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Domestic Abuse and Gang Violence Against Women: Expanding the Particular Social Group Finding in *Matter of A-R-C-G-* to Grant Asylum to Women Persecuted by Gangs

Tina Zedginidze†

Introduction

A young woman from El Salvador, Ms. Rivera-Barrientos, refused to join a violent street gang known as the *Mara Salvatrucha* ("MS-13") because she did not "believe in what [they did]."[1] As a result, the gang members kidnapped her at knifepoint, hit her in the face with a beer bottle, and brutally gang raped her.[2] The MS-13 members continued to follow Ms. Rivera-Barrientos and threatened her and her family.[3] Knowing that the police would not help her, Ms. Rivera-Barrientos decided to run away, and she sought asylum in the United States.[4] However, the immigration judge denied her asylum application.[5] The judge found that, although Ms. Rivera-Barrientos had suffered past persecution, the persecution was not on the basis of her political opinion or her membership in a particular social group of "women in El Salvador between the ages of twelve and twenty-five who resisted gang recruitment."[6] Both the nation's highest immigration court—the Board of Immigration Appeals (BIA)—and

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1. Rivera-Barrientos v. Holder, 666 F.3d 641, 644 (10th Cir. 2012).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *See id.* at 647–52 (accepting the BIA's definition of "particular social group" and finding that the proposed social group in this case did not meet the standards of "particularity" and "social visibility").

the Tenth Circuit Court of Appeals affirmed, finding that while the group was sufficiently "particular," it was not "socially visible"[7] under the particular social group standard.[8]

This conclusion failed to consider the unique vulnerability of women resisting gang recruitment.[9] Violence against girls and women is widespread in Honduras, El Salvador, and Guatemala—the same nations that are dominated by gang violence.[10] Women in these nations are disproportionately subjected to domestic violence, sexual abuse and exploitation, sex trafficking, and other forms of largely gendered violence.[11] The strong culture of *machismo*[12]—society's view of women as inferior[13]—and the

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7. "Social visibility" was renamed "social distinction" in *Matter of W-G-R-*, 26 I. & N. Dec. 208, 212 (B.I.A. 2014). *See infra* Part I.B.

8. *Rivera-Barrientos*, 666 F.3d at 645, 654; Lisa Frydman & Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, IMMIGR. BRIEFINGS, Oct. 2012, at 1, 10, http://cgrsdrupal.uchastings.edu/sites/default/files/October%202012%20Immigration%20Briefings.pdf.

9. Frydman & Desai, *supra* note 8, at 8–9 (explaining that women are regularly physically and sexually abused once they become members of a gang and that male dominance is present in all gang activities).

10. *See* UNITED NATIONS HIGH COMM'R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 93 (2014), http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf ("Gang violence is a feature of everyday life in some countries of the world. Entire communities may be dominated by gangs and gang culture."); *see also* Monica Ramirez & Anne K. Ream, *Migrant Children Are Fleeing a Region Rife With Sexual Violence*, NEW REPUBLIC (July 23, 2014), http://www.newrepublic.com/article/118820/sexual-violence-major-cause-immigration-us (discussing the wide-spread incidence of sexual and gender-related violence in the region, and noting that this is one key factor driving the child-migrant crisis).

11. Frydman & Desai, *supra* note 8, at 8–9.

12. *See* Robert Hanser, *Domestic Violence Against Women in Latin America*, CRIME & JUST. INT'L, July/Aug. 2001, at 5, 5 (stating that *machismo* is a common social construct in many Latin American countries and serves to organize gender roles with a primarily patriarchal system); Catherine L. Marrs Fuchsel, Sharon B. Murphy & Rebecca Dufresne, *Domestic Violence, Culture, and Relationship Dynamics Among Immigrant Mexican Women*, 27 J. WOMEN & SOC. WORK, 263, 264 (2012) (defining *machismo* as "a set of behaviors among Hispanic males . . . of being dominant, superior, and strong in relationships"); *see also* Ramirez & Ream, *supra* note 10 (stating that a person who speaks out about sexual and gender-related violence is subjected to "*machista* violence," or retaliation for making an accusation).

