizing "homosexuals . . . in Cuba" as members of a particular social group). The Board recently affirmed that "homosexuals in Cuba" are members of a cognizable particular social group because, among other things, the group is defined with particularity. *See*

M-E-V-G-, 26 I&N Dec. at 245; *W-G-R-*, 26 I&N Dec. at 219. The Board has never found, in a precedent decision, that a group of gay and lesbian people in a given country is not defined with particularity, even though such groups are sizable. Likewise, the Board has recognized that particular social group membership can be based on clan membership. In particular, in *Matter of H-*, 21 I&N Dec. 337, 343 (BIA 1996), the Board found that members of the Marehan subclan in Somalia are members of a particular social group. The Board later affirmed that the group of "members of the Marehan subclan" is defined with particularity, simply noting that the group is "easily definable." *See W-G-R-*, 26 I&N Dec. at 219 (stating that the group of "members of the Marehan subclan" is "easily definable and therefore sufficiently particular").

In *Matter of W-G-R-*, 26 I&N Dec. at 221, the Board found that the proposed group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" was not defined with particularity. The Board supported this conclusion by finding "[t]he group as defined lacks particularity because it is too diffuse, as well as being too broad and subjective. As described, the group could include persons of any age, sex, or background." *Id.* However, the Board's decision in *Matter of W-G-R-* does not support a finding that the group of "women in Honduras" is not defined with particularity. The Board's conclusion in *Matter of W-G-R-* that the group in that case was not defined with particularity was based on its finding that the group's "boundaries" were "not adequately defined" because the respondent had not established that society in El Salvador would "generally agree on who is included" in the group of former gang members. *Id.* at 221. By contrast, the group in this case—women in Honduras—has well-defined boundaries. "[M]embers of society" in Honduras would "generally agree on who [are] included in the group" —women—and who are excluded—men. The boundaries of the group of "women in Honduras" are precise, finite, and objective. Further, the group is not based on some "former association" with an organization, as was the proposed group in *W-G-R-*. Instead, it is based on one's biological identity, which has a clear and well-defined boundary.

It could be argued that the Board's decision in *Matter of W-G-R-* stands for the proposition that a group cannot be defined with particularity if it is internally diverse. After all, in ruling that the proposed group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" is not defined with particularity, the Board, as noted above, stated that the group "could include persons of any age, sex, or background." *Id.* at 221. In the Board's words, the group could include "a person who joined the gang many years ago at a young age but disavowed his membership shortly after initiation without having engaged in any criminal or other gang-related activities" as well as "a long-term, hardened gang member with an extensive criminal record who only recently left the gang." *Id.* If one accepts the premise that a group cannot be defined with particularity if it is internally diverse, then it could be further argued that the group of "women in Honduras" is not defined with particularity. That group is highly diverse, as it encompasses, for example, women of different ages, races, and levels of education.

However, imposing a requirement that a group cannot be internally diverse to be defined with particularity would run counter to other Board precedent decisions, and would preclude the recognition of particular social groups that are currently commonly accepted. In *Matter of C-A-*, 23 I&N Dec. at 957, the Board stated that it did not "require an element of 'cohesiveness' or homogeneity among group members." *See also S-E-G-*, 24 I&N Dec. at 586 n. 3. A policy that an internally diverse group cannot be defined with particularity would preclude particular social

groups based on sexual orientation. As noted above, the Board has long recognized, and continues to recognize, particular social groups of gay and lesbian people in various countries. *See Toboso-Alfonso*, 20 I&N Dec. at 822-23; *see also M-E-V-G-*, 26 I&N Dec. at 245, (affirming that "homosexuals in Cuba" are members of a cognizable particular social group because, among other things, the group is defined with particularity); *W-G-R-*, 26 I&N Dec. at 219 (affirming that "homosexuals in Cuba" "had sufficient particularity because it was discrete and readily definable"). Groups composed of gay and lesbian people in particular countries are extremely diverse; such a group would include young people and old people, rich people and poor people, people in same-sex romantic relationships and people not in such relationships, people living in cities and people living in rural areas, and so on. Such a policy would also likely preclude particular social groups based on clan membership, as a clan would, in all likelihood, include people from a variety of backgrounds and walks of life. *See H-*, 21 I&N Dec. at 343 (finding that members of the Marehan subclan in Somalia are members of a particular social group); *see also W-G-R-*, 26 I&N Dec. at 219 (affirming that the group in *Matter of H-* is defined with particularity as it is "easily definable"). For the same reason, such a policy would also likely preclude particular social groups based on ethnicity, such as "Filipino[s] of mixed Filipino-Chinese ancestry," recognized by the Board as a particular social group in *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997). *See also W-G-R-*, 26 I&N Dec. at 219 (stating that the group of "Filipino[s] of mixed Filipino-Chinese ancestry" is defined with particularity as it "ha[s] clear boundaries, and its characteristics ha[ve] commonly accepted definitions").

Additionally, the respondent's particular social group exists independent of the harm its members suffer. *See A-B-*, 316 at 334 ("To be cognizable, a particular social group *must* 'exist independently' of the harm asserted in an application for asylum or statutory withholding of removal.") (emphasis in the original) (citing *M-E-V-G-*, 26 I&N Dec. at 236 n.11, 243). The harm the members suffer does not create any of the characteristics they share; rather, very clearly, as discussed below, the characteristics of the members give rise to the harm. Honduran society treats women separately from the rest of society apart from any abuse the women suffer on account of their membership in this particular social group. Finally, the respondent is a member of her particular social group. She is a Honduran woman. For the foregoing reasons, the respondent has established her membership in a cognizable particular social group. The Court must now analyze if the persecution she suffered was on account of her membership in this group.

d. On Account Of

For the respondent to establish that her persecution was on account of a protected ground, she must show the protected ground was "at least one central reason" she was persecuted. *J-B-N- & S-M-*, 24 I&N Dec. at 214; INA § 208(b)(1). The protected ground, however, need not be "*the* central reason or even a dominant central reason' for [the] persecution." *Crespin-Valladares*, 632 F.3d at 127; *see also Oliva v. Lynch*, 807 F.3d 53, 59 (4th Cir. 2015) ("[A] protected ground must be 'at least one central reason for the feared persecution' but need not be the only reason."). Nevertheless, the protected ground cannot be incidental, tangential, superficial, or subordinate to a non-protected reason for harm. *Oliva*, 807 F.3d at 59 (quoting *J-B-N- & S-M-*, 24 I&N Dec. at 214). The persecutors' motivations are a question of fact, and may be established through testimonial evidence. *Matter of S-P-*, 21 I&N Dec. 486, 490 (BIA 1996).

The respondent has demonstrated that her status as a woman was at least one central reason for the harm that [redacted] and [redacted] inflicted on her. She submitted sufficient circumstantial evidence of [redacted] and [redacted] motives to establish that her status as a woman was one central reason for the harm she suffered. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (stating that "the [asylum] statute makes motive critical," and that an applicant "must [therefore] provide *some* evidence of it, direct or circumstantial") (stating that "we do not require" "direct proof of [a] persecutor's motives"). [redacted] The Court therefore finds that the respondent's membership in the particular social group of "women in Honduras" is "at least one central reason" for the persecution she suffered. *J-B-N- & S-M-*, 24 I&N Dec. at 214.

4. Presumption of Future Persecution

Because the respondent established that she experienced past persecution on account of her membership in a protected class at the hands of actors the Honduran government was unable or unwilling to control, she benefits from a rebuttable presumption of future persecution. 8 C.F.R. § 1208.16(b)(1). To overcome this presumption, the DHS bears the burden of demonstrating, by a preponderance of the evidence, that (1) there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in her country of nationality on account of a protected ground; or (2) the applicant could avoid future persecution by relocating to another part of her country of nationality and under the circumstances, it would be reasonable to expect her to do so. 8 C.F.R. § 1208.13(b)(1)(i)(A)-(B); *see also* 8 C.F.R. § 1208.13(b)(3)(ii) (where past persecution is established, internal relocation is presumptively unreasonable); *see also Matter of D-I-M-*, 24 I&N Dec. 448, 451 (BIA 2008) (remanding a case for failing to shift the burden of proof to the DHS that, by a preponderance of the evidence, relocation was reasonable). The DHS provided no evidence nor made any meaningful attempt to rebut this presumption. Accordingly, the Court finds that the presumption that the respondent has a well-founded fear of future persecution on account of her membership in a particular social group remains unrebutted.

5. Discretion

After an applicant establishes her statutory eligibility for asylum, the Court may exercise its discretion to grant or deny asylum. 8 C.F.R. § 1208.14(a); *see also* INA § 208(b)(1)(A); *Cardoza-Fonseca*, 480 U.S. at 427-28; *Pula*, 19 I&N Dec. at 473. A decision to deny asylum as a matter of discretion should be based on the totality of the circumstances. *See Pula*, 19 I&N Dec. at 473. The Fourth Circuit has recognized that discretionary denials of asylum are "'exceedingly rare'" and require "egregious negative activity by the applicant." *Zuh v. Mukasey*, 547 F.3d 504, 507 (4th Cir. 2008). The Court is not required to "analyze or even list every factor," but must

demonstrate it has "reviewed the record and balanced the *relevant* factors and must discuss the positive or adverse factors" supporting the decision. *Id.* at 511 (citing *Casalena v. INS*, 984 F.2d 105, 107 (4th Cir. 1993) and *Matter of Marin*, 16 I&N Dec. 581, 585 (BIA 1978)) (emphasis in original).

The Court finds that the respondent merits a favorable exercise of discretion. She suffered past persecution and has a well-founded fear of persecution in Honduras on account of a protected ground. She has no known criminal record in the United States or elsewhere. The only negative factor in the respondent's case is her entry without inspection. *See* Exh. 1. Thus, after considering the totality of the circumstances, the Court will grant her request for asylum in the exercise of discretion.

IV. CONCLUSION

The respondent established that she suffered past persecution on account of her membership in a legally-cognizable particular social group. Additionally, the DHS did not rebut the presumption of future persecution. Moreover, the respondent established that she warrants a favorable exercise of the Court's discretion. Accordingly, the Court grants her application for asylum. For the same reason, the Court grants the rider respondents' derivative applications for asylum. Therefore, the Court does not reach the respondent's applications for withholding of removal under the Act and protection under the CAT. Accordingly, the Court enters the following orders.

ORDERS

It Is Ordered that: The respondent's application for asylum under INA § 208 be **GRANTED**.

It Is Further Ordered that: The rider respondents' derivative application for asylum pursuant to 8 C.F.R. § 1208.21 be **GRANTED**.

[redacted] 2008
Date

D Nadkarni
Deepali Nadkarni[1]
Immigration Judge

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due at the Board of Immigration Appeals on or before thirty (30) calendar days from the date of service of this decision.

[1] The Immigration Judge formerly assigned to this case has since retired and is unable to complete this case. Pursuant to 8 C.F.R. § 1240.1(b), the signing Immigration Judge has reviewed the record of proceeding and familiarized herself with the record.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

Matter of	Date: Sept. 13, 2018
	File Number:
Respondent	In Removal Proceedings

Charge: Section 212(a)(7)(A)(i)(I), of the Immigration and Nationality Act, as amended, as an immigrant who, at the time of application for admission, was not in possession of a valid entry document as required by the Act

Applications: Asylum, Withholding of Removal, and Protection under the Convention Against Torture

On Behalf of Respondent:
Kelly Engel Wells
Dolores Street Community Services
938 Valencia Street
San Francisco, California 94110

On Behalf of DHS:
Susan Phan
Office of the Chief Counsel
100 Montgomery Street, Suite 200
San Francisco, California 94104

DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

On December 13, 2017, the Department of Homeland Security ("DHS") initiated these removal proceedings against Respondent, , by filing a Notice to Appear ("NTA") with the San Francisco, California, Immigration Court. Exh. 1. The NTA alleges that Respondent is a native and citizen of Mexico, who applied for admission into the United States at the Nogales, Arizona, Port of Entry on July 10, 2017, and did not then possess or present a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document. *Id.* Based on these allegations, DHS charged Respondent with removability under the Immigration and Nationality Act ("INA" or "Act") § 212(a)(7)(A)(i)(I), as amended, as an immigrant who, at the time of application for admission, was not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document as required by the Act. *Id.*

On , Respondent admitted the factual allegations in the NTA and conceded the charge of removability but declined to designate a country of removal. Based on her admissions and concession, the Court sustained the charge of removability and directed

Mexico as the country of removal, should removal become necessary. 8 C.F.R. § 1240.10(c), (f). On . 2018, Respondent filed a Form I-589, Application for Asylum and for Withholding of Removal ("Form I-589"), applying for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). Exh. 3A.

II. EVIDENCE PRESENTED

The Court has thoroughly reviewed the evidence in the record, even if not explicitly mentioned in this decision. The evidence of record consists of the testimony of Respondent and the following exhibits:

Exhibit 1:	NTA;
Exhibit 2:	Form I-213, Record of Deportable/Inadmissible Alien;
Exhibit 3:	Letters in support of Respondent's Form I-589;
Exhibit 3A:	Form I-589;
Exhibit 4:	2016 United States Department of State Human Rights Report for Mexico;
Exhibit 5:	Respondent's documentation in support of her Form I-589;
Exhibit 6:	Respondent's amendments to her Form I-589;
Exhibit 7:	Respondent's supplemental documentation;
Exhibit 8:	Respondent's additional supplemental documentation; and
Exhibit 9:	Respondent's additional supplemental documentation.

A. Respondent's Testimony and Declaration

Respondent testified before the Court on August 23, 2018, and submitted two declarations in support of her applications for relief. Exhs. 5 at Tab B, 9 at Tab B. The Court summarizes Respondent's testimony and declarations together below.

1. Background

Respondent was born on , in Mexico. She grew up in Morelos, Mexico with her parents and five siblings. Respondent studied art education and worked as a teacher.

2. Abuse by

From the age of 5, until the age of 22, Respondent's mother, , physically and mentally abused Respondent on a daily basis. Beginning when Respondent was approximately five years old, her mother forced her to complete the duties of a servant, including sweeping, mopping, and washing clothing, to teach Respondent how to be a good housewife. Respondent testified that her mother also beat her to make her strong and to prepare her to be a good wife, teaching her how to tolerate a beating by her future husband. She beat Respondent with a belt, cables from a washing machine, a broomstick, and a kitchen spoon. On one occasion, when Respondent told her father about the abuse, Respondent's mother beat her so severely that she was unable to sit or leave her bed the following day. Respondent also testified that her mother taught her that women always needed to obey their husbands and that

once Respondent was married, Respondent would need to ask him for permission to do anything because he was in charge. She also taught Respondent that the husband is the "superior being who can do no wrong," and if a husband beats his wife, it is her fault.

Respondent also testified that when she was nine or ten years old, she was raped during a robbery of her family's home. She told her mother who committed the robbery but not that she was raped; her mother called her a "liar and blamed [Respondent] for not alerting her to the robbery."

3. Abuse by

In 1989, Respondent met her husband, ("Mr. B "). They married in Mexico on , 1993. They have one child, ("Ms. R "), born on , 1993.

Approximately three months after they married, Mr. B egan consistently beating Respondent. On the first occasion, while on a trip to the United States, he slapped her twice across the face and punched her mouth, breaking her two front teeth. When they returned to Mexico, Mr. B continued to abuse her, often after consuming alcohol. Respondent testified that Mr. B abused her because "he felt wounded in his machismo" and told her "you're not going to step on me. I'm the man and you're going to do what I say." She believes he beat her because she was a woman and believed that she was his equal with a right to her own opinions and ideas.

Respondent also testified that on two occasions, Mr. B burned her with cigarettes, leaving permanent scars. During the first incident, in the middle of the night, Mr. B ourned Respondent's arm with a cigarette while she slept, demanding that she cook for him. She refused, but he insisted that she must cook for him because it was her job. He dragged her by her hair to the kitchen, stating, "A woman's only job was to shut up and obey her husband." Respondent continued to refuse to cook for him, and in response, Mr. B slapped her. In the second incident, Mr. B burned Respondent's face with a cigarette because she continued to work, despite his orders to quit her job, thus, explicitly disobeying Mr. B and continuing to express that she had a right to work. Respondent testified that he burned her to show her that they were not equals, he was in charge, and to impress these principles upon her since he believed she did not understand them.

Eventually, Respondent quit her job. However, Mr. B abandoned her approximately six months after they married; Respondent and her daughter lived with Respondent's family. Mr. B and Respondent remain married because Respondent's family is Catholic, and her family would disown her if they divorced.

4. Abuse by

In January 1995, Respondent entered the United States and began living in Phoenix, Arizona. Approximately two months later, she met ("Mr. H "), and they began a relationship in May 1995. They have three United States citizen

children together, born 1996, born 1997, and born 2004. Shortly after beginning their relationship, Respondent and Mr. H began living together, and Mr. H beat Respondent for the first time because he believed she was having an affair with his friend. However, he did not harm Respondent again until approximately two years later.

Respondent testified that from approximately 1998 until 2016, Mr. H consistently abused her; he also used drugs and abused alcohol often. He beat, raped, and strangled her over the course of their relationship. Mr. H raped her approximately five times per month and beat her approximately three times per month. Respondent testified that she bears physical scars from multiple incidents of his abuse. On one occasion, when Respondent refused to give Mr. H money or sex, he hit her, broke a beer bottle, cut her leg with the bottle, and then raped her. On other occasions when Respondent rejected his sexual advances, Mr. H stated that Respondent was "his woman and had to have sex with him whenever he wanted" before raping Respondent. Mr. H stated that Respondent needed to have sex with him whenever he wanted because she was a woman and thus, "his slave" and required to obey him. On another occasion, in 2004, Respondent entered their home and told Mr. H that his friends should leave. Mr. H warned Respondent that she was not to speak when entering the room and beat Respondent so severely she had a vaginal hemorrhage.