13. Frydman & Desai, *supra* note 8, at 8–9 ("Gangs prey on young women in Central America because of their subordinate status in society and their deprivation of state protection.").

governments' failure to protect women's rights contribute to high rates of sexual violence.[14] Rates of femicide—"the violent and deliberate killing of a woman"[15]—are also very high in this region.[16]

In Latin America, violence against girls and women has intensified; at the same time, courts in the United States have increasingly accepted gender-based asylum cases.[17] On August 26, 2014, the BIA held in *Matter of A-R-C-G-* that, in certain cases, "married women in Guatemala who are unable to leave their relationship[s]" could constitute a cognizable particular social group.[18] This was the first BIA decision to recognize domestic violence as potential grounds for seeking asylum in the United States.[19] It set a precedential standard that affords immigration judges a uniform basis for deciding domestic violence cases and allows courts to avoid the "contradictory and arbitrary" decisions of previous cases.[20]

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14. *Id.* (asserting that international and domestic organizations have condemned the high levels of impunity for violence against women in Honduras, El Salvador, and Guatemala).

15. *Femicide in Latin America*, U.N. WOMEN (Apr. 4, 2013), http://www.unwomen.org/en/news/stories/2013/4/femicide-in-latin-america [hereinafter *Femicide in Latin America*].

16. *See id.* El Salvador has the highest murder rate of women in the world. *Id.* In El Salvador and Honduras, the rate of impunity for femicide crimes is about 77%. *Id.* Guatemala has the third-highest murder rate of women in the world. Matthias Nowak, *Femicide: A Global Problem*, SMALL ARMS SURV., Feb. 2012, at 3, http://www.smallarmssurvey.org/fileadmin/docs/H-Research_Notes/SAS-Research-Note-14.pdf.

17. *See* Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 124 (2013), http://cgrs.uchastings.edu/sites/default/files/Final%20WLJ%20Version.pdf.

18. A-R-C-G-, 26 I. & N. Dec. 388, 389 (B.I.A. 2014).

19. Julia Preston, *In First for Court, Woman Is Ruled Eligible for Asylum in U.S. on Basis of Domestic Abuse*, N.Y. TIMES (Aug. 29, 2014), http://www.nytimes.com/2014/08/30/us/victim-of-domestic-violence-in-guatemala-is-ruled-eligible-for-asylum-in-us.html?rref=us&module=Ribbon&version=origin&region=Header&action=click&contentCollection=U.S.&pgtype=article.

20. Bookey, *supra* note 17, at 109, 147. Prior to *Matter of A-R-C-G-*, some immigration judges granted relief in domestic violence cases following the approach in *Matter of R-A-*, 22 I. & N. Dec. 906 (B.I.A. 2001), and *Matter of L-R-*, *see* Department of Homeland Security's Supplemental Brief, L-R- at 12 (B.I.A. Apr. 13, 2009) [hereinafter DHS Supplemental Brief], http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf. *See* Bookey, *supra* note 17, at 147. However, other immigration judges denied relief based on a refusal to see domestic violence as "anything other than a personal dispute." Bookey, *supra* note 17, at 147; *see, e.g.*, *R-A-*, 22 I. & N. Dec. at 917–27 (disagreeing with the Immigration Judge's finding that "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" is a particular social group and that Respondent was

Though groundbreaking, the BIA decision in *Matter of A-R-C-G-* was narrow, limiting the holding to a particular social group comprised of "married women in Guatemala who are unable to leave their relationship[s]."[21] However, doubt still exists as to whether a court would expand the holding to recognize female victims of gang violence or forced gang recruitment as members of a particular social group for purposes of asylum claims.[22] Gang violence and killings dominate many nations in Central America and contribute to both the high rates of femicide[23] and the recent wave of child migration to the United States.[24] A social group defined by gender and gang-membership resistance has "particularity" and "social distinction" similar to the now-recognized social group defined by gender and status in a domestic relationship.[25]

Part I of this Note provides the definition of "refugee" and outlines the requirements for asylum in the United States, including the law surrounding the "particular social group" protected ground for seeking asylum. Part II describes the history of domestic violence as a basis for seeking asylum and summarizes the first BIA decision to grant relief on the basis of domestic abuse, *Matter of A-R-C-G-*. Part III analyzes the recent issues surrounding gang recruitment in Latin America and how the culture in that region specifically affects women. Part III also examines the BIA's refusal to recognize a particular social group in a case involving forced gang recruitment, *Matter of S-E-G-*,[26] and addresses how that refusal affects women seeking asylum to avoid gang violence and recruitment. Part III concludes by highlighting the similarities between women who are victims of

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persecuted on account of her membership in that group); DHS Supplemental Brief at 12 ("[T]he social group defined by the Immigration Judge does not qualify as a particular social group.").