Mr. H often ordered Respondent to quit her job and beat her when he was jealous of her male supervisors. He also demanded she only work with other women and dress as he desired. Respondent testified that when she wore an outfit Mr. H did not approve of, he ripped it off of her. Mr. H also frequently bit Respondent, leaving marks on her neck and arms to show that she was "[his] woman" because others "need[ed] to know it." Respondent also testified that if she resisted due to her belief that they were equal partners, Mr. H harmed her.

Respondent attempted to end her relationship with Mr. H numerous times; however, he refused to leave and would beat and rape her to emphasize his refusal. She believed he mistreated her because she was the mother of his children and he believed he had the power and could do whatever he wanted. In 2015, Respondent moved into a house without Mr. H Yet, Mr. H found opportunities to physically harm Respondent, often utilizing their children to have contact with her.

In the spring of 2017, Mr. H was removed to his native Guatemala. Shortly thereafter, Respondent was subsequently removed to Mexico, and she returned to her parents' home. She fled Mexico approximately two weeks later because she received menacing phone calls from Mr. H

5. Criminal History

In 2007, Respondent was arrested for criminal impersonation. She testified that when she went to the Department of Motor Vehicles to renew her Arizona identification, the clerk informed her that a social security number was required for the renewal application. When

Respondent expressed that she did not have a social security number, the clerk threatened to call the police; Respondent became fearful and wrote down a random number. She was ultimately convicted and sentenced to one year of probation.

6. Fear of Returning to Mexico

Respondent fears that if she returns to Mexico, she will be persecuted by both Mr. B and Mr. H .

Respondent testified that approximately two years ago, Mr. B called her requesting information regarding her whereabouts. He expressed his desire to rekindle their relationship, but Respondent refused and told him to leave her alone. Thereafter, Respondent changed her phone number. However, Mr. B continued to contact Respondent through Facebook messages, again seeking information on her whereabouts. Respondent deleted her account to prevent Mr. B from contacting her. Yet, Respondent testified that she heard from her daughter that Mr. B visited her and was aggressive; he threatened to take "revenge" against Respondent for rejecting him and having relationships with other men.

Respondent testified that approximately one week after she was removed to Mexico, Mr. H called her on her cell phone and told Respondent he planned to locate her. Respondent believes Mr. H could find her in Mexico because his entire family resides in Chiapas, Mexico. During a second phone call, Mr. H stated that he already confirmed that Respondent was residing at her parents' home in Mexico, and he would be "coming for [Respondent]." Despite Respondent's repeated pleas to Mr. H to leave her alone, he continued to attempt to acquire information about Respondent's whereabouts through their children. She fled to the United States after she continued to feel fear and distress from Mr. H 's menacing phone calls. Respondent testified that if Mr. harmed her in Mexico she would attempt to report him to the police, but she did not believe they would help her. She believed that he would be able to locate her through their children.

B. Documentary Evidence

Respondent submitted a copy of her marriage certificate to the Court. Exh. 9 at 1. Respondent also submitted her psychological evaluation by Dr. Jane Christmas, a licensed clinical psychologist; Dr. Christmas diagnosed Respondent with post-traumatic stress disorder and major depressive disorder. *Id.* at 7–24. Respondent also submitted letters of support from community members. *See* Exh. 3.

Respondent submitted declarations from her daughter, Ms. R , and her son, , in which they described the abuse Respondent suffered by both of their fathers. Exh. 5 at 20–25. stated that Mr. H called him after Respondent was removed to Mexico seeking information on her location. *Id.* at 21. Ms. R stated that Mr. B is very aggressive and angry with Respondent because she had a relationship with another man. *Id.* at 23. She also stated that both Mr. B and Mr. H are seeking information on Respondent's whereabouts. *Id.* at 23–24. Respondent also submitted a copy of text messages Mr. H sent to Ms. R seeking information regarding Respondent's location. *Id.*

at 39. The record also includes photographic evidence of the injuries Respondent sustained from the abuse by Mr. H . *Id.* at 29–38.

Respondent submitted a letter from Adriana Prieto-Mendoza, a Mexican attorney; Ms. Prieto-Mendoza stated that Mr. H would be able to obtain permanent residency in Mexico because his children with Respondent are Mexican citizens and included copies of Mexican law to support her statement. Exh. 7 at 30–54.

Finally, Respondent submitted documentation of her criminal convictions. *Id.* at Tab A. The record evinces that in 2007, Respondent was convicted of criminal impersonation and was sentenced to one year of probation, and she was convicted of shoplifting and sentenced to pay a fine. *Id.* at 3–25. In 2017, Respondent was convicted for illegal entry in violation of 8 U.S.C. § 1325(a)(2) and sentenced to 150 days of confinement. *Id.* at 27–29.

C. Country Conditions Evidence

Respondent submitted extensive documentary evidence regarding country conditions in Mexico. *See* Exhs. 5 at Tabs G–OO, 7 Tabs D–M. DHS also submitted country conditions evidence. Exh. 4. The Court has comprehensively reviewed all country conditions evidence in the record and discusses the relevant information in the analysis below.

III. ANALYSIS

A. Credibility

A respondent has the burden of proof to establish she is eligible for relief, which she may establish through credible testimony. *See* INA § 240(c)(4). In making a credibility finding under the REAL ID Act, the Court may base its credibility determination on the demeanor, candor, or responsiveness of the applicant; the inherent plausibility of her account, the consistency between her written and oral statements, the internal consistency of each such statement, the internal consistency of such statements with other evidence of record, any inaccuracies or falsehoods in such statements, or any other relevant factor. *Id.*

The Court analyzed Respondent's testimony for consistency, detail, specificity, and persuasiveness. Overall, Respondent testified in a consistent, believable, and forthright manner, and DHS conceded that Respondent was credible. Considering the totality of the circumstances, the Court finds that Respondent testified credibly and accords her testimony full evidentiary weight. *Id.*

B. Asylum

To qualify for a grant of asylum, an applicant bears the burden of demonstrating that she meets the statutory definition of a refugee. INA § 208(b)(1)(B)(i). The Act defines the term "refugee" as any person who is outside her country of nationality who is unable or unwilling to return to, and is unable or unwilling to avail herself of the protection of that country because of

past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A).

Respondent argues she is eligible for asylum relief based on the past persecution she suffered at the hands of her mother and her husband and based on an independent well-founded fear of harm by her ex-partner.[1] The Court analyzes Respondent's claims for relief below.

I. Past Persecution

To establish past persecution, an applicant must show that she experienced harm that (1) rises to the level of persecution, (2) was on account of a protected ground, and (3) was committed by the government or forces the government is unable or unwilling to control. *Navas v. INS*, 217 F.3d 646, 655–56 (9th Cir. 2000).

a. Harm Rising to the Level Necessary to Establish Persecution

"Persecution" is "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive." *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997). Physical violence, such as rape, torture, assault, and beatings, "has consistently been treated as persecution." *Chand v. INS*, 222 F.3d 1066, 1073 (9th Cir. 2000). In assessing whether an applicant has suffered past persecution, the Court may not consider each individual incident in isolation but must instead evaluate the cumulative effect of the abuse the applicant suffered. *See Krotova v. Gonzales*, 416 F.3d 1080, 1084 (9th Cir. 2005).

While living in Mexico, Respondent experienced harm by her mother and her husband, Mr. B . *See* Exhs. 5 at Tab B, 9. The Court addresses the harm Respondent suffered by each in turn.

As an initial matter, the Court notes that Respondent was a child at the time of the harm she suffered by her mother, and "age can be a critical factor in the adjudication of asylum claims and may bear heavily on the question of whether an applicant was persecuted . . . ." *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007) (internal quotation marks omitted). The Court must assess the alleged persecution from the child's perspective, as the "harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution." *Id.* By its common usage, "child abuse" encompasses "any form of cruelty to a child's physical, moral, or mental well-being." *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 996 (BIA 1999) (internal quotation marks omitted); *see also Velazquez-Herrera v. Gonzales*, 446 F.3d 781, 782 (9th Cir. 2006). From the age of 5 until the age of 22, Respondent's mother physically harmed Respondent on a daily basis. She beat Respondent with a belt, cables from a washing machine, a broomstick, and a kitchen spoon. On one occasion, Respondent's mother beat her so severely that she was unable to sit or leave her bed the following day. In addition, Respondent's mother forced her to perform all of the duties of a servant at home, which imposed psychological harm upon Respondent. Considered cumulatively, the Court finds that the physical and mental

[1] The Court does not analyze whether the harm Respondent experienced by Mr. H constitutes past persecution because it occurred in the United States and not in the country of prospective return. *See* INA § 101(a)(42)(A).

abuse of Respondent by her mother constitutes harm rising to the level of persecution. *See Krotova*, 416 F.3d at 1084; *Chand*, 222 F.3d at 1073.

Next, the Court considers the harm Respondent suffered by her husband, Mr. B Respondent testified that after they married, Mr. B consistently physically and psychologically abused Respondent during their marriage. He frequently beat her, pulled her hair, slapped her, and on two occasions, burned her with a cigarette, once on her face, leaving permanent scars. He abused her for months before he left her and moved away. The Court finds the harm Respondent suffered by Mr. B rises to the level of persecution. *See Krotova*, 416 F.3d at 1084; *Chand*, 222 F.3d at 1073.

b. On Account of a Protected Ground

In addition to showing harm rising to the level of persecution, an applicant must show that the persecution was on account of one or more of the protected grounds enumerated in the Act: race, religion, nationality, political opinion, or membership in a particular social group. INA § 101(a)(42)(A); 8 C.F.R. § 1208.13(b)(1).

Respondent asserts that she was persecuted on account of her membership in numerous particular social groups,[2] including "women in Mexico." The Court understands Respondent's proposed social group to constitute the particular social group "Mexican females." Accordingly, the Court adopts this refined formulation of the particular social group and addresses each of the three requirements to determine the group's cognizability under the INA below. Respondent also asserts that she was harmed on account of her political opinions, including: (1) that women have the right to pursue a career; (2) men and women have equal rights; and (3) husbands and wives have equal status. The Court understands each of these three political opinions to constitute a feminist political opinion and analyzes the protected ground as such. The Court analyzes each protected ground in turn.

i. Particular Social Group

A "particular social group" must be (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question. *See Matter of A-B-*, 27 I&N Dec. 316, 319 (AG 2018) (citing *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014)). "To be cognizable, a particular social group *must* 'exist independently' of the harm asserted in an application for asylum or statutory withholding of removal." *Id.* (quoting *M-E-V-G-*, 26 I&N Dec. at 236 n.11, 243). The Board of Immigration Appeals ("Board") stated that "[s]ocial groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups." *Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006); *see Matter of Acosta*, 19

[2] Respondent proposed additional particular social groups related to her claim for past persecution including: (1) "direct descendants of ;" (2) "female children of ;" (3) "women and girls in Mexico;" and (4) "married women in Mexico." Further, Respondent also proposed additional particular social groups for her claim of well-founded fear of persecution including: (5) "married women in Mexico who are unable to leave their relationship;" (6) "mothers of the children of ;" and (7) "women in Mexico who are unable to leave their relationship with the father of their children." However, the Court does not address their cognizability at this time.

I&N Dec. 211, 233 (BIA 1985).

First, common and immutable characteristics are those attributes that members of the group "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Acosta*, 19 I&N Dec. at 233 (listing sex, color, kinship, and shared past experiences as prototypical examples of an immutable characteristic). Respondent's social group, "Mexican females," satisfies the immutability requirement because it is defined by gender and nationality, two innate characteristics that are fundamental to an individual's identity. *Id.*; *see also Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010) (reiterating that "women in a particular country, regardless of ethnicity or clan membership, could form a particular social group"); *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) ("[G]irls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group . . . .").

Second, to be cognizable, the proposed social groups must be sufficiently particular. *M-E-V-G-*, 26 I&N Dec. at 239 ("A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group.") (citation omitted); *see also Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1091 (9th Cir. 2013) (en banc). The "particularity" requirement addresses the outer limits of the group's boundaries and requires a determination as to whether the group is sufficiently discrete without being "amorphous, overbroad, diffuse, or subjective;" "not every 'immutable characteristic' is sufficiently precise to define a particular social group." *A-B-*, 27 I&N Dec. at 335 (quoting *M-E-V-G-*, 26 I&N Dec. at 239). Here, the group is sufficiently particular because the membership is limited to a discrete section of Mexican society—female citizens of Mexico—and is thus distinguishable from the rest of society. *See Perdomo*, 611 F.3d at 667, 669 (rejecting the notion that a persecuted group could represent too large a portion of the population to constitute a particular social group); *M-E-V-G-*, 26 I&N Dec. at 239.

Finally, Respondent must demonstrate that the group is socially distinct within Mexico. To establish social distinction, an applicant must show that members of the social group are "set apart, or distinct, from other persons within the society in some significant way," *M-E-V-G-*, 26 I&N Dec. at 238, and that they are "*perceived* as a group by society." *Matter of W-G-R-*, 26 I&N Dec. 208, 216 (BIA 2014) (emphasis in original). The Board clarified that "a group's recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor." *A-B-*, 27 I&N Dec. at 330 (quoting *M-E-V-G-*, 26 I&N Dec. at 242). Legislation passed to protect a specific group can be evidence that the society in question views members of the particular group as distinct. *See Henriquez-Rivas*, 707 F.3d at 1092. Yet, "a social group may not be defined exclusively by the fact that its members have been subjected to harm." *A-B-*, 27 I&N Dec. at 331 (citing *M-E-V-G-*, 26 I&N Dec. at 238). "[S]ocial groups must be classes recognizable by society at large" rather than "a victim of a particular abuser in highly individualized circumstances." *Id.* at 336 (citing *W-G-R-*, 26 I&N Dec. at 217 (providing that "[t]o have the 'social distinction' necessary to establish a particular social group, there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group")).

The Court finds the evidence in the record demonstrates that Mexican society views members of the particular social group "Mexican females" to be distinct. *See id.* Notably, country conditions documentation in the record evinces that violence committed against Mexican females is "pandemic," including femicide and domestic violence. Exh. 5 at 80, 255, 280. The 2017 United States Department of State Human Rights Report for Mexico ("2017 HR Report") identified that federal law criminalizes femicide and rape, however, impunity for all crimes remained high. *Id.* at 42, 67. Indeed, Respondent's home state of Morelos is tied for the highest number of rape and femicides. Exh. 7 at 73. Furthermore, in 2015 and 2016, the federal government began utilizing a "gender alert" mechanism to direct local authorities to "take immediate action to combat violence against women by granting victims legal, health, and psychological services and speeding investigations of unsolved cases." Exh. 5 at 100. The government issued a "gender alert" for Morelos, and a federal agency worked to set in place measures for the security and prevention of violence for women. *Id.*; Exh. 7 at 83. The existence of these efforts demonstrates the government's recognition of the need for specialized protection for Mexican females and, thus, that Mexican females are viewed as a distinct group from the general population in Mexico. *See Henriquez-Rivas*, 707 F.3d at 1092; *Silvestre-Mendoza v. Sessions*, No. 15-71961, 2018 WL 3237505 (9th Cir. July 3, 2018) (unpublished) (the Ninth Circuit remanded to the BIA to consider whether "Guatemalan women" constituted a particular social group because the record appeared to support that it may be "socially distinct").[3]

Accordingly, the Court finds that Respondent's particular social group "Mexican females" is cognizable under the Act. Furthermore, the Court finds that Respondent is a member of the particular social group.

ii. Particular Social Group Nexus

"Applicants must also show that their membership in the particular social group was a central reason for their persecution." *A-B-*, 27 I&N Dec. at 319; INA § 208(b)(1)(B)(i). A "central reason" is a "reason of primary importance to the persecutors, one that is essential to their decision to act. In other words, a motive is a 'central reason' if the persecutor would not have harmed the applicant if such motive did not exist." *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2008). The applicant may provide either direct or circumstantial evidence to establish that the persecutor was or would be motivated by the applicant's actual or imputed status or belief. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). Proof of motivation may consist of statements made by the persecutor to the victim. *See Sinha v. Holder*, 564 F. 3d 1015, 1021–22 (9th Cir. 2009) (providing that attackers' abusive language showed they were motivated at least in part by a protected ground).

Here, Respondent provided sufficient direct and circumstantial evidence to establish that her membership in the social group of "Mexican females" was at least one central reason for the persecution she suffered by her mother and her husband. Although Respondent's mother is also a member of the particular social group "Mexican females," a person may be persecuted by members of her own social group. As the Ninth Circuit explained, "[t]hat a person shares an identity with a persecutor does not . . . foreclose a claim of persecution on account of a protected ground." *Maini v. INS*, 212 F.3d 1167, 1175 (9th Cir. 2000). Respondent's mother consistently

[3] Although unpublished decisions are not precedential, they serve as persuasive authority.

beat her, reasoning she was preparing Respondent for her life with her future husband. Exh. 5 at 5. She told Respondent that women needed to obey their husbands, and she beat Respondent because Respondent was female and needed to prepare to be a good wife. *Id.* at 4. Viewing the evidence of record in its totality, and, in particular, her mother's statements, the Court finds that Respondent's membership in her particular social group was at least "one central reason" for her persecution by her mother. INA § 208(b)(1)(B)(i); *Parussimova*, 555 F.3d at 741.

Similarly, Respondent testified that Mr. B frequently abused her because she was a Mexican woman. On one occasion, he awoke Respondent in the middle of the night, intentionally burned her with a cigarette, and demanded that she cook him food, dragging her by the hair to the kitchen and stating that "a woman's only job was to shut up and obey her husband." Exh. 5 at 5. During another occasion of abuse, Mr. B threw Respondent to the floor and said, "You're not going to step on me. I'm the man and you're going to do what I say." *Id.* The record supports that many individuals in Mexico have an endemic perception that women are inferior to men. *See generally id.* The record also includes the declaration of Nancy K. D. Lemon, an expert on domestic violence, in which she opined "gender is one of the main motivating factors, if not the primary factor, for domestic violence. In other words, the socially or culturally constructed and defined identities, roles, and responsibility that are assigned to women, as distinct from those assigned to men, are at the root of domestic violence." *Id.* at 118. In particular, Mr. B 's statements in the context of Mexican society are strong evidence that if Respondent were not a woman, he would not have harmed her in this manner. Further, a report from Mexico's interior department, the National Women's Institute, and UN Women stated, "Violence against women and girls . . . is perpetrated, in most cases, to conserve and reproduce the submission and subordination of them derived from relationships of power." *Id.* at 253. As such, in the totality of the circumstances, the Court finds that Respondent's membership in the particular social group "Mexican females" was "at least one central reason" for her persecution by Mr. B . INA § 208(b)(1)(B)(i); *Parussimova*, 555 F.3d at 741.

iii. Political Opinion

To establish that past persecution is on account of political opinion, an asylum applicant must meet two requirements. First, the applicant must demonstrate that she held, or that her persecutors believed she held, a political opinion. *Ahmed v. Keisler*, 504 F.3d 1183, 1192 (9th Cir. 2007). Second, the applicant must show that she was persecuted "because of" this actual or imputed political opinion. *Id.* The Ninth Circuit held that "[a] political opinion encompasses more than electoral politics or formal political ideology or action," *Id.* The factual circumstances of the case alone may at times be sufficient to demonstrate that the persecution was committed on account of a political opinion. *Navas*, 217 F.3d at 657.

Respondent asserts that Mr. B and her mother also persecuted her on account of her feminist political opinion. Respondent expressed her belief in the equality of men and women, including equality in opinions, worth, and support; she also believes that as a woman, she has the right to work. The Court finds Respondent's views constitute a political opinion. *See Ahmed*, 504 F.3d at 1192; *see also Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993) (stating there is "little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes").

Next, the Court considers whether Respondent's political opinion was one central reason for the persecution she suffered by her mother and Mr. B . *See* INA § 208(b)(1)(B)(i); *Navas*, 217 F.3d at 656. Respondent testified that her mother abused her to teach her that women needed to obey their husbands and that husbands were in charge. Respondent also testified that her mother admitted to physically abusing Respondent because she would "answer back." The record indicates that Respondent's mother was not primarily motivated to harm Respondent because of her political opinion. *See Parussimova*, 555 F.3d at 741. Therefore, the Court finds that Respondent's political opinion was not one central reason for the persecution she suffered by her mother. *See* INA § 208(b)(1)(B)(i). However, the Court finds that Respondent's feminist political opinion was "a reason" for the persecution because Respondent's mother disagreed with Respondent's political opinion and abused Respondent, in part, for disagreeing with her. *See* INA § 241(b)(3)(A); *see Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017) (nexus standard for withholding of removal is the protected ground must have been "a reason" for the persecution).

However, the evidence in the record demonstrates that Respondent's feminist political opinion was one central reason for the persecution by Mr. B . Respondent testified that Mr. B burned her with a cigarette because she refused to quit her job and disobeyed his instruction to quit. Mr. B also burned her face with a cigarette to show her that they were not equals, he was in charge, and to impress these principles upon her since he believed she did not understand them. She also testified that he beat her because she believed she had the right to her own opinions and ideas; specifically, Mr. B beat her when she expressed her opinion that she had a right to work or she refused to cook for him. Based on Mr. B 's actions and statements, the Court finds that Respondent's political opinion was at least one central reason for the persecution by Mr. B . *See* INA § 208(b)(1)(B)(i); *Parussimova*, 555 F.3d at 741. Therefore, the Court finds that Mr. B persecuted Respondent on account of her feminist political opinion. *See Ahmed*, 504 F.3d at 1192.

c. Government Unable or Unwilling to Control Persecutor

Finally, the applicant must demonstrate that the persecution she experienced was inflicted by the government or forces the government was unable or unwilling to control. *Navas*, 217 F.3d at 655–56. Prior unheeded requests for authorities' assistance or showing that a country's laws or customs deprive victims of meaningful recourse to protection may establish governmental inability or unwillingness to protect. *See Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073–74 (9th Cir. 2017) (en banc) (providing that where "ample evidence demonstrates that reporting [persecution to police] would have been futile and dangerous," applicants are not required to report their persecutors"); *Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010) (holding that "the authorities' response (or lack thereof)" to reports of persecution provides "powerful evidence with respect to the government's willingness or ability to protect" the applicant and noting that authorities' willingness to take a report does not establish they can provide protection). Yet, applicants "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *A-B-*, 27 I&N Dec. at 338. The Ninth Circuit also recognizes that there are significant barriers for children to report abuse. *Bringas-Rodriguez*, 850 F.3d at 1071.

Respondent testified that she did not report the abuse she suffered by her mother or Mr. B to the police because she believed it would be futile and that the police would not help her. *See id.* at 1073–74. Specifically, Respondent mentioned a friend who reported severe abuse by her husband to the police; however, the police merely told Respondent's friend to "stop gossiping," instructed Respondent's friend to return to her house to do her "duties," and blamed Respondent's friend for the abuse because she was not doing her chores. *See Afriyie*, 613 F.3d at 931.

The country conditions evidence in the record overwhelmingly establishes that any efforts by Respondent to report the abuse by Mr. B would have been futile. Although "[t]he fact that the local police have not acted on a particular report of an individual crime does not necessarily mean that the government is unwilling or unable to control crime," here, the record supports Respondent's testimony and indicates that the Mexican government is unable or unwilling to control Respondent's persecutors. *A-B-*, 27 I&N Dec. at 337. The 2017 HR Report states that impunity for human rights abuses in Mexico remained a problem, "with extremely low rates of prosecution for all forms of crimes." Exh. 5 at 42. Morelos, Respondent's home state, has the fourth highest murder rate in the country and ranks in the top two for rape. Exh. 7 at 94. Relatedly, police and military were involved in serious human rights abuses and benefitted from the trend of impunity. Exh. 5 at 80, 88. A 2016 report found that nearly one in ten of Mexico's police officers are unfit for service, and the country faces serious issues of police corruption on both the federal and local level with federal counter corruption efforts continually failing. *Id.* at 308, 312–17.

Furthermore, "Mexican laws do not adequately protect women and girls against domestic and sexual violence." *Id.* at 269. Although federal laws address domestic violence, federal law does not criminalize spousal abuse, and the "[s]tate and municipal laws addressing domestic violence largely failed to meet the required federal standards and often were unenforced." *Id.* at 67. Violence against women and domestic violence continue to be some of the most serious human rights abuses in Mexico, with approximately two-thirds of women in Mexico having experienced gender-based violence during their lives. *Id.* at 80, 198. Although the federal government has issued some "gender alerts" to focus efforts on assisting women victims of domestic violence, there has not yet been a noticeable impact. *Id.* at 101, 202. In addition, often, domestic violence victims did not report abuses due to fear of spousal reprisal, stigma, and societal beliefs that abuse did not merit a complaint. *Id.* at 100.

Additionally, in protective services, including police services, bias against women leads to inadequate investigations of abuse, resulting in impunity for abusers. *Id.* at 185–86, 202. In fact, investigations regarding femicide cases revealed that 70% of femicides were committed by intimate partners, and "the majority of [victims] had sought help from government authorities, but that nothing had been done because this type of violence was considered to be a private matter." *Id.* at 187; *see also id.* at 297. Further, the Mexican government admitted its role in gender issues in the country, citing their "culture deeply rooted in stereotypes, based on the underlying assumption that women are inferior." *Id.* at 187–88. There "has not been success in changing the cultural patterns that devalue women and consider them disposable." *Id.* at 251.

Finally, despite efforts on the federal level to combat gendered violence, criminal investigations continue to be ineffective. *See id.* at 192. A common response from police is to not take a report of abuse seriously, similar to the response experienced by Respondent's friend. *Id.* Common responses by police include attempts to convince women not to file a complaint, or in the case where authorities do respond, they negotiate a "reconciliation" between the victim and the abuser. *Id.* Police treat domestic violence reporting as though it was the "normal state of affairs." *Id.* at 258 (internal quotation marks omitted). In addition, Mexican law enforcement authorities are not equipped to respond quickly or to effectively enforce protective orders. *Id.* at 193. The record indicates that "cases of violence against women are not properly investigated, adjudicated or sanctioned." *Id.* at 257.

In light of the evidence in the record, the Court finds that Respondent has shown that reporting the persecution to the authorities would have been futile or would have subjected her to further abuse. *See Bringas-Rodriguez*, 850 F.3d at 1073–74. Thus, the Court finds that Respondent met her burden to show that the government either condoned the actions of private actors or demonstrated a complete helplessness to protect victims like Respondent. *See A-B-*, 27 I&N Dec. at 337.

Although the Attorney General stated in *A-B-* that "[g]enerally, claims by aliens pertaining to domestic violence . . . perpetrated by non-governmental actors will not qualify for asylum," the Attorney General did not foreclose this possibility, and the Court finds that in this particular case, Respondent established that she was persecuted on account of her membership in the particular social group "Mexican females" and her feminist political opinion by actors the Mexican government was unable or unwilling to control. *A-B-*, 27 I&N Dec. at 320; *see* INA § 101(a)(42)(A); 8 C.F.R. § 1208.13(b).

2. Well-Founded Fear of Future Persecution

Because Respondent has demonstrated that she suffered past persecution in Mexico on account of a protected ground by actors that the government is unable or unwilling to control, she is entitled to a presumption that she has a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b)(1). DHS may overcome this presumption by showing, by a preponderance of the evidence, that (1) there has been a fundamental change in circumstances such that Respondent no longer has a well-founded fear of persecution in Mexico, or (2) Respondent could avoid future persecution by relocating to another part of the country. *See* 8 C.F.R. § 1208.13(b)(1)(i).

a. Fundamental Change in Circumstances

The evidence indicates that Respondent no longer has a well-founded fear of persecution by her mother on account of her particular social group of "Mexican females." Respondent's mother abused her during the time she resided at home with her parents. Now, however, Respondent is no longer a child and does not live in her parents' home. Given these facts, Respondent's circumstances have fundamentally changed such that her mother does not remain a

danger to her, and the Court finds that Respondent no longer has a well-founded fear of persecution by her mother on account of a protected ground. 8 C.F.R. § 1208.13(b)(1)(i)(A).

However, Mr. B has continued to contact and harass Respondent, including as recently as two years ago. Mr. B and Respondent's daughter, Ms. R , stated in her declaration that her father continues to ask about Respondent and is angry because Respondent was in a relationship with another man. Exh. 5 at 23. DHS did not present evidence to indicate a fundamental change in circumstances regarding Mr. B. *See* 8 C.F.R. § 1208.13(b)(1)(ii). Therefore, the Court concludes that DHS failed to meet its burden to show that there has been a fundamental change in circumstances such that Respondent no longer has a well-founded fear of persecution by Mr. B on account of a protected ground. 8 C.F.R. § 1208.13(b)(1)(i)(A).

b. Internal Relocation

In a case in which the applicant has demonstrated past persecution, DHS bears the burden of proving by a preponderance of the evidence that the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality and it would be reasonable to expect the applicant to do so. 8 C.F.R. § 1208.13(b)(1)(ii); *see also A-B-*, 27 I&N Dec. at 344–45 (The Court "must consider, consistent with the regulations, whether internal relocation in [the applicant's] home country presents a reasonable alternative before granting asylum."). Generalized information about country conditions is not sufficient to rebut the presumption of a well-founded fear of future persecution. *Molina-Estrada v. INS*, 293 F.3d 1089, 1096 (9th Cir. 2002). Rather, DHS must introduce evidence that rebuts the applicant's specific grounds for fearing future persecution on an individualized basis. *Id.*

Here, Respondent testified that her entire family lives on the same piece of land as her parents' home. In addition, Respondent remains married to Mr. B As recently as two years ago, Mr. B called Respondent seeking information regarding her location; he expressed that he wanted her to live with him again. She refused and changed her phone number. However, Mr. B continued to send her messages through Facebook asking about her whereabouts. Further, DHS has not introduced individualized evidence demonstrating that Respondent could avoid future persecution by relocating to another part of the country. *See Gonzales-Hernandez v. Ashcroft*, 336 F.3d 995, 997–98 (9th Cir. 2003) (holding that the government must introduce evidence that, on an individualized basis, rebuts the applicant's specific grounds for fearing future persecution). Accordingly, the Court finds that DHS failed to meet its burden to show that Respondent could relocate within Mexico and thus, DHS failed to rebut Respondent's presumption of a well-founded fear of future persecution by Mr. B both on account of her particular social group membership and her political opinion. *Id.*; 8 C.F.R. § 1208.13(b)(1)(ii). Therefore, the Court finds Respondent is statutorily eligible for asylum. *See* INA § 208(b)(1)(A).

c. Independent Well-Founded Fear

In the alternative, even in the absence of past persecution, an applicant may be eligible for asylum based on a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1). An applicant has a well-founded fear of persecution if (1) she fears persecution in the country of

nationality on account of race, religion, nationality, membership in a particular social group, or political opinion, (2) there is a reasonable possibility of suffering such persecution if she were to return to that country, and (3) she is unable or unwilling to return to, or avail herself of the protection of that country because of such fear. *See* 8 C.F.R. § 1208.13(b)(2)(i). To demonstrate a well-founded fear, the applicant need not prove that persecution is more likely than not; even a ten percent chance of persecution is sufficient to establish that persecution is a reasonable possibility. *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987)).

i. Subjectively Genuine and Objectively Reasonable Fear

A well-founded fear of future persecution must be both subjectively genuine and objectively reasonable. *Ahmed*, 504 F.3d at 1191. The subjective test is satisfied by credible testimony that the applicant genuinely fears persecution on account of a statutorily protected ground that is perpetrated by the government or by forces the government is unable or unwilling to control. *Rusak v. Holder*, 734 F.3d 894, 896 (9th Cir. 2013). The objective component requires "credible, direct, and specific evidence" that the applicant risks persecution in her home country. *Id.*

In the instant case, Respondent credibly testified that she fears her ex-partner, Mr. H , will locate her and physically harm or kill her in Mexico. A respondent's credible testimony of fear of harm satisfies the subjective prong for a well-founded fear of persecution. *See id.* Accordingly, the Court finds that Respondent established that her fear is subjectively genuine. *See id.*

Next, the Court considers whether Respondent established through "credible, direct, and specific evidence" that her fear of returning to Mexico is objectively reasonable. *See id.* First, Respondent testified at length regarding the atrocious abuse she endured from 1998 until 2016 during her relationship with Mr. H in the United States. Over the course of their relationship, he consistently beat, raped, strangled, and psychologically abused her. Respondent testified that Mr. H raped her approximately five times per month and beat her approximately three times per month. The record also includes photographic evidence of the injuries Respondent sustained from the abuse by Mr. H . Exh. 5 at 29–38.

In addition, Ms. R stated in her declaration that Mr. H contacted her and her siblings seeking information regarding Respondent's location and stated that he was in Chiapas, Mexico. Exh. 5 at 24; *see also* Exh. 5 at 39 (text messages from Mr. H seeking Respondent's address in Mexico). Furthermore, the record reflects that Mr. H will have the ability, if he is not already present in Mexico, to enter Mexico and find and harm Respondent. Mr. H , as the father of three Mexican citizen children, could self-petition for permanent residency in Mexico, placing him in a position to have access to finding and harming Respondent. *See* Exh. 7 at Tab B–C. Additionally, Mr. H repeatedly beat and raped Respondent when she resisted reconciling with him or attempted to leave him in the past. Therefore, because Mr. H has expressed that he will attempt to find Respondent, it is likely that if Respondent again resists Mr. H she is at a high risk of harm by him. Considering the totality of the circumstances, the Court finds that Respondent's fear of future

harm by Mr. H is objectively reasonable, and she faces a chance greater than ten percent of persecution occurring upon her return to Mexico. *Al-Harbi*, 242 F.3d at 888.

iii. On Account of a Protected Ground

Respondent asserts that she will suffer persecution by Mr. H on account of her membership in the particular social group "Mexican females" and on account of her feminist political opinion. As discussed *supra*, the Court finds Respondent's proposed social group of "Mexican females" to be cognizable and that Respondent is a member of the group. In addition, the Court finds that Respondent holds a feminist political opinion, as discussed *supra*. Accordingly, the Court considers whether either protected ground would be one central reason for the persecution she would face in Mexico. INA § 208(b)(1)(B)(i).

The Court finds that Respondent's membership in the particular social group "Mexican females" would be at least "one central reason" for her future persecution. *Id.* Respondent has an objectively reasonable fear of persecution by Mr. H , particularly due to the abuse she suffered in the past. For example, on one occasion when Respondent rejected his sexual advances, Mr. H stated that Respondent was "his woman and had to have sex with him whenever he wanted," and thereafter raped Respondent. Exh. 5 at 8. On other occasions, Mr. H stated that Respondent needed to have sex with him whenever he wanted because she was a woman and thus, "his slave." *Id.* at 15. Mr. H also frequently bit Respondent, leaving marks on her neck and arms to show that she was "[his] woman" because others "need[ed] to know it." *Id.* at 9. These statements establish that Mr. H frequently harmed Respondent in the past because she was a woman, and the Court finds that her membership in her particular social group "Mexican females" would be at least one central reason for her future persecution. *See* INA § 208(b)(1)(B)(i).

The Court also finds that Respondent's feminist political opinion would be one central reason for her future persecution, particularly because of her past experiences, which form the basis of her objectively reasonable fear of persecution. *Id.* Respondent testified that Mr. H frequently beat and raped her when she resisted his domination of her as the male head of the household. *See* Exh. 5 at 9–10. On one occasion, Mr. H beat Respondent so badly that she had a vaginal hemorrhage because she entered their home and told Mr. H that his friends should leave; he warned Respondent that she was not permitted to speak when entering the room. He also beat Respondent when she expressed her own opinions, justifying the abuse by stating that she was not allowed to have her own opinions or a say. Mr. H also exerted his dominance and control over Respondent by demanding she only work with other women and dress as he desired. If she resisted due to her belief that they were equal partners, Mr. H harmed her. Because Respondent's feminist opinion was a focus of Mr. H 's abuse in the past, the Court finds that her feminist political opinion would be one central reason for her future persecution. *See* INA § 208(b)(1)(B)(i).