21. *A-R-C-G-*, 26 I. & N. Dec. at 389.

22. *See, e.g.*, Emily Bazelon, *Who Gets To Stay? The Courts Are Finally Granting Asylum to Victims of Domestic Abuse. Victims of Gang Violence Are Still Out of Luck*, SLATE (Sept. 12, 2014, 6:04 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/immigrants_seeking_asylum_courts_say_yes_for_domestic_violence_no_for_gang.single.html (describing the recent influx of immigrants arriving at the border, and noting that, although *Matter of A-R-C-G-* allows domestic violence victims to bring claims for asylum, victims of gang persecution cannot do so).

23. *See* Nowak, *supra* note 16, at 3; *Femicide in Latin America*, *supra* note 16.

24. Frances Robles, *Fleeing Gangs, Children Head to U.S. Border*, N.Y. TIMES (July 9, 2014), http://www.nytimes.com/2014/07/10/world/americas/fleeing-gangs-children-head-to-us-border.html.

25. Frydman & Desai, *supra* note 8, at 10.

26. *See* S-E-G-, 24 I. & N. Dec. 579, 587 (B.I.A. 2008).

gang violence and those who are victims of domestic abuse and recommends extending the holding of *Matter of A-R-C-G-* to protect women in the former category. Part IV analyzes the inequality surrounding women affected by gang violence and acknowledges that, although asylum law is moving toward recognition of gender-based social groups, the BIA needs to facilitate uniform methodology and decision-making by extending its decision in *Matter of A-R-C-G-* to apply to women who refuse forced gang recruitment. Part IV argues in the alternative that Congress should follow in the footsteps of many other nations and adopt "gender" as a sixth protected ground on which individuals can seek asylum in the United States.

Courts in the United States currently analyze gang violence and forced gang recruitment of women under the same standard as forced gang recruitment of men.[27] However, this Note argues that women's resistance to gang recruitment is significantly different from that of men; therefore, such an analysis ignores the unique nature of gang violence against women. Furthermore, this Note concludes that courts should expand the holding of *Matter of A-R-C-G-* and treat women who resist forced gang recruitment, who are forced into relationships with a gang member, or who are sexually exploited by gang members in a similar manner to those who are victims of domestic abuse. Thus, these women should qualify for asylum based on their membership in a "particular social group."

I. Asylum Law in the United States

A. "Refugees" and Requirements for Asylum

An individual may apply for asylum if he or she is physically present in or arrives in the United States[28] and qualifies as a "refugee."[29] The term "refugee," as adopted by the 1951 United Nations Convention Relating to the Status of Refugees[30] and the 1967 United Nations Protocol Relating to the Status of Refugees,[31]

27. *See* W-G-R-, 26 I. & N. Dec. 208, 208–09 (B.I.A. 2014); *S-E-G-*, 24 I. & N. Dec. at 585.

28. 8 U.S.C. § 1158(a)(1) (2012).

29. *Id.* § 1158(b)(1)(A).

30. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

31. United Nations Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

is codified in the Immigration and Nationality Act (INA).[32] A "refugee" is defined as

> any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of [1] race, [2] religion, [3] nationality, [4] membership in a particular social group, or [5] political opinion . . . .[33]

Accordingly, an applicant for asylum must demonstrate a well-founded fear of persecution *on account of* one of the five protected grounds,[34] and he or she must demonstrate that his or her government is unable or unwilling to provide protection.[35] Moreover, the applicant must establish that one of the five protected characteristics is (or will be) at least one central reason for that persecution.[36] In addition, a finding of past persecution creates a rebuttable presumption of future persecution.[37] And if the government can demonstrate that reasonable relocation within the home country can end the persecution, or that a change in circumstances has occurred such that the applicant will no longer be persecuted, then the burden of proof shifts back to the applicant.[38] However, the applicant can still receive asylum by showing the severity of the past harm or "other serious harm."[39] A well-founded fear of future persecution must also be on the basis of one of the five protected categories, and it must be both subjectively and objectively reasonable.[40] Most gender violence claims are founded on account of "membership in a particular social group."[41]

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32. Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(42)(A) (2012).