Therefore, the Court finds Respondent would face future persecution on account of both her membership in the particular social group "Mexican females" and her feminist political opinion. *See id.*

iv. Government Unable or Unwilling to Control

Respondent must also establish that the persecution she would suffer will be inflicted by forces the government is unable or unwilling to control. *See Navas*, 217 F.3d at 655–56. The Court finds for the same reasons articulated in Section III.B.1.c. *supra*, the Mexican government would be unable or unwilling to control Mr. H In addition, the Court notes that Respondent testified that if Mr. H found her in Mexico and persecuted her, she would try to report it to the police, but she believed it would be futile. She believed the lack of police protection would result in impunity for Mr. H , giving him more power to abuse her in any manner he desired. Accordingly, the Court finds that Respondent met her burden to establish that the persecution she would suffer would be inflicted by actors the government is unable or unwilling to control. *See Navas*, 217 F.3d at 655–56.

v. Internal Relocation

If the applicant failed to demonstrate past persecution, to establish a well-founded fear of persecution, it is the applicant's burden to show that she could not avoid persecution by relocating to another part of the country and it would not be reasonable to expect her to do so. *See A-B-*, 27 I&N Dec. at 344–45; 8 C.F.R. § 1208.13(b)(2)(ii).

Here, Respondent established that she could not avoid persecution by relocating to another part of the country. *See* 8 C.F.R. § 1208.13(b)(2)(ii). Respondent testified that although she believed Mr. H was removed to his native Guatemala, she believes he is presently in Mexico because his entire family resides in Mexico. Further, Ms. R stated in her declaration that she spoke with Mr. H and he stated in was in Chiapas and persists in seeking information regarding Respondent from her. Exh. 5 at 24.

In addition, Respondent stated that approximately one week after she was removed to Mexico, Mr. H called her on her cell phone and told Respondent he was going to find her. During a second phone call, Mr. H stated that he already confirmed that Respondent was residing at her parents' home in Mexico, and he would be "coming for [Respondent]." Despite Respondent's repeated pleas to Mr. H to leave her alone, he continued to attempt to acquire information about Respondent's whereabouts through their children. Respondent fled to the United States after she continued to receive menacing phone calls from Mr. H Respondent believes Mr. H would be able to locate her anywhere in Mexico through their children or through their children's school documentation. *See also* Exh. 5 at 194–96 (abusers continue to have a right to obtain information about their children, making it relatively easy for an abuser to locate a woman fleeing his abuse). Indeed, their son stated in his declaration that Mr. H contacted him seeking information regarding Respondent's location. *Id.* at 21. In addition, as previously noted, Respondent's entire family lives on the same piece of land as her parents' home. Further, country conditions evidence evinces that violence against women is a nationwide problem. *See generally* Exhs. 5, 9.

Because Respondent has established that she is likely to face danger throughout Mexico on account of her membership in a particular social group or political opinion, the Court finds

that she has met her burden of establishing that she cannot internally relocate to avoid persecution and it would not be reasonable for her to do so. Therefore, the Court finds that Respondent established that she has a well-founded fear of persecution and is statutorily eligible for asylum. *See* INA §§ 101(a)(42)(A), 208(b)(2)(B).

3. Discretion

"Asylum is a discretionary form of relief from removal, and an applicant bears the burden of proving not only statutory eligibility for asylum but that she also merits asylum as a matter of discretion." *A-B-*, 27 I&N Dec. at 345 n.12; *see also* INA § 240(c)(4)(A)(ii). This determination requires a weighing of both the positive and negative factors presented in Respondent's case. *Kalubi v. Ashcroft*, 364 F.3d 1134, 1139–40 (9th Cir. 2004); *Matter of Pula*, 19 I&N Dec. 467, 473–74 (BIA 1987) (*superseded in part by regulation on other grounds as stated in Andriasian v. INS*, 180 F.3d 1033, 1043–44, n.17 (9th Cir. 1999)). To determine whether an asylum applicant merits relief in the exercise of the Court's discretion, the Court must consider the totality of the circumstances including the severity of the past persecution suffered and the likelihood of future persecution. *Gulla v. Gonzales*, 498 F.3d 911, 916 (9th Cir. 2007); *Kalubi*, 364 F.3d at 1138. "[D]iscretionary factors should be carefully evaluated in light of the unusually harsh consequences which may befall an alien who has established a well-founded fear of persecution; the danger of persecution should generally outweigh all but the most egregious of adverse factors." *Pula*, 19 I&N Dec. at 474. Factors to consider include the applicant's age, health, and ties to the United States, among others. *Id.*

Here, Respondent has many positive equities. Respondent has lived in the United States for approximately 28 years. She is the primary wage earner for her family, has a consistent work history, and owns her own business. Respondent has three United States citizen children, two of whom live in the United States. She actively participates in her children's education. *See* Exh. 3. Furthermore, Respondent suffered severe past persecution and has a high likelihood of suffering severe persecution should she be removed to Mexico. Additionally, she continues to suffer from post-traumatic stress disorder and major depressive disorder due to the abuse and harm she experienced throughout her life. *See* Exh. 9 at Tab C. She testified that should she be granted asylum, she would like to continue working on her business and raising her children.

These positive equities must be weighed against Respondent's negative equities; namely, her criminal history. In 2007, Respondent was convicted of criminal impersonation and was sentenced to one year of probation. Exh. 7 at 6–25. Respondent testified that when she attempted renew her Arizona identification, she was instructed to include a social security number and she wrote down a random number. Respondent was also convicted of shoplifting and sentenced to pay a fine in 2007. *Id.* at 3–4. Finally, in 2017, Respondent was convicted for illegal entry and sentenced to 150 days of confinement. *Id.* at 27–29. While the Court does not condone Respondent's actions, her convictions are for relatively minor and nonviolent crimes. Respondent did not display an intent to defraud anyone, and Respondent's conviction for illegal entry was committed in the context of her attempt to flee Mexico.

Therefore, after carefully reviewing the entire record and weighing the equities in this case, the Court finds that Respondent warrants a favorable exercise of discretion, and the Court grants Respondent asylum in the exercise of discretion. *See A-B-*, 27 I&N Dec. at 345 n.12.

C. Alternative Finding: Withholding of Removal

Withholding of removal requires an applicant to establish that his life or freedom would be threatened in the country of removal because of her race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3)(A); *see Barajas-Romero*, 846 F.3d at 360 (explaining that the nexus requirement for withholding of removal includes weaker motives than the "one central reason" asylum standard). An applicant may prove eligibility for withholding of removal either (1) by establishing a presumption of future persecution based on past persecution that DHS does not rebut, or (2) through an independent showing of a clear probability of future persecution. *INS v. Stevic*, 467 U.S. 407, 429–30 (1984); 8 C.F.R. §§ 1208.16(b)(1)–(2). The Supreme Court defined "clear probability of persecution" to mean that it is "more likely than not" the applicant would be subject to persecution on account of a protected ground if returned to the proposed country of removal. *Cardoza-Fonseca*, 480 U.S. at 429.

For the same reasons elucidated above, considering the entire record, the Court also finds Respondent is statutorily eligible for withholding of removal because it is more likely than not that her life or freedom would be threatened in the future in Mexico because of a protected ground. *See* INA § 241(b)(3)(A); 8 C.F.R. § 1208.16(b)(2). Accordingly, the Court grants Respondent withholding of removal in the alternative.

D. Alternative Finding: Protection Under the Convention Against Torture

Protection under the CAT is mandatory relief if the requirements are met. 8 C.F.R. § 1208.16(c). The applicant bears the burden of establishing that it is more likely than not she would be tortured by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity if removed to Mexico. *Id.*; *Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003). Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for purposes such as intimidation, coercion, punishment, or discrimination, by, at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, including willful blindness. 8 C.F.R § 1208.18(a)(1). The Ninth Circuit held that the applicant need only show "awareness" and "willful blindness" on the part of government officials. *Zheng*, 332 F.3d at 1197. Under the Ninth Circuit's interpretation, "[i]t is enough that public officials could have inferred the alleged torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it." *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1060 (9th Cir. 2006).

The Court must consider all evidence relevant to the likelihood of future torture, including, but not limited to: past torture inflicted upon the applicant; evidence that she could relocate to another part of Mexico where it is unlikely she will be tortured; gross, flagrant, or mass violations of human rights; and other relevant information regarding conditions in Mexico.

See 8 C.F.R § 1208.16(c)(3).

Respondent believes Mr. B . or Mr. H will rape or kill her if she returns to Mexico. The evidence in the record corroborates Respondent's fear of torture. First, Respondent credibly testified that she experienced torture in the past by both men. *See Edu v. Holder*, 624 F.3d 1137, 1145 (9th Cir. 2010) (quoting *Nuru v. Gonzales*, 404 F.3d 1207, 1218 (9th Cir. 2005) (the existence of past torture "is ordinarily the principal factor on which [the court must] rely")). Mr. B . beat her numerous times, and he burned her with a cigarette on two occasions. In addition, Mr. H repeatedly raped and beat Respondent. The Court is satisfied that both Mr. B and Mr. H intentionally inflicted severe pain and suffering upon Respondent that rises to the level of torture. *See* 8 C.F.R § 1208.18(a)(1).

Moreover, Respondent continues to suffer the effects of the torture today. *See Mohammed v. Gonzales*, 400 F.3d 785, 802 (9th Cir. 2005) (stating that evidence of past torture that causes "permanent and continuing harm" may be sufficient to establish eligibility for CAT relief). Respondent suffers from post-traumatic stress disorder and major depressive disorder due to the abuse and harm she experienced throughout her life. *See* Exh. 9 at Tab C. She continues to think about the abuse she experienced every day and suffers from frequent nightmares of her former partners trying to kill her. *Id.*

Additionally, Mexican females continue to have limited, if any, means to escape violence, particularly in family relationships. Exh. 5 at 181. Mexico continues to display "deep and persistent insensitivity to gender issues," causing widespread gender-based violence throughout society, as well as in domestic relationships. *Id.* The Court previously found that Respondent could not relocate to avoid harm from either Mr. B or Mr. H If women attempt to move elsewhere in the country, they are unprotected and there are no guarantees for their safety. *Id.* Based on the combination of all of the above factors, the Court finds that Respondent would not be able to safely relocate in Mexico, contributing to the likelihood that she would more likely than not be tortured if returned to Mexico.

Respondent has also demonstrated that it is more likely than not that she will be tortured with the consent or acquiescence of the Mexican government. *See* 8 C.F.R. § 1208.18(a)(1). The country-conditions documentation indicates that the Mexican government has made attempts to curb violence against women; for example, it has enacted the gender alert systems intended to protect women. *See* Exh. 5 at 202. However, the record indicates that the government's actions have had no effect on the current situation in Mexico and laws protecting women are not enforced effectively. *Id.* The Mexican legal system is unresponsive and ineffective, and as discussed above, justice officials are unwilling or unable to protect women from gender-related harms in their homes and elsewhere, despite recent efforts to improve this problem. *Id.* at 181. This is reflected in the few prosecutions or convictions for femicides. *Id.* at 202.

Not only is the Mexican government ineffective in protecting women from sexual violence and torture, but the record contains evidence that the government is aware of and "willfully blind" to such treatment. The Mexican government admitted the country's difficult adjustment from its mentality that women are inferior. *Id.* at 187–88. As previously noted, police often do not seriously consider reports of abuse and commonly negotiate a reconciliation

with abusers, placing the woman reporting the abuse at risk of future harm; police treat domestic violence, including incidents of torture by a partner, as the "normal state of affairs." *See id.* at 192, 258. This culture of violence against women, combined with high levels of impunity for gender-based violence, sufficiently demonstrate a pattern of acquiescence by government officials to the type of violence women like Respondent face. *See id.* at 251, 253.

Based on this evidence, the Court finds that Respondent has established that it is more likely than not that she will be tortured with the acquiescence of the Mexican government upon her return. 8 C.F.R. § 1208.16(c). Accordingly, the Court grants Respondent protection under CAT in the alternative.

IV. CONCLUSION

The Court finds that Respondent suffered past persecution and has a well-founded fear of persecution on account of her membership in a particular social group and her political opinion. The Court also finds that the Mexican government is unable or unwilling to protect Respondent and that she cannot internally relocate within Mexico. Thus, she is statutorily eligible for asylum, and the Court grants her application in the exercise of its discretion. Finally, the Court finds that Respondent is statutorily eligible for withholding of removal under INA § 241(b)(3) and protection under CAT, and the Court would grant Respondent's applications for such relief in the alternative.

In light of the foregoing, the following order[4] shall enter:

ORDER

IT IS HEREBY ORDERED that Respondent's application for asylum under INA § 208(a) be and hereby is **GRANTED.**

Miriam Hayward
Immigration Judge

[4] Pursuant to 8 CFR § 1003.47(i), a copy of the post order instructions and information on the orientation on benefits available to asylees is attached to this decision and hereby served on the parties.

Deborah Anker, LAW OF ASYLUM IN THE UNITED STATES (Draft excerpts, 2019 edition forthcoming)

5:45. Gender *Per Se*

Gender-based particular social group (PSG) claims encompass those in which the applicant's gender is the defining, or one of the defining, fundamental or immutable characteristics (usually also including citizenship or nationality)[1] giving rise to her past persecution or fear of future persecution. Gender-related claims may fall analytically within different grounds.[2] In many cases, PSG is appropriate where a claimant fears persecution because she is a woman, where gender is the trait that gives rise to a differential risk of harm. As discussed below, gender also may meet the Board's requirements, problematic as they are, of "social distinction" and "particularity."

Some types of gendered PSG claims discussed below include those based on female genital mutilation (FGM); spousal or relational violence, forced marriage, trafficking, and gender-based discrimination.

Gender[3] or "sex" is a form of immutable characteristic specifically recognized in the seminal *Acosta*[4] and *Ward v. Attorney General* (Canada)[5] definitions of particular social group (indeed "sex" is the first exemplary characteristic named in *Acosta*).[6] The Ninth Circuit in *Mohammed v. Gonzales* called

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[1]*See supra* § 5:40. *See generally* Deborah E. Anker, Legal Change From the Bottom Up: The Development of Gender Asylum Jurisprudence in the United States, *in* Gender in Refugee Law 46 (Efrat Arbel et al. eds., 2014).

[2]Gender may factor into any of the grounds. *See, e.g.*, religion, race and nationality, *infra* §§ 5:68 to 5:90; gender-based political opinion claims are discussed *supra* at § 5:29. Gender-specific forms of harm, included within the persecution element, are discussed *supra* §§ 4:1 et seq.

[3]*See* Heaven Crawley, Refugees and Gender: Law and Process 6–7 (2001) (suggesting the avoidance of the term "sex" when discussing gendered distinctions); Deborah Anker, Refugee Law, Gender, and the Human Rights Paradigm, 15 Harv. Hum. Rts. J. 133, 138 n.27 (2002) ("'Gender' refers to socially contingent divisions of roles between men and women, socially constructed notions of femininity and masculinity and resulting power disparities that implicate women's identities and status within societies."). Male gender may also be an element of a particular social group claim. *See* RAIO Combined Training Course, Nexus—Particular Social Group 25 (July 27, 2015), *available at* perma.cc/4RL5-J3YA (hereinafter RAIO, PSG) (removed from USCIS website); *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1094-95 (9th Cir. 2000), overruled in part on other grounds by, Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005) (discussing the PSG of gay men with female sexual identities); *Applicant S v. Minister for Immigration & Multicultural Affairs*, [2004] 217 C 387 &p;16 (Austl.). *See also supra* §5:16.

[4]*Matter of Acosta*, 19 I. & N. Dec. 211, 233, 1985 WL 56042 (B.I.A. 1985), overruled in part on other grounds by, Matter of Mogharrabi, 19 I. & N. Dec. 439, 1987 WL 108943 (B.I.A. 1987). Transgender persons may choose to change their physical sex; sex remains a characteristic that either "is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be required to be changed." *Id*.

[5]Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233, 1985 WL 56042 (B.I.A. 1985)). Following *Ward*, the Canadian courts have recognized particular social groups comprised of "Haitian women," *Josile v. Canada (Minister of Citizenship & Immigration)*, [2011] 382 FTR 188 (Can. FC, Jan. 17, 2011), at [10], [28]-[30], and "women in the [Democratic Republic of the Congo]," *Kn v. Canada (Minister of Citizenship & Immigration)*, (2011) 391 FTR 108 (Can. FC, June 13, 2011), at [30], among others similar categories. *See* James C. Hathaway & Michelle Foster, The Law of Refugee Status § 5.9.1 (2d ed. 2014) (collecting these and other cases).

[6]*Matter of Acosta*, 19 I. & N. Dec. 211, 233, 1985 WL 56042 (B.I.A. 1985), overruled in part on other grounds by, Matter of Mogharrabi, 19 I. & N. Dec. 439, 1987 WL 108943 (B.I.A. 1987) ("We interpret the phrase 'persecution on account of membership in a particular social group' to mean 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* ... ." (emphasis added)). USCIS notes that the Board in *Acosta* recognized that "[g]ender is an immutable trait. ... [G]ender may form the basis of a particular social group in combination with the applicant's nationality or ethnicity." RAIO, PSG, *supra* note 3, at 25. *See also Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010) ("Women in a particular country, regardless of ethnicity or clan

gender a "prototypical immutable characteristic," [1] an analysis reaffirmed later in *Perdomo v. Holder*.[2] The gender/immutable characteristic formulation, endorsed by the Third Circuit in *Fatin v. INS* as far back as 1993,[10] was later reinforced in the 1995 U.S. Gender Guidelines.[3] In addition to the Third and Ninth Circuits, the Seventh, the Eighth and the Tenth Circuits all have endorsed the Board's immutability analysis in gender cases.[12] Several immigration judge decisions have recognized gender plus nationality or citizenship – Mexican women, or Honduran women, for example –as meeting the immutability criterion of *Acosta*.[4] The U.K. House of Lords also has found the principle that women can constitute a PSG "neither novel nor heterodox" but, rather, "simply a logical application of the seminal reasoning in

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membership, could form a particular social group" (citing *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005))); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (finding that Somali females constitute a PSG).

[1] *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005).

[2] *Perdomo v. Holder*, 611 F.3d 662,667 (9th Cir. 2010) (noting that in *Mohammed*, "we clearly acknowledged that women in a particular country, regardless of ethnicity or clan membership, could form a particular social group," and remanding to the Board to determine in the first instance). *See also Silvestre-Mendoza v. Sessions*, 729 Fed. Appx. 597, 598 (2018) (remanding to the BIA to consider whether "Guatemalan women" constitutes a particular social group).

[10] *Fatin v. I.N.S.*, 12 F.3d 1233, 1240–41 (3d Cir. 1993) (noting that a person who has a well-founded fear that she would be persecuted in Iran simply because she is a woman could satisfy the requirement that she is a member of a particular social group). The Ninth Circuit in *Perdomo v. Holder* emphasized that both the U.S. Gender Guidelines and the UNHCR have recognized gender itself as defining a particular social group. *Perdomo v. Holder*, 611 F.3d 662, 667 n.5 (9th Cir. 2010) (noting that the Third Circuit, Australia, Canada, and the United Kingdom have all "recognized gender as the basis for a particular social group" (citing *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005))); *Minister for Immigration & Multicultural Affairs v. Khawar*, (2002) 76 A.L.J.R. 667; *Higbogun v. Canada*, [2010] F.C. 445; Islam v. Sec'y of State for the Home Dep't, 2 All E.R. 546 (1999).

[3] Memorandum from Phyllis Coven, INS Office of International Affairs, Considerations For Asylum Officers Adjudicating Asylum Claims From Women 1, 8 (May 26, 1995), *available at* http://www.unhcr.org/refworld/docid/3ae6b31e7.html [perma.cc/EUF5-NND6]. These U.S. Guidelines described *Fatin* as consistent "with the statement of the Board in *Acosta* that "'sex' might be the sort of shared characteristic that could define a particular social group." *Id.* (citing *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir. 1993)). *See also Matter of Fauyiza Kasinga*, 21 I. & N. Dec. 357, 377 (B.I.A. 1996) (J. Rosenberg, concurring) ("Our recognition of a particular social group based upon tribal affiliation and gender is also in harmony with the guidelines for adjudicating women's asylum claims issued by [INS]."). The U.S. Gender Guidelines were inspired by those issued by the Canadians. *See* Immigration & Refugee Board of Canada, Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act (Mar. 9, 1993); Immigration & Refugee Board of Canada, Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act (Nov. 13, 1996) (explaining that gender is the type of innate characteristic that may define a particular social group). *See also* Australian Department of Immigration and Multicultural Affairs, Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers § 4.33 (July 1996) ("[G]ender . . . may be a significant factor in recognising a particular social group . . . . [W]hilst being a broad category, women nonetheless have both immutable characteristics and shared common social characteristics which may make them cognizable as a group and which may attract persecution."); Immigration Appellate Authority of the United Kingdom, Asylum Gender Guidelines 41 (Nov. 2000 (providing that "[p]articular social groups can be identified by reference to innate or unchangeable characteristics or characteristics that a woman should not be expected to change").

[12] *See, e.g., Cece v. Holder*, 733 F.3d 662, 676–77 (7th Cir. 2013) (concluding that young women living alone in Albania is a cognizable social group under *Acosta* because the "the attributes are immutable or fundamental"); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (finding Somali females to constitute a PSG); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (concluding that female members of a tribe constitutes a PSG). *See also Ahmed v. Holder*, 611 F.3d 90, 96 (1st Cir. 2010) ("Gender – a common, immutable characteristic – can be a component of a viable 'social group' definition.").

[4] *See, e.g., Matter of G-R-*, immigration judge decision (Matthew D'Angelo), Boston, MA (Dec. 5, 2017), *on file with the author* (concluding, in the case of a woman who had been sexually assaulted and molested after the male members of her family left her household, that the applicant's PSG "Honduran women without a male family member" was cognizable under *Matter of M-E-V-G-* and *Matter of W-G-R-*).

Acosta."[8] Other states parties to the Refugee Convention also recognize that women can constitute a PSG,[5] as has the United Nations High Commissioner for Refugees.[6]

Gender is entrenched, innate and central to identity,[7] and it serves as a ground for differential treatment around the world. As the UNHCR Gender Guidelines state, "sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men."[13] That violence may be directed at women because of their gender is increasingly well-recognized.[15]

To avoid large PSGs,[16] adjudicators have defined gender-specific PSGs in inappropriately complex

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[8] ***I**slam v. Sec'y of State for the Home Dep't*, [1998] 2 W.L.R. 1015.

See also Fornah (FC) v. Sec'y of State for Home Dep't, [2006] UKHL 46, para. 31 (opining that the question whether the applicant had established her membership in a particular social group was "blindingly obvious," and observing that "the world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society," *id.* paras. 83–86).

[5] In addition to the Canadian decisions cited *supra* note 5, and U.K. cases cited *supra* note 8, *see, e.g.*, *E1-248.714/2008 v. Federal Asylum Authority*, High Court for Asylum, Austria (2011) (finding that women may be seen as a PSG within the meaning of the Refugee Convention); *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 4, &p;35 (Austl.) ("Women in any society are a distinct and recognisable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments."); *Re MN*, Refugee Appeal No. 2039/93 (N.Z. R.S.A.A. 1996); *Re ZWD*, Refugee Appeal No. 31/91 (N.Z. R.S.A.A. 1992).

[6] United Nations High Commissioner for Refugees, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees &p;30 (HCR/GIP/02/01) (May 7, 2002), *available at* http://www.unhcr.org/refworld/docid/3d36f1c64.html [perma.cc/L3WT-CNH4] (hereinafter UNHCR, Gender Guidelines].

[7] Brief of *Amici Curiae* Harvard Immigration and Refugee Clinical Program, with Akin Gump, Strauss Hauer & Feld, LLP, at 3, in *Matter of L-S-M-J-* In Removal Proceedings, August 3, 2018 (on file with author) ("Gender is a universal fact of life – listed on birth certificates, marriage certificates, and death certificates the world over.").

[13] UNHCR, Gender Guidelines, *supra* note 7. USCIS has similarly commented that "women often suffer types of harm unique to women or much more commonly experienced by women than men, and at times women may suffer harm solely because of their gender." ▶RAIO Combined Training Course, Gender-Related Claims 44 (Oct. 16, 2012), *available at* ▶perma.cc/D3YU-RHCP (hereinafter RAIO, Gender) (removed from USCIS website).

[15] "The world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society." *Fornah (FC) v. Sec'y of State for Home Dep't*, [2006] UKHL 46, para. 86 (Baronness Hale) (approving the claim of a woman from Sierra Leone fleeing female genital mutilation and finding that "women in Sierra Leone are a group of persons sharing a common characteristic which, without a fundamental changes in social mores is unchangeable, namely a position of social inferiority compared to men").

[16] *See, e.g.*, ▶*Da Silva v. U.S. Atty. Gen.*, 459 Fed. Appx. 838, 841 (11th Cir. 2012) ("The BIA determined that 'women' was too broad to constitute a particular social group. We agree that such a group is too numerous and broadly defined to be considered a 'social group' under the INA."); ▶*Safaie v. I.N.S.*, 25 F.3d 636, 639 (8th Cir. 1994), superseded by statute on other grounds as stated in, Rife v. Ashcroft, 374 F.3d 606, 614–15 (8th Cir. 2004) ("Safaie asserts that Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group. We believe this category is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.").
As noted, the Ninth Circuit in *Mohammed* found that Somali women could constitute a particular social group. *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005). Some courts have distinguished *Mohammed* by treating FGM in Somalia as a special case set apart by the high percentage of women in that country forced to undergo FGM. *See, e.g.*, *Rreshpja v. Gonzales*, 420 F.3d 551, 555–56 (6th Cir. 2005) (rejecting a gender-based PSG and noting that "we find that *Mohammed* is distinguishable from the present case because Rreshpja did not introduce any evidence to show that the practice of forcing young women into prostitution in Albania is nearly as pervasive as the practice of female genital mutilation in Somalia"). However, the high percentage of women in Somalia who are forced to undergo FGM is irrelevant to the determination of immutability under *Acosta*. *See* ▶*Niang v. Gonzales*,

ways, conflating the definition of PSG with other requirements of the refugee definition.[17] Some decision makers and reviewing courts have been reluctant to define PSGs in terms of gender *per se* because of fear of "floodgates" – that too many persons may access protection. As discussed *supra*, such concern is not realistic, nor is fear of floodgates a principled, legal argument.[18] Notably, the Board, in applying its particularity test, has rejected reasoning that a claim can be denied solely because it is too large.[8] Neither PSG nor any ground performs the function of the entire refugee definition.[20] PSG is only one element of eligibility; legitimate concerns about particularizing or individualizing a claim appropriately should be addressed through other definitional criteria.[21] As the Tenth Circuit in ▶*Niang v. Gonzales* emphasized:

> There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there. But the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted "on account of" their membership.[22]

The rise of the problematic social distinction and particularity criteria underscores the importance of using gender *per se* as the defining characteristic of a PSG, or combining gender with another basic *Acosta* immutable characteristic such as race, nationality, or tribal membership. Importantly, several 2018 administrative decisions have held that a PSG defined by gender plus nationality can meet the Board's social distinction and particularity requirements. The Attorney General's *A-B-* decision, overruling the Board's precedent that had recognized a claim based on domestic violence,[9] endorses *Acosta*'s basic immutability paradigm[10] and does not address cases where gender

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422 F.3d 1187, 1199–1200 (10th Cir. 2005). *See also* ▶*Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (finding that "women in Guatemala" can constitute a PSG and noting that "the size and breadth of a group alone does not preclude a group from qualifying as such a social group").

[17]*See, e.g., Lushaj v. Holder*, 380 Fed. Appx. 41, 43 (2d Cir. 2010) (rejecting the proposed PSG, "women who were previously targeted for sex-trafficking by members of the Haklaj gang and who managed to escape and avoid capture," because, *inter alia* "it was based exclusively on the persecution that its members suffered or feared"); *Rreshpja v. Gonzales*, 420 F.3d 551, 555 (6th Cir. 2005) (rejecting a particular social group of "young (or those who appear to be young), attractive Albanian women who are forced into prostitution").

[18]*See supra* § 5:40. Michelle Foster notes that the "size and diversity" of a group are characteristics that "have been uniformly rejected at the international level, and should therefore be deemed irrelevant to determining the existence of a [social group]." Michelle Foster, International Refugee Law and Socio-Economic Rights: Refuge From Deprivation 332–33 (2007). *See also* Deborah Anker, Refugee Law, Gender, and the Human Rights Paradigm, 15 Harv. Hum. Rts. J. 133, 153 (2002) . USCIS, in its training material, has rejected "floodgates" arguments in the specific context of gender claims; "[t]he fact that a practice is widespread (e.g., domestic violence, FGM, rape as part of an occupation during war) is not relevant to determining whether the alleged acts constitute persecution." RAIO, Gender, *supra* note 13, at 29.

[8] *Matter of M-E-V-G-*, 2 I.& N. Dec. 227, 228 (B.I.A. 2014).

[20]*See supra* ▶§ 5:40.

[21]*See generally supra* ▶§§ 5:41 to 5:42.

[22]*Niang v. Gonzales*, 422 F.3d 1187, 1199-1200 (10th Cir. 2005). *See also Cece v. Holder*, 733 F.3d 662, 673 (3d Cir. 2013) (*en banc*) (similarly emphasizing that in cases based on gender or gender plus other immutable characteristics, the question of immutability should not be confused with other distinct parts of the asylum inquiry, namely nexus; large size should preclude PSG recognition); Foster, *supra* note 18, at 328 (arguing that the social group "women in Pakistan" can still exist even though some women in the relevant group are able to avoid persecution) (citing *Islam v. Secretary of State for the Home Department*, [1998] 2 W.L.R. 1015, and ▶*Regina v. Immigration Appeal Tribunal and Another, ex parte Shah*, 2 All E.R. 545 (1999) (H.L.) 644 (quotation marks omitted)).

[9] *See infra* § 5:49.

itself defines the PSG. The Board decision, *Matter of C-S-H-A*,[11] was issued one month before *A-B-*. The Arlington court (finding "women in Honduras" to be a cognizable PSG)[12] and San Francisco court (finding "Mexican females" to be a cognizable PSG)[13] decisions were issued after *A-B-* and make reference to it in support of their decisions granting asylum.

In each of these cases, decision makers found their PSG analysis to be consistent with precedent Board case law, *Matter of W-G-R-*[14]and *M-E-V-G-*,[15] regarding social distinction and particularity, upon which the Attorney General in *A-B-* relied and which he directed adjudicators to apply.[16] In *Matter of H-A-C-S-*, the Board in a non-precedent decision found that the size of the proposed PSG "young women in Honduras" – the fact that it was large or constituted a major segment of society – did not negate a finding that the group was "particular" or "socially distinct."[17] The Board emphasized that the particularity inquiry focuses on whether the group has definable boundaries; social distinction concerns whether society perceives the group as sufficiently separate or distinct.[18] Both require focused inquiries into societal conditions and attitudes.[19] The Board held similarly in a post-*A-B-* unpublished decision.[20] In *Matter of* –,[21] the Arlington immigration judge found that the PSG of "women in Honduras" met all three criteria for a PSG: gender is immutable, under *Acosta*; it has definable boundaries recognizable by Hondurans themselves;[22] and reports by the State Department and UN bodies of marginalization, discrimination, pervasive violence against women, and impunity for perpetrators,

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[10] *Matter of A-B-*, 27 I. & N. Dec. 316, 328 (A.G. 2018).

[11] *Matter of H-A-C-S-*, B.I.A. decision, Orlando, FL (May 22, 2018), 2, *available at* perma.cc/4S9G-JTUN.

[12] *Matter of* —, immigration judge decision (Deepali Nadkarni), Arlington, VA (2018) at 6, *available at* perma.cc/2BMS-P88F.

[13] *Matter of* —, immigration judge decision (Miriam Hayward), San Francisco, CA (Sep. 13, 2018) at 8–10, 12–14, 18–20, *available at* perma.cc/M3RC-Y6G9.

[14] *Matter of W-G-R-*, 26 I. & N. Dec. 208, 217 (B.I.A. 2014), aff'd in part and vacated and remanded in part on other grounds, by Reyes v. Lynch, 842 F.3d 1125 (9th Cir. 2016), cert. denied sub nom. Reyes v. Sessions, 138 S. Ct 736 (2018)).

[15] *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 249 (B.I.A. 2014).

[16] *Matter of A-B-*, 27 I. & N. Dec. 316, 319–20, 330, 334–45 (A.G. 2018). As discussed *infra* § 5:49, despite problematic non sequitur dicta, the Attorney General's decision is limited, overruling the Board's decision in *A-R-C-G-* without creating new asylum standards. The Attorney General does comment that "[a] particular social group must avoid, consistent with the evidence, being too broad to have definable boundaries and too narrow to have larger significance in society." "Broad" should not be synonymous with size, however, as the Board has explained, the "particularity" requirement refers to "definable" boundaries, not size. *Matter of W-G-R-*, 26 I. & N. Dec. 208, 214, aff'd in part and vacated and remanded in part on other grounds, by Reyes v. Lynch, 842 F.3d 1125 (9th Cir. 2016), cert. denied sub nom. Reyes v. Sessions, 138 S. Ct 736 (2018)). *See also Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 238 (B.I.A. 2014) (noting that, in order to be particularly defined, a group a must have "definable boundaries," "provide a "clear benchmark" and not be "amorphous, overbroad, diffuse or subjective.").

[17] *Matter of H-A-C-S-*, B.I.A. decision, Orlando, FL (May 22, 2018) at 2, *available at* perma.cc/4S9G-JTUN.

[18] *Matter of H-A-C-S-*, B.I.A. decision, Orlando, FL (May 22, 2018) at 2, *available at* perma.cc/4S9G-JTUN. The Board rejected the IJ's conclusion that the PSG lacked particularity "solely because it was too large of a group, consisting of a major segment of the population. . . .[W]e have stated, in assessing particularity, the focus is 'whether the group is discrete or is, instead, amorphous' and that '[s]ocietal considerations will necessarily play a factor in that determination." *Id*.

[19] *Matter of H-A-C-S-*, B.I.A. decision, Orlando, FL (May 22, 2018) at 2, *available at* perma.cc/4S9G-JTUN.

[20] *See Matter of M-D-A-*, B.I.A. decision, Los Angeles, CA (Feb. 14, 2019), *available with a subscription of* Index of Unpublished Decisions of the Board of Immigration Appeals, *available at* http://www.irac.net/unpublished/index, and on on file with the author.

[21] *Matter of* —, immigration judge decision (Deepali Nadkarni), Arlington, VA (2018) at 6, *available at* perma.cc/2BMS-P88F.

[22] "The group of 'women in Honduras' does not change based on who defines it, and it therefore has boundaries that are fixed enough to meet the particularity requirement. . . .[It] . . . is defined with particularity even though it is large." *Matter of* —, immigration judge decision (Deepali Nadkarni), Arlington, VA (2018) at 8, *available at* perma.cc/2BMS-P88F.

inter alia, establish social distinction.[23] The Ninth Circuit also has indicated that "legislation passed to protect a specific group can be evidence that the society in question views members of that group as distinct."[24] Similar analyses can be found in IJ decisions where the PSG was defined as "Mexican females" in the San Francisco court decision,[25] and "women in El Salvador."[26]

In all these cases, individual circumstances – the applicant's own experiences or fear of violence – were addressed through elements of the refugee definition such as well-founded fear or serious harm (as a part of persecution) rather than through the particular social group definition itself. Indeed, it may be more difficult to establish social distinction when, for example, gender-based PSGs are formulated as theories of the case – where multiple elements of the refugee definition are contained in the PSG definition itself – as opposed to an *Acosta*-grounded gender *per se* PSG approach, suggested here.[27]

[23] "[E]vidence [establishes] that cultural and legal norms in Honduras permit widespread violence and discrimination against women," setting women in Honduras "'apart, or distinct, from other persons within [Honduras] in some significant way.'" *Matter of —*, immigration judge decision (Deepali Nadkarni), Arlington, VA (2018) at 7, *available at* perma.cc/2BMS-P88F (citing *Matter of M-E-V-G-* 26 I. & N. Dec. 227, 238 (B.I.A. 2014). The court further cited an article noting that "Honduras is rapidly becoming one of the most dangerous places on Earth for women." *Id.* (citation omitted). *See also Matter of —*, immigration judge decision (Miriam Hayward), San Francisco, CA (Sep. 13, 2018) at 11, *available at* perma.cc/M3RC-Y6G9 (noting that "many individuals in Mexico have an endemic perception that women are inferior to men" and that the respondent's husband made statements to her such as "a woman's only job was to shut up and obey her husband").

[24] *Silvestre-Mendoza v. Sessions*, 729 Fed. Appx. 597, 598 (2018). In that case, the panel considered the Guatemalan government's specialized femicide courts, femicide-focused police officers, special compensation for femicide victims, and mandatory sentences to support the social distinction of "Guatemalan women" as a particular social group. Note that whether these measures evidence the state's ability or even willingness to protect is a distinct inquiry into the persecution element of the refugee definition. *See infra* § 4:10.

[25] *Matter of —*, immigration judge decision (Miriam Hayward), San Francisco, CA (Sep. 13, 2018), *available at* perma.cc/M3RC-Y6G9.

[26] *Matter of —*, immigration judge decision (Amy C. Hoogasian), San Francisco, CA (Nov. 7, 2012) at 10–12, *available at* perma.cc/3EG9-LFCY. *See also Matter of S-R-P-O-*, B.I.A. decision, Tucson, AZ (Dec. 20, 2018), *available at* perma.cc/2ERP-A7S9 (remanding for further consideration of whether "Mexican women" is a valid particular social group); *Matter of X-Q-C-D-*, B.I.A. decision, Seattle, WA (Dec. 11, 2018), *available at* perma.cc/T8HB-8CSN (same).

[27] *See, e.g.*, *Silvestre-Mendoza v. Sessions*, 729 Fed. Appx. 597, 598 (2018) (rejecting the proposed particular social group of "young Guatemalan females who have suffered violence due to female gender" as insufficiently distinct and remanding to the BIA to consider whether "Guatemalan women" constitutes a particular social group).

ROUTLEDGE RESEARCH IN ASYLUM, MIGRATION AND REFUGEE LAW

Gender in Refugee Law

From the margins to the centre

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2 Legal change from the bottom up

The development of gender asylum jurisprudence in the United States

Deborah E. Anker[1]

Legal change is often thought of as change from the top down – change brought about by new legislation, regulations, precedent administrative, and federal court decisions, or changes resulting from major impact litigation. Gender asylum in the United States, however, tells an unusual story of legal change from the bottom up, grounded, at least in significant part, in direct representation of women refugees.

There is a long theoretical debate about progressive lawyering for social justice and legal change. Many critical theorists doubt the role of direct services and individual representation, while some argue more generally that instrumental uses of the law justify the status quo and are ineffective and even counter-productive, legitimizing the law in ways that in fact impede legal and social change (Alfieri 2008–09; Wexler 1970). This chapter, in telling at least part of the story of gender asylum in the United States, provides a counter-example of how direct representation can actually change the culture of decision-making and be an effective vehicle for meaningful legal change. At the same time, such representation, rather than disempowering clients (Quigley 1994), can create authentic and non-hierarchical relationships between lawyer and client as I hope the case examples provided in this chapter illustrate. In the narratives that accompany these asylum claims, lawyers, in partnership or 'alliance' with their clients (Bellow 1996), develop narratives that portray women refugees not as simple victims, or fitting only within the Refugee Convention's particular social group ground, but rather, for example, as in cases involving domestic violence, as having feminist political opinions that led to them standing up to their abusers. This chapter, as well as other works, also describes the relationship between direct representation and coalition building for social change with lawyers engaged in such direct representation allying with client-based and other community organizations (Anker 2002; Sharpless 2012). From the enactment of the

1 Special thanks to Sabi Ardalan for superb drafting and editing help and the use of examples of many of her clients, to Nancy Kelly and John Willshire Carrera for help in editing this chapter and for their maverick work over the past 30 years in helping to develop this area of law, and to Micah Stein for great research and editing help.

Refugee Act of 1980 until the 1990s, asylum seekers fleeing gender-based violence were routinely denied protection and status in the United States (Kelly 1993; Goldberg 1993; Goldberg and Kelly 1993). Serious harms faced by women, including domestic violence, female genital mutilation (FGM), psychological harm, and rape, went unrecognized in United States asylum law until advocacy organizations, including the Harvard Immigration and Refugee Clinic (HIRC), began representing women asylum seekers in increasing numbers and transforming underlying institutions and the law through this direct representation.

Today, HIRC and other legal services organizations and clinics regularly win cases involving domestic abuse and other gender-based persecution and gender-related grounds. In January 2013, for example, Isabella,[2] a strong and independent woman who fled violent abuse in Honduras, was granted asylum. Isabella was first attacked by Jorge, a suitor of her sister's, at age 13, when he kidnapped her, dragged her to a hotel room, and brutally raped her. Jorge continued to stalk her for years, kidnapping, beating, and raping her, because he considered her, in his words, 'my woman' and 'my property'. Isabella, however, refused to submit to Jorge. She went back to school, worked hard, and became a successful and well-respected manager at a local retail chain. She believed she deserved to be treated with respect, as an equal. When Jorge's violence escalated unbearably, Isabella fled her country. For years she lived in the United States in hiding, too traumatized to come forward. Finally, after confiding in a psychologist she trusted, she was able to open up, and, represented by attorneys at HIRC, Isabella was granted asylum on the basis of the abuse she had suffered. Such a result would have been unheard of 30 years ago.

Most gender asylum victories in the United States are won at lower levels of adjudication, either before the United States Citizenship and Immigration Service (USCIS) Asylum Office, as in Isabella's case, or in immigration courts under the jurisdiction of the Department of Justice. However, federal agency regulations addressing gender asylum have been pending for over 13 years without being finalized. The Board of Immigration Appeals (Board), the administrative appellate body charged with interpreting immigration and asylum law, has failed to issue a precedential decision on the key questions of whether domestic violence can serve as a basis for asylum[3] and whether gender per se can define a particular social group (PSG).

Given this dearth of formal law, HIRC attorneys and other advocates representing individual clients have grounded arguments for recognition of gender asylum claims in persuasive, normative, but non-binding instruments, including United States and international gender asylum guidelines, agency guidance and training materials, legal briefs, decisions by low-level adjudica-

2 Clinic client names changed throughout to protect confidentiality

3 Although on other issues involving gender, there has been some significant progress. See generally below and (Anker 2013, 4:25, 5:50–1).

tors, and international human rights law. Through direct representation of hundreds of women fleeing gender-based violence, the HIRC and other advocates have not only laid the foundation for changes at higher administrative and federal judicial levels, but have also changed the culture of the relevant immigration agencies, the perspective of judges and other decision-makers, in effect creating a body of jurisprudence at the administrative level, which, despite its non-precedential nature, has had enormous impact.

In a different context, the late Professor Gary Bellow, founder of the Harvard Law School's Clinical Program and a major force in progressive lawyering, also utilized a bottom-up legal strategy as a means of affecting institutional practice. Bellow's 'focused case' approach involved bringing targeted streams of individual cases in order to compel proper enforcement of the law and change the incentives of institutional players. Through bringing a substantial number of individual claims, he sought to close the 'enormous gap between existing law and the practices of most public and private institutions' (Bellow 1977).

HIRC, as well as many other direct legal service organizations and clinics, has adopted a similar emphasis on bottom-up representation to change the culture of asylum decision-making and create an expanded body of asylum law. Especially in an area of law with a shortage of 'hard' sources, the individual representation model is particularly salient, generating its own jurisprudence and creating an environment in which larger change can happen. Continuing to bring gender asylum claims founded on non-traditional sources of law has made novel legal arguments more familiar, compelling, and legitimate to asylum officers, immigration judges, as well as other higher level institutional and judicial decision-makers.

This chapter first provides a brief overview of refugee law, United States implementation of the United Nations 1951 Convention Relating to the Status of Refugees (Refugee Convention) and 1967 United Nations Protocol relating to the status of refugees (Protocol), and protections for women under the Convention. The chapter then addresses the development of gender asylum law in the United States over the past almost 20 years, examining institutional and legal changes brought about through, among other means, advocacy from the bottom up. The chapter brings to light the role of gender asylum in transforming United States refugee law as a whole, and, in particular, adjudicators' understanding of key elements of the refugee definition, including the failure of state protection and non-state agents of harm, the meaning of persecution, and the nexus, or causal linkage, requirement. The chapter includes throughout examples of recent victories in gender asylum cases brought by HIRC, although, as noted, many other direct legal services organizations and clinics have engaged in similar advocacy. Obviously, there have been many defeats and frustrations along the way (e.g. the failure to publish gender guidelines and the many gender asylum cases that have been lost), but there is reason as well for some optimism.

Overview of the Refugee Convention and its implementation in United States asylum law

Refugee status is governed by the 1951 United Nations Refugee Convention and the 1967 United Nations Protocol relating to the status of refugees. Articles 1 and 33 are centrepieces of the Convention. Article 1 defines a 'refugee' as a person who:

> owing to 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.
>
> (Refugee Convention, Art. 1A(2))

Article 33 of the Refugee Convention forbids a state from returning a refugee to a country where his or her life or freedom would be threatened on account of one of the grounds enumerated in the refugee definition (Refugee Convention, Art. 33).

Refugee law provides surrogate protection when a state has failed to protect the basic human rights of its inhabitants for a discriminatory reason, such as the person's race, religion, nationality, membership of a particular social group, and/or political opinion. Contemporary international refugee law arose out of the same post-Second World War context that produced the major instruments of international human rights law, most fundamentally the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights (Anker 2013, 4:1). International refugee law is an unusual area of international law and international human rights law in that many states, including the United States, fulfil their obligations through domestic legal systems. No international or specific treaty-based agency is formally responsible for the implementation and interpretation of refugee law. While this structure has been subject to a great deal of legitimate criticism, it is in many respects one of the system's strengths. Enforcement by states allows states to provide substantive remedies within their own borders to real people facing human rights abuses (Anker 2002, 135).

The United States ratified the Protocol in 1968 and, in 1980, enacted the Refugee Act, implementing Articles 1 and 33 of the Convention and replacing a former definition of 'refugee' dictated by Cold War geopolitics with a more neutral non-ideological definition from the Protocol and Refugee Convention (Refugee Act 1980 Pub. L. No. 96–212, 94 Stat. 102). The United States Supreme Court in the seminal 1987 case of *Immigration and Naturalization Service [I.N.S.] v Cardoza-Fonseca* [*Cardoza-Fonseca*] emphasized the international treaty roots of the Refugee Act, stating:

> If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.
>
> ([1987] 480 US 421, [436–7])

Key provisions of the United States statute faithfully track the language of the international treaty, with some exceptions. The Convention's Article 1 refugee definition is incorporated into United States law in s.1101(a)(42) of the Immigration and Nationality Act, which defines a 'refugee' as:

> [A]ny person who is outside any country of such person's nationality or … who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion
>
> (INA §1101(a)(42); 8 U.S.C. §101(a)(42)(A))[4]

The *non-refoulement*, or non-return, protection of Article 33 of the Convention is incorporated into United States law in s.241(b)(3) of the Immigration and Nationality Act, the United States 'withholding of removal' provision (INA §241(b)(3)8 U.S.C. §1231(b)(3)).[5]

4 It is noteworthy that in contrast to the definition of 'refugee' in the Refugee Convention, the refugee definition in the United States context is explicitly framed in terms of persecution or a well-founded fear of persecution. The United States statute thus adds past persecution as a separate basis for eligibility, distinct from well-founded fear. This statutory mandate is not, however, followed entirely under the regulations that establish past persecution as creating a rebuttable presumption of future persecution (not a separate basis for eligibility), which can be rebutted if the government can show either changed country conditions or that the applicant can relocate internally. A person can, however, still obtain asylum despite changed country conditions where an applicant suffered severe or atrocious past persecution or faces other serious harm if forced to return to the home country (8 C.F.R. §§208.13(b)(1)(iii), 1208.13(b)(1)(iii))

5 The United States is also unusual in that the standard of risk is different in withholding of removal versus asylum. To obtain withholding of removal, an applicant must show that the harm feared is more likely than not, whereas for asylum, the applicant must show a reasonable possibility or a one in ten chance that the harm feared will be inflicted. Asylum also allows for family reunification, leads to permanent residency, and creates a path to United States citizenship, while withholding does not. Withholding does not provide beneficiaries with any permanent status; rather it only prevents beneficiaries from being returned to a country where it is more likely than not that they will be persecuted. This differentiation between the standard of risk in asylum and withholding has been subject to much international criticism (Farbenblum 2011, 1122; Hathaway and Cusick 2000, 486). Withholding of removal is nonetheless important for asylum applicants in the United States, who may be subject to bars to asylum status, including the one-year filing deadline and certain criminal bars, but may still be eligible for withholding.

Gender-based asylum claims may implicate any of the five grounds in the refugee definition – race, religion, nationality, membership in a particular social group, and/or political opinion. While some contend that gender should be an explicit ground in the refugee definition, the obstacles to women's eligibility for refugee status lie not in legal categories per se, but in the incomplete and gendered interpretation of refugee law – the failure of decision-makers 'to acknowledge and respond to the gendering of politics and of women's relationship to the state' (Crawley 2000, 17). Adding gender or sex to the enumerated grounds of persecution would not solve this problem, nor would it address cases involving other elements of the refugee definition, where, for example, the harm feared was unique to, or disproportionately affected, women (United Nations High Commissioner for Refugees [UNHCR] 2002, [6]). Gender, properly understood, should pervade the interpretation of every element of the refugee definition.

Thirty years ago, United States asylum law, like international law, was so trapped within the public/private distinction – with harms disproportionately affecting women relegated to the 'private sphere' – that rape, for example, was generally understood as an act driven by personal motivations, such as lust or hate, not as a cognizable harm amounting to persecution.[6] Today, rape, domestic violence, and other gender-based acts of violence are frequently recognized as persecutory harms encompassed within the refugee definition. Over the past two decades, advocates, including lawyers at HIRC, have successfully represented female asylum seekers fleeing such violence and, as described further below, this direct client representation has changed the institutional culture and norms, with adjudicators increasingly recognizing and granting gender-based asylum claims.

Advocacy from below: the context and history of women's asylum claims

Formal changes in the law are slow to emerge. Gender asylum serves as an important reminder that formal law – typically set forth in statutes, in precedent-setting high court or administrative decisions, and in

6 For further discussion of adjudicators' treatment of gender-based violence as 'private' harm not protected by the Convention, see Kelly 1993. See also *Campos-Guardado v I.N.S.*, 809 F.2d 285, 288 (5th Cir. 1987) (upholding denial of asylum to a Salvadoran woman who was gruesomely raped and forced to watch her uncle, the chairman of the local agrarian cooperative, hacked to death (while the attackers shouted political slogans), finding that the rape and trauma imposed on Ms. Campos was of a personal nature); *Klawitter v I.N.S.*, 970 F.2d 149, 152 (6th Cir. 1992) (affirming the Board's denial of asylum to a woman subjected to sexual violence by a colonel in the Polish secret police because 'it is clear that he was not "persecuting her".... [H]e simply was reacting to her repeated refusals to become intimate with him'). But see *Lazo-Majano v I.N.S.*, 813 F.2d 1432, 1434 (9th Cir. 1987), overruled in part on other grounds by *Fisher v I.N.S.*, 79 F.3d 955 (9th Cir. 1996).

regulations – is not the sole source of legal authority. By bringing individual cases and presenting arguments grounded in informal, non-binding but persuasive law, the Clinic, along with other organizations, has helped shape the thinking of decision-makers, changed the culture of legal institutions, and in effect created a body of gender asylum law, developed in large part at the ground level.

Most successful gender asylum claims are won before the United States Citizenship and Immigration Service Asylum Office or in the immigration courts, and do not generally result in publicly available written opinions.[7] Thus, these decisions are only formally determinative for the claim at issue, and are not binding on any other asylum applications or court cases (8 C.F.R. § 1003.1(g)). The Board of Immigration Appeals has issued precedential decisions in only a few gender-based asylum claims, primarily involving female genital mutilation (*Matter of Kasinga* [*Kasinga*], 21 I&N Dec. 357 (BIA 1996); *Matter of A-T-*, 25 I&N Dec. 4 (BIA 2009)), although, as discussed below, there has been substantial general forward movement with respect to various gender asylum issues with the exception of whether domestic violence can serve as the basis for an asylum claim, an issue that has been pending at the Board for many years without a formal decision (Anker, Gilbert, and Kelly 1997; Torrey, Anker, Neale, Eby, Musalo, Casper, Manning, Koop, and Kelly 2011; Torrey, Anker, Ardalan, Marouf, Casper, Goldfaden, Kelly, and Wilshire Carrera 2012).

Federal circuit courts issue publicly available, precedent-setting decisions, but claims appealed to the federal courts have often been denied because they are based on poorly developed facts, or an incomplete record (Anker 2013, 1:10, 3:1). Federal courts are required to defer to administrative decision-makers where the decisions reached are supported by substantial evidence (*I.N.S. v Elias-Zacarias*, 502 US 478, 481 (1992)). As a result, the visible legal precedents set at the federal level are often based on weak and poorly developed claims.

Given this problematic formal legal context, the HIRC and other organizations have, through their advocacy efforts and especially through representation of individual women in asylum proceedings, worked to generate legal authority from sources that are not traditionally considered authoritative. These include unpublished Board decisions, immigration judge decisions, government briefs, national gender guidelines (United States Bureau of Citizenship and Immigration Services 1995), Citizenship and Immigration Service training materials that analyse the law and often take

7 The United States Citizenship and Immigration Service Asylum Office is under the Department of Homeland Security (DHS) and does not write publicly available decisions (Anker 2013, 1:3). Immigration courts are under the Executive Office for Immigration Review under the United States Department of Justice, and, while immigration judges may issue written decisions, they are, in some instances, circulated informally, but they are not issued officially or as precedent (Anker 2013, 1:3).

progressive positions, especially on gender asylum (United States Citizenship and Immigration Services – Asylum Division 2009a), children's asylum,[8] sexual orientation, and gender identity and related claims (Anker, Kelly, Willshire Carrera, and Ardalan 2012; UNHCR 2002). Attorneys have argued and won cases, drawing on these normative, but sub-regulatory sources, and these arguments have, in turn, led to greater formalization of these sources.

Gender asylum: the early years – 1980s to 1990s

The Board of Immigration Appeals' 1985 decision in *Matter of Acosta* laid the formal foundation for gender asylum claims in the United States and internationally (*Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Islam and Shah v Home Department* [1999] 2 AC 629 (UK); *Regina v Immigration Appeal Tribunal and Another, ex parte Shah* [*R. v I.A.T.*] [1999] 2 All ER 545 (HL); *Canada (Attorney General) v Ward* [1993] 2 SCR 689; *Minister for Immigration and Multicultural Affairs v Khawar* [*Khawar*] [2002] HCA 14). In *Acosta*, the Board explored the ground of membership in a particular social group and reasoned that PSG is defined by a 'common, immutable characteristic' that 'members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences' (1985, [233]). The Board explained that a 'shared characteristic might be an innate one such as *sex*, color, or kinship ties' (*Acosta* 1985, [232–4], emphasis added). That same year, the UNHCR Executive Committee adopted Conclusion No. 39, recognizing that women asylum seekers who fear harsh or inhumane treatment for gender-based reasons may be considered a PSG under the Convention (UNHCR 2009;[9] Edwards 2010).

In the late 1980s and early 1990s, collaboration across borders among women's human rights activists, immigration rights advocates, and scholars led to positive changes (Anker 2013; Goodwin-Gill and McAdam 2007; Hathaway 1991).[10] During this period, the Women's Refugee Project was formed, growing out of a partnership among HIRC, Greater Boston Legal Services (GBLS, originally Cambridge and Somerville Legal Services), and the Harvard Human Rights Program, to advocate in various ways and before different bodies for a gender sensitive interpretation of refugee law.

8 HIRC has participated actively in the training of asylum officers and indirectly in the development of their training materials (United States Citizenship and Immigration Services – Asylum Division 2009b).

9 UNHCR Conclusions Adopted by the Executive Committee on the International Protection of Refugees, conclusion 39 specifically recognizes: 'women asylum seekers who fear harsh or inhumane treatment due to their transgressions of societal mores in their home countries may be considered a particular social group under the convention'.

10 In the late 1980s and 1990s the women's refugee rights movement started grounding itself in international human rights law, including the core human rights treaties and the platform for action developed at the 1995 Beijing Women's Conference (United Nations 1996).

The international women's rights movement had shown gender asylum advocates the importance of challenging the public/private distinction, of recognizing that harms committed against women in the private sphere were of public concern and should be considered serious human rights violations embraced within the meaning of persecution under the Refugee Convention. The human rights paradigm,[11] the leadership of UNHCR, and its ongoing dialogue with non-governmental organizations and civil society generally provided a critical backdrop for the evolution of gender asylum law. During this period, asylum and refugee lawyers campaigned for United States and international tribunals and courts to recognize gender violence as persecution and feminism as a political opinion meriting protection. In 1993, Canada issued its historic Gender Guidelines, which served as a model for the United States and other countries around the world (Canadian Immigration and Refugee Board 1993).

That same year, a United States federal court in *Fatin v I.N.S.* denied asylum to an Iranian woman who refused to wear the *chador*, a traditional Islamic veil she considered a sign of support for the Khomeini government that she opposed (12 F.3d 1233, 1241 (3d Cir. 1993)). HIRC filed an amicus brief to support her claim and, when her claim was denied, seized upon language in the court's decision: that feminism could constitute a political opinion, that gender could define a PSG, and generally that women who were being subjected to serious abuse because of their gender deserve protection. Attorneys at HIRC highlighted this dictum and used it to support gender asylum claims, as did many other attorneys advocating in other cases.

The language of the *Fatin* decision created a basis for future cases, laying the groundwork for asylum for thousands of women based on political opinion, their feminist beliefs, as well as on other grounds. The court's reasoning in *Fatin* also set the stage for recognition of emotional and psychological harm as persecution, critical to the recognition of the claims of women, as well as children and other asylum seekers.

Around this same time, following the first coup against Haitian President Aristide in 1991, HIRC among other organizations began representing Haitians who had fled their country and were seeking asylum in the United States. Among the clients were a large number of Haitian

11 For example in the landmark 1993 case of Canada v Ward, the Supreme Court of Canada stated:

> [u]nderlying the [Refugee] Convention is the international community's commitment to the assurance of basic human rights without discrimination.... Persecution, for example, undefined in the Convention, has been ascribed the meaning of 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection'.
>
> (*Canada (Attorney General) v Ward* [Ward] [1993] 2 SCR 689, 70)

women who told stories that clearly revealed the gendered nature of the harm they had suffered in Haiti. The Board addressed the issue of gender-based violence in Haiti in *Matter of D-V-*, granting asylum to a Haitian woman who had been gang raped and beaten by members of the Haitian military because of her support for Aristide (21 I&N Dec. 77 (BIA 1993)). The decision was, however, initially unpublished and as such was effectively hidden. It was only through the stalwart efforts of immigration professors and law clinics around the country that the Board agreed to establish the *D-V-* decision as precedent (Anker 2002, 142). In 1995, HIRC joined with the Center for Constitutional Rights, New York University Law School, the international women's human rights organization MADRE (see MADRE 2013), and a coalition of women's groups within Haiti to gather affidavits from Haitian women who had been and were being systematically raped and beaten in retaliation for their actual and imputed political beliefs. The organizations submitted a lengthy report on these human rights abuses to the Inter-American Commission on Human Rights, which then reviewed the facts and recognized that rape constitutes torture, even outside the detention context (Anker 2002, 142; Inter-American Commission on Human Rights 1995). This was the first recognition of rape as torture by an international human rights body and it provided a basis from which to argue in the asylum context that rape is persecution.

Mid to late 1990s: gender guidelines, **Kasinga,** *and decisions from around the world*

Through collaboration across the border with advocates in Canada, as well as United States government officials, United States gender asylum guidelines were issued in 1995 (United States Bureau of Citizenship and Immigration Services 1995). The guidelines, which were initially drafted by HIRC, incorporated human rights standards and addressed both procedural and substantive aspects of adjudication of women's asylum claims. In order to build momentum for these guidelines before they were issued, HIRC attorneys worked with female journalists to highlight the fairness and equity issues at stake, and the *New York Times* and other major newspapers ran front-page articles highlighting the individual stories of women represented by HIRC seeking asylum because of gender-based persecution (Anker 2002).

Although these guidelines were sub-regulatory pronouncements by the United States government, the guidelines were cited and relied upon by the Board and federal courts in published decisions as well as by attorneys in various cases (*Matter of S-A-* [*S-A-*], 22 I&N Dec. 1328, 1333 (BIA 2000); *Fisher v I.N.S.*, 79 F.3d 955 (9th Cir. 1996) (Noonan J, dissenting)). As a result, the guidelines became highly normative and influential. Following the example of Canada and the United States, many other state parties to

the Refugee Convention, including Australia and the United Kingdom, subsequently developed similar guidelines.[12]

The Board of Immigration Appeals in 1996 issued its second precedential ground-breaking gender asylum decision, *Matter of Kasinga*, which recognized female genital mutilation as a basis for an asylum claim (*Kasinga* 1996).[13] The decision was ground-breaking in recognizing that gender could, at least in part, define a particular social group (*Kasinga* 1996; Musalo 1997). The applicant, represented by the American University College of Law Clinic, was a young woman from Togo who feared FGM, and the Board found that her fear of persecution was on account of her membership in the particular social group of young women of the Tchamba-Kusuntu Tribe who had not been subjected to FGM and who opposed the practice (*Kasinga* 1996, [358]; Musalo 1997).

Around the same time, high courts and tribunals in other countries, including New Zealand, the United Kingdom, and Australia, began issuing positive and ground-breaking gender asylum decisions (*Refugee Appeal No. 2039/93 Re MN*, RSAA (1996); *Regina v I.A.T.* 1999; *Minister for Immigration and Multicultural Affairs v Khawar* 2002). These decisions largely focused on the failure of countries to protect women from gender-based violence and highlighted the bifurcated nature of persecution, i.e. that persecution involves two prongs – serious harm and failure of state protection, whereby states can either cause the harm or fail to protect from harms caused by others.

Late 1990s to 2000s: **R-A-** *and the changing landscape of gender asylum*

Then in 1999, a lightning rod Board decision, *Matter of R-A-*, complicated the landscape. In a highly controversial published decision, the Board reversed the immigration judge's decision and denied asylum to Rody Alvarado, a Guatemalan woman fleeing a violently abusive relationship (*Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999), see also discussion of this case in Musalo in this volume). The Board's decision called into question whether domestic violence could serve as the basis for an asylum claim, and the issue of whether gender could define a particular social group was also left in limbo. As a result, advocates increasingly began relying on

12 For a list of these international gender guidelines, see Center for Gender and Refugee Studies, *Gender Guidelines*. Online: http://cgrs.uchastings.edu/law/gender_guidelines.php (accessed 30 September 2013).

13 While the outcome and much of the reasoning of the case was highly positive, the Board's particular social group analysis in *Kasinga* was problematic; the particular social group presented by the Board improperly combined two other elements of the refugee definition – the political opinion ground (i.e. opposing the practice), as well as the risk factor or well-founded fear. In her concurrence, Board member Lory Rosenberg argued against this construction and for a PSG based on a single immutable characteristic – in this case, Kasinga's gender. See also the discussion of *Kasinga* in Musalo in this volume).

alternative legal theories and began winning claims brought under other grounds, including political opinion and religion. Shortly after denying Rody Alvarado's claim, the Board granted asylum in the precedential decision *Matter of S-A-* to a young Moroccan woman who was severely physically abused by her father (2000, [1332]). The Board (which also cited the gender guidelines) decided that case based on the religion ground; the daughter flouted the conservative Muslim rules her father imposed.

In 2001, in response to pressure from an advocacy group led by the Center for Gender and Refugee Studies which now represented Rody Alvardo, and scholarship in the area, Attorney General Janet Reno vacated the Board decision in *R-A-* on the last day of her term and remanded the case to the Board, ordering the Board to stay a decision in the case until issuance of final federal gender asylum regulations, which had been drafted by the Department of Justice and were pending at the time (*Matter of R-A-*, 22 I&N Dec. 906 (AG 2001) (vacating Board decision)). The proposed federal regulations, which have still not been finalized, reinforced that gender could form the basis for a particular social group and provided principles for the analysis of domestic violence claims (United States Department of Justice *Asylum and Withholding Definitions* 65 Fed. Reg. 76588-01 (proposed 7 December 2000)).

The *R-A-* case was re-briefed to the Board in 2004, and almost 200 groups, individuals, and organizations signed on to the amicus brief that HIRC and others drafted (Kelly, Anker, Willshire Carrera, Women Refugees Project, Harvard Immigration and Refugee Clinic, Greater Boston Legal Services, *et al.* 2004). In a critical development, the government shifted its position in the case, and, in its brief, the Department of Homeland Security (DHS) recommended an asylum grant based on a PSG of married women who are unable to leave their abusive relationships (Whitley, Cerda, and Carpenter 2004). For almost a decade, the case of *R-A-* remained pending at the Board with no decision as to whether domestic violence could form the basis of an asylum claim and with no recognition from the Board that gender itself defines a PSG in these cases.[14] In 2008, Attorney General Michael Mukasey certified the case to himself, lifted the stay ordered by Attorney General Reno given that the more positive regulations had still not been finalized, and remanded the case to the Board for a decision (*Matter of R-A-*, 24 I&N Dec. 629 (AG 2008)). The Board then remanded the case to the immigration judge for further factual development and the submission of new evidence. In 2009, the immigration judge granted Rody Alvarado's case and she finally won asylum (Leahy 2009). Unfortunately, while the decision was a major

14 Attorney General John Ashcroft attempted to revive *Matter of R-A-* by reasserting jurisdiction over it, but he too remanded it to the Board for a decision following finalization and publication of the federal gender asylum regulations (*Matter of R-A-*, 23 I&N Dec. 694 (AG 2005)).

victory, it came with no explanation and only applied specifically to her, not to any of the other hundreds of women whose cases were still pending.

As a result of this vacuum in the formal law as it related to domestic violence claims, advocates increasingly turned to non-traditional sources of authority, including the United States and UNHCR gender guidelines, materials used by the Asylum Office to train its officers, and government briefs, including the DHS brief in *R-A-*, to argue that gender should be recognized as a cognizable particular social group, that opposition to domestic violence could constitute a feminist political opinion, and that domestic violence can serve as a basis for an asylum claim. For ten years, while *R-A-* was left undecided, HIRC and other lawyers and organizations continued winning many individual gender asylum cases, based on gender as a PSG, race, religion, and especially on feminism as a political opinion.

Through the use of creative legal arguments, advocates helped to shape the development of the law at the lower levels. Case by case, for example, HIRC attorneys and other advocates pieced together seemingly inconsequential language from court decisions, government briefs and memoranda, and international law, and created compelling legal arguments to persuade adjudicators that women asylum seekers met the requirements of the law. In response to these victories, the government's position has evolved in individual cases across the country, recognizing, in the context of those cases, that domestic violence can serve as the basis for an asylum claim.

2009 to the present

The same year that Rody Alvarado won asylum, a similar case involving domestic violence, *Matter of L-R-*, hit the front page of prominent newspapers, including the *New York Times*, and, again, the DHS brief submitted in the case was critical (Preston 2009, A1; United States Department of Homeland Security 2009). The DHS brief in *Matter of L-R-*,[15] like the brief in *R-A-*, recommended an asylum grant based on a PSG, this time defined in terms of 'Mexican women in domestic relationships who are unable to leave', and 'Mexican women who are viewed as property by virtue of their positions within a domestic relationship' (United States Department of Homeland Security 2009, 14). The case was remanded and the immigration judge granted asylum in 2010, but again did not issue a written or precedential decision.

Attorneys who had long cited and relied on the DHS brief in *Matter of R-A-* as a de facto statement of agency policy, also started using the brief in *L-R-* in court to argue for recognition of asylum claims based on domestic

15 Department of Homeland Security's Supplemental Brief 17–18 (13 April 2009), submitted in *Matter of L-R-*.

violence. But certain government trial attorneys refused to accept the position set forth in those briefs and opposed their introduction into evidence. As a result, in 2010, HIRC gathered examples from across the country of government trial attorneys who opposed the *L-R-* brief in immigration court, and submitted these examples to members of the United States House of Representatives Subcommittee on Immigration. Congressional staffers then met with Department of Homeland Security officials and pushed for recognition of the agency position set forth in *L-R-*. In response, the government changed its position in many individual immigration court cases across the country, and began conceding that domestic violence could form the basis for an asylum claim. In one case, the DHS issued a written clarification, acknowledging that 'the Department continues to maintain that victims of domestic violence can qualify for asylum' (United States Department of Homeland Security 2010).[16]

While the DHS's position on gender-based asylum claims evolved positively, the Board of Immigration Appeals remained silent on the issue of whether gender could define a particular social group and whether domestic violence could be the basis of asylum. In the autumn of 2011 and then again in 2012, the Board asked for amicus briefing on the question of whether domestic violence can serve as the basis of an asylum claim, and the American Immigration Lawyers Association along with others submitted briefs (Torrey, Anker, Neale, Eby, Musalo, Casper, Manning, Koop, and Kelly 2011; Torrey, Anker, Ardalan, Marouf, Casper, Goldfaden, Kelly, and Wilshire Carrera 2012), but to date no formal decision has been issued.[17] Some advocates are optimistic that, at the very least, the Board will not issue another *R-A-* type decision given how much the discourse has shifted and especially the changes in ground-level jurisprudence on gender asylum since the Board's vacated decision in that case. It is also entirely possible that the Board will continue to remain silent and evasive on the question of whether domestic violence may be a basis for asylum. The Department for Homeland Security and the Department of Justice are in the process of redrafting gender regulations, which may be forthcoming. It is worth noting that although the question of whether gender can define a particular social group, and in particular whether domestic violence may be a basis of an asylum claim remains unanswered at the formal level, over the past two decades some gender asylum issues have

16 HIRC sent this clarification out on the 'Immigration Professor' listserv so that advocates and scholars could use it to support their arguments in gender asylum cases, and this written clarification is now cited in a leading immigration law casebook as DHS recognition that domestic violence can be a basis for asylum (Aleinikoff, Martin, Motomura, and Fullerton 2012, 888).

17 Only the case of *K-C-* is still pending; the other cases have all been remanded to the immigration judges for a grant of asylum. See *Matter of K-C-*, I.J. Durling (York, PA Mar. 21, 2008) (unpublished) (on file with author) (pending before the Board of Immigration Appeals).

moved in positive directions; for example, in United States case law FGM claims are widely recognized, as are many gender claims based on family membership, forced marriage,[18] and sexual orientation and identity, the latter due in significant measure to the work of the NGO Immigration Equality[19] (Anker 2013, 5:44, 5:46, 5:50, 5:53, 5:54).

Gender asylum, a catalyst for change: the transformation of United States asylum law and legal institutions

Due in part to advocacy in the gender asylum context, refugee law has matured enormously over the past 20 years. Many United States adjudicators (in particular asylum officers and immigration judges) now accept that refugee law provides surrogate protection to those who have suffered or fear harm in the domestic context, including harm by private, non-governmental actors. Gender asylum cases have also led to a more nuanced understanding of the political opinion ground, as the questions of whether gender constitutes a PSG and whether domestic violence constitutes a basis for asylum continue to stymie the Board of Immigration Appeals. Gender asylum claims have also expanded adjudicators' understanding of the meaning of persecutory harm, leading to greater recognition of emotional and psychological harm, as well as a broader understanding of exceptions to the one-year filing deadline bar.

Agents of harm and non-state actors

Women asylum seekers often have suffered or fear harm at the hands of non-state agents, such as abusive spouses or parents. Through the work of dedicated attorneys around the country representing women and creatively framing these cases, many adjudicators now recognize that harm inflicted in the home or by private actors also constitutes persecution, where the applicant's home country is either unwilling or unable to protect the applicant.

It is well established in the jurisprudence of many states party to the Refugee Convention that, in this context, seeking state protection is futile

18 For example, Nancy Kelly, co-managing attorney at HIRC at Greater Boston Legal Services, reports that she regularly wins forced marriage cases before asylum officers and immigration judges, although by their nature, these decisions remain unreported. Conversation with Nancy Kelly, 7 July 2013.

19 Among other contributions, Immigration Equality, an organization fighting for equality under United States immigration law for lesbian, gay, bisexual, transgender, and HIV-positive individuals, played a major role in developing asylum officer training materials in this area, and generally in advancing LGBT asylum jurisprudence. See Immigration Equality 2010.

and, indeed, could result in further persecution (Anker 2013, 4:8–4:11).[20] Showing that a victim has tried to seek protection is not therefore required of applicants, especially where the state supports gender stereotypes, turns a blind eye to intimate partner violence as a 'private' or 'family' affair, or even where the state professes to address gender inequalities, but in reality does not have the power, resources, or, in some cases, even the political will to effect this change.[21]

In the case of Isabella, described earlier, for example, her mother called the police to report the horrific abuse suffered by her daughter and her family, but the police merely picked up Jorge, the abuser, and let him go just a few blocks away. The daughter herself never called the police because she knew it was useless and would only further anger Jorge, who was a police officer himself, and cause him to retaliate against her and her family.

Nexus or the causal link

Gender asylum cases have also transformed adjudicators' approach to the nexus or causation element in asylum claims. The Board had, in its early years, defined persecution as 'harm or suffering … inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome' (*Acosta* 1985, [222–3]). However, in *Matter of Kasinga*, a case involving a young Togolese girl who feared female genital mutilation, the Board changed its position and recognized explicitly that 'subjective "punitive" or "malignant" intent is not required for harm to constitute persecution' (*Kasinga* 1996, [365]).

The Board in *Kasinga* found that the FGM feared by the applicant constituted persecution, in spite of the fact that FGM was considered a beneficial cultural rite in Togo, not a form of punishment or harm

20 See e.g. *Sarhan v Holder*, 658 F.3d 649, 650–51 (7th Cir. 2011) (finding Jordanian government complicit in harm petitioner would suffer at the hands of her brother where 'significant evidence' revealed that the government failed to protect women against honour killings by family members); *Nabulwala v Gonzales*, 481 F.3d 1115, 1116–18 (8th Cir. 2007) (finding that the immigration judge erred in concluding that the family-arranged rape of Ugandan lesbian constituted 'private family mistreatment'); *Ali v Ashcroft*, 394 F.3d 780, 785–87 (9th Cir. 2005) (noting that persecutory harm 'need not be directly at the hands of the government; private individuals that the government is unable or unwilling to control can persecute someone' (internal quotation marks omitted)).

21 As the United States Citizenship and Immigration Services Asylum Office training materials explain:

> In some cases, an applicant may establish that state protection is unavailable even when she did not actually seek protection. For example, the evidence may indicate that the applicant would not have received assistance if she had sought it. Country conditions information may reveal that government officials in the applicant's country view violence perpetrated by a family member, clan member, or tribal member as a 'private' dispute for which governmental intervention is inappropriate. Or, evidence may establish that seeking protection would have placed an applicant at even greater risk of persecution.
>
> (United States Citizenship and Immigration Services – Asylum Division 2009a, 25)

(*Kasinga* 1996, [366, 371] (Filppu, Board Mem., concurring)). The Board's analysis in *Kasinga* thus focused on the *effect* of the practice on the *victim*, rather than on the subjective *intent* of the *persecutor*. Federal courts have reiterated this position in other cases involving FGM, emphasizing: '[p]ersecution simply requires that the perpetrator cause the victim suffering or harm and does not require that the perpetrator believe … the victim has committed a crime or some wrong' (*Mohammed v Gonzales*, 400 F.3d 785, 796 n.15 (9th Cir. 2005); *Niang v Gonzales*, 422 F.3d 1187, 1197 (10th Cir. 2005)). The Asylum Office has also adopted this position, and instructs its officers that 'there is no malignant intent required on the part of the persecutor, as long as the applicant experiences the abuse as harm' (United States Citizenship and Immigration Services 2011, 19).

As an example, in a recent case HIRC brought before the Asylum Office, a client named Miriam from Guinea had been subjected to FGM and forced into marriage with an older cousin against her will, because her family thought this was best for her. Miriam feared her daughters would be subjected to the same. The Asylum Office granted her case, without questioning the reasons why the harm was inflicted on her, focusing instead on the harm she suffered and other aspects of her claim. In her case, the asylum claim was also based in part on her fear of being attacked due to her involvement with an opposition political party and her tribal membership, owing to rising ethnic tensions in the country.

Grounds of persecution

While the Board has avoided formally deciding, in a precedential decision, the issue of whether domestic violence constitutes a basis for asylum, HIRC as well as other advocates have focused on bringing domestic violence claims under other grounds, including political opinion, race, and religion, as well as PSG. The difficulties with gender as a PSG have led to an expanded understanding of the political opinion ground as embracing women's belief in equal treatment and opposition to domestic violence. Attorneys built on the reasoning in *Fatin* that feminism can constitute a political opinion, and argued that feminism includes resistance to such practices as FGM and domestic violence.

HIRC attorneys have worked closely with clients to elicit their opinions about how they believe they should be treated, and to present information about how they expressed these opinions in their relationships, and the consequences they faced because of it.[22] HIRC attorneys have described

22 Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of the State, government, society, or policy may be engaged. This may include opinions about gender roles. It would also include non-conformist behavior which leads the persecutor to impute a political opinion to him or her. (UNHCR 2002, [32])

this as 'the independent woman case theory'. As Isabella, the Honduran client described earlier, explained in her affidavit:

> I am an independent and successful businesswoman, and I have always believed that women should be treated equally and with respect.… But [my abuser] hated my independence, my self-sufficiency, my success. He considered me his property and could not stand that I refused to submit to him. He attacked me for working hard, for educating and improving myself, and for standing up for myself. He demanded that I stop working … But I was proud of my work, and told him, over and over, that I would not quit. I told him that I had my own life – I could provide for myself and my family.… The greater success I had in my work, the angrier and more violent [my abuser] became.

Through hearing these types of claims, decision-makers at the lower levels have increasingly recognized that resistance to domestic violence – through refusal to follow the spouse's orders, through attempts to escape, and ultimately through flight – constitutes expressions of a political opinion (Anker 2013, 5:28).

For example, two recent HIRC cases involved young Afghan women, Delbar and Fereshteh, who were active in educating other women, informing them about upcoming elections, and encouraging them to stand up for equal treatment. Because of their work and their beliefs, the young women were targeted, called infidels, and threatened with death. In the words of Delbar:

> I have always spoken out against injustice and inequality, especially in how women are treated in Afghanistan. My father used to beat my mother and me for refusing to submit to him, but I learned from my mother to be strong and to assert myself. She stood up to my father and taught me to do the same.

The cases were successfully framed in terms of gender and political opinion, as well as religion, since the clients were Muslim women who resisted conservative Muslim values and attended a Christian college and who were, as a result, perceived to be Christian converts.

Similarly, in the case of Aneni, a violently abused Zimbabwean woman, HIRC worked carefully to understand the dynamics of her marriage and the reasons for the violence she suffered. Upon first being interviewed, like many women who have suffered domestic abuse, she denied having any political opinions. Through further interviews, however, her attorneys learned that she actually held very strong beliefs about how women should be treated, based on having seen her parents treat each other respectfully and also because equality and human rights were part of her church's teachings. It also became clear that her husband Paul was a strong supporter of Zimbabwean President

Robert Mugabe, while she was against President Mugabe, especially his inhumane treatment of people and the lack of freedom throughout her country. She even secretly donated money to the main opposition party without her husband's knowledge, but was too scared to reveal this to her attorneys for many months, because of her fear of Mugabe's spies.

It is noteworthy, that while the Board's PSG analysis in gender cases has been on hold, federal courts have issued some positive decisions involving gender-based PSGs. In *Mohamed v Gonzales*, for example, the court found that gender was a 'prototypical immutable characteristic' under the PSG ground (400 F.3d 785, 797 (9th Cir. 2005)). However, PSGs in gender-based cases are typically constructed as gender in addition to some other factor such as victimization, the harm suffered, or another ground, i.e. political opinion, expressed as opposition to the harm. The reticence to rely on gender itself to define the PSG has been a clear problem and these convoluted PSGs have had a negative effect on the formulation of PSGs in other contexts (*Rreshpja v Gonzales*, 420 F.3d 551, 555–56 (6th Cir. 2005); *Lushaj v Holder*, 380 Fed. Appx. 41, 43 (2d Cir. 2010); *Gatimi v Holder*, 578 F.3d 611 (7th Cir. 2009)).

Gender-based violence and emotional and psychological harm

As noted, gender asylum claims have expanded adjudicators' understanding of the meaning of harm, including in the 'private' sphere. In part as a result of the previously described representation of Haitian women, it is now well established that rape constitutes persecution (United States Citizenship and Immigration Services – Asylum Division 2009a, 22). The United States Citizenship and Immigration Services Asylum Office training materials explain: '[i]n some countries a woman may experience severe discrimination and social ostracization because she was raped. The ostracism is further harm after the rape, and may itself be sufficiently serious to constitute persecution' (United States Citizenship and Immigration Services – Asylum Division 2009a, 22). The Citizenship and Immigration Services also emphasize the varied nature of harm that women may face, including 'forced female genital mutilation, forced abortion, involuntary marriage, societal stigma that prevents marriage, "honor" killings, and forced prostitution' (United States Citizenship and Immigration Services – Asylum Division 2009a, 6).

In addition, based in part on the use and reasoning of the *Fatin* decision (where the court recognized that gender alone could form the basis of a PSG), adjudicators now acknowledge that women may be subjected to harm solely by virtue of being women.[23] In many countries, including

23 For example, '[a] woman may be prevented from traveling, from obtaining an education or from pursuing a profession, or suffer other forms of institutionalized discrimination, because of her gender' (United States Citizenship and Immigration Services – Asylum Division 2009a).

Guatemala and Honduras, femicide and violence against women is widespread, and as female activists gain more ground in their fight to change the culture of machismo, they too have come under increasing attack. Marta, a recent HIRC client who was granted asylum, fled Honduras after she received death threats, calls threatening her children, and eventually had her house burned down, as a result of her outspoken support for women's rights and her efforts to establish protections for women in abusive relationships. As the USCIS Asylum Office training materials note, '[w]omen may be harmed for violating social norms or legal restrictions associated with gender' and for 'express[ing] opposition to, or violat[ing], social norms associated with gender' (United States Citizenship and Immigration Services – Asylum Division 2009a, 6).

Gender asylum claims have especially served to highlight the psychological and emotional harm suffered by women, in addition to sexual and physical abuse. For example, Fereshteh, one of the young Afghan women mentioned previously, suffered such severe psychological harm growing up in a repressive society and family from which she rebelled, that she became suicidal. As she explains in her affidavit,

> [e]ven as a young girl, I was often defiant and challenged how my extended family, neighbours, and community expected me to behave. Still, it was very difficult for me growing up in a culture that was so against me being independent and outspoken; I was often depressed and tried to commit suicide twice when I was younger.

Living in an environment where she was expected to stay silent and where she could not express her views about women's rights and equal treatment of women severely threatened the core of her identity. HIRC argued that the Asylum Office should recognize this psychological harm as part of her past persecution in adjudicating her claim, and she was ultimately granted asylum.

Bars to asylum

Gender-based cases have also helped shape our understanding of the bars to asylum in United States law, promoting, for example, a more generous interpretation of exceptions to the one-year filing deadline. Under United States law, applicants who fail to apply for asylum within one year of their last arrival to the United States are precluded from obtaining asylum unless they fall under one of the exceptions to the filing deadline (INA §208(a)(2)(B), 8 U.S.C. §1158(a)(2)(B); Anker 2013, 6:31–7). Since many women are too terrified to reveal what they have suffered and live in hiding in the United States for years before coming forward, they are often disproportionately impacted by the one-year filing deadline bar,

unless they can prove they meet an exception (Massimino 2013; Schrag, Schoenholtz, Ramji-Nogales, and Dombach 2010). Exceptions to the one-year bar can include 'serious illness or mental or physical disability', such as post-traumatic stress disorder (PTSD) and other psychological conditions, which often prevent an applicant from coming forward earlier (INA §208(a)(2)(B), 8 U.S.C. §1158(a)(2)(B); 8 C.F.R. §§208.4(a)(4) to (5), 1208(a)(4) to (5); Anker 2013, 6: 31–7).

HIRC has brought and won gender cases involving an exception to the one-year filing deadline, even when the gap between arrival and filing spans several years or even decades, by demonstrating that the client suffered from severe trauma and/or depression that prevented the client from talking to anyone about the harm she suffered. One client, Patricia, a Guatemalan woman who suffered years of physical, sexual, and psychological harm, including witnessing her abuser's horrific violence towards their young children and threatening phone calls even after fleeing to the United States, states in her affidavit:

> Since coming to the U.S. in August 2007, I have been withdrawn, depressed, and scared because of my experiences in Guatemala. The humiliation and violence I suffered have made it extremely difficult to talk about the past and who I am. When I arrived here, I could not get help or talk about these experiences, including about my legal status. I was mentally and emotionally shut down. I just wanted to start over and forget the pain.

Another client, Isabella, the Honduran woman mentioned previously, lived underground for almost a decade here in the United States before she was able to talk about the extraordinary harm her abuser inflicted from the time she was 13 until her escape to the United States. She explains in her affidavit:

> For years here in the United States, I could not sleep at night because of the terrible nightmares that made me relive the rapes, the beatings and the abuse over and over again. For a long time, I lived completely isolated and emotionally closed up. I could not trust anyone. I tried to have relationships and even got married, but I was so traumatized, it was very difficult for me to be in an intimate relationship. When I opened up a little to my now ex-husband … who I met and married here, he used what I told him against me and made me feel ugly and worthless. I felt like I had escaped from my country, but not from my past.

Aneni, the Zimbabwean woman described earlier, also lived in hiding in the United States for about eight years before she was able to come

forward. Throughout her time here in the United States, her abuser threatened her, sending angry letters and messages through her sisters and children, to try to find and hurt her. In Aneni's words:

> Since coming to the U.S. in 2003, I have been depressed and scared because of my experiences in Zimbabwe. I have regular nightmares about [my abuser] attacking me. I have been very sick and suffered from paralysis in my face and numbness in my body from worrying too much. For a long time, I could not talk about these experiences or get help, including about my legal status. I didn't want to leave the house or meet people from my country. I was terrified that if I talked about what I had been through, [my abuser] would find out where I was and kill me.

In all of these cases, the one-year filing deadline was a significant challenge. But HIRC worked closely with psychologists who were able to evaluate these brave women and write reports describing how the severe trauma the clients experienced as a result of years of violence at the hands of their abusers had prevented them from coming forward. In this way, the women were able to overcome the bar, meet the extraordinary circumstances exception to the one-year filing deadline, and find safety in being granted asylum.

Conclusion

The development of United States gender asylum law tells a fascinating and unusual story of progressive legal change. The traditional story of legal change is one of litigation or major legislation first, that then opens the door for change at the ground level. But the history of gender asylum reveals a legal transformation that occurred from the ground up. Through persistent, extensive, individual case representation, there is now a long tradition of adjudicators recognizing gender-based persecution and gender-based asylum claims, including domestic violence claims; indeed there is now a ground-level jurisprudence that is having significant impact on other aspects of refugee law and decision-making institutions including at higher levels.

This evolution of the law was brought about in part by large-scale representation of individual clients, advocacy on the ground with NGOs, people in government, and women in the media, who highlighted the issues of fairness and equality central to proper understanding of the treatment of gender asylum claims. And based on this work, colleagues at our clinic working along with others, have forayed into new areas, for example, developing a new case law that comprehends the long-term and persecutory effects of the Guatemalan genocide targeted at indigenous

people,[24] as well as the special requirements and the need for a refocused asylum jurisprudence for children asylum claimants (Anker, Kelly, Willshire Carrera, and Ardalan 2012). In describing political lawyering and how social change could be realized. Gary Bellow criticized both 'dogmatic optimism or disillusioned withdrawal' and the need to be 'less impatient with ambiguity' (Bellow 1996). I hope this chapter provides an example of how strategic optimism and direct work with clients – extraordinary, inspiring survivors – can be a powerful means of legal and social change, even as we learn to tolerate all the ambiguities associated with our sometimes limited formal and 'suspended' victories.

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24 See e.g. *Mendoza-Pablo v Holder*, 667 F.3d 1308, 1314–15 (2012) (finding persecution and describing the effects of the Guatemalan genocide on a child and his family); *Mejillo-Romero v Holder*, 600 F.3d (1 St Cir. 2010).

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