33. *Id.*

34. The requirement that the persecution be "on account of" one of the five protected categories is often referred to as the "nexus" requirement. *See* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

35. 8 U.S.C. § 1101(a)(42)(A).

36. 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

37. 8 C.F.R. § 208.13(b)(1) (2012).

38. *Id.*

39. *Id.* § 208.13(b)(1)(iii). "Other serious harm" does not need to be based on a protected ground. *See* Jason Dzubow, *The Forgotten Path to Asylum: "Other Serious Harm,"* ASYLUMIST (Nov. 21, 2011), http://www.asylumist.com/2011/11/21/the-forgotten-path-to-asylum-other-serious-harm/.

40. 8 U.S.C. § 1101(a)(42)(A); *see, e.g.*, Feleke v. Immigration & Naturalization Serv., 118 F.3d 594, 598 (8th Cir. 1997) (holding that the applicant did not show an objectively reasonable threat of persecution on the basis of his political opinion).

41. *See* Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 48 (2008).

B. Membership in a Particular Social Group

"Membership in a particular social group" is the most controversial and ambiguous of the five protected classes.[42] In some cases, a group defined as a "particular social group" may overlap with "political opinion."[43] The BIA first defined the term "particular social group" in *Matter of Acosta* by using the doctrine of *ejusdem generis*.[44] The court required group members to share a "common immutable characteristic" that either cannot be changed or should not be required to change because it is "fundamental to their individual identit[ies] or conscience[s]."[45]

In *Matter of C-A-* and *Matter of S-E-G-*, the BIA further formulated the definition of "particular social group" by adding the elements of "social visibility" and "particularity."[46] These decisions held that the group must be described in a manner in which it would be recognized by society as a discrete class of persons.[47] In other words, the proposed description must be "sufficiently particular" and not too amorphous to "create a benchmark for determining group membership."[48]

The BIA further clarified its definition on February 7, 2014, in the companion cases of *Matter of M-E-V-G-*[49] and *Matter of W-G-R-*.[50] The BIA explained that "social visibility" did not mean "ocular visibility" and renamed the requirement "social

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42. *Id.* (analyzing the four approaches to defining membership in a particular social group, and arguing that adjudicators should reject the "social visibility" approach).

43. Deborah Anker et al., *Women Whose Governments Are Unable or Unwilling To Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law*, 11 GEO. IMMIGR. L.J. 709, 742 (1997).

44. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (applying the *ejusdem generis* doctrine—meaning literally "of the same kind"—to the five protected categories in the definition of "refugee," and finding that a particular social group requires a common immutable characteristic).

45. *Id.* ("The shared characteristic might be an innate one, such as sex, color or kinship ties, or in some circumstances, it might be a shared past experience such as former military leadership or land ownership.").

46. S-E-G-, 24 I. & N. Dec. 579, 582 (B.I.A. 2008); C-A-, 23 I. & N. Dec. 951, 957, 960 (B.I.A. 2006) (holding that a group of "noncriminal drug informants working against the [Columbian] Cali drug cartel" was not a particular social group because it did not have "social visibility" and "particularity").

47. *S-E-G-*, 24 I. & N. Dec. at 584 (noting that the size of the proposed group may be an important factor, but holding that the key question is whether the group is sufficiently "particular"); *C-A-*, 23 I. & N. Dec. at 956.

48. *S-E-G-*, 24 I. & N. Dec. at 584 (citing A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 76 (B.I.A. 2007)).

49. 26 I. & N. Dec. 227, 228, 248–49 (B.I.A. 2014).

50. 26 I. & N. Dec. 208 (B.I.A. 2014).

distinction."[51] Following these cases, in order for a group to be socially distinct, it must be perceived as a group by the society in question.[52] Furthermore, for a social group to be "particular," it must be set apart from society in some significant way, and the outer limits of the group's boundaries must be defined.[53]

The social distinction and particularity requirements have been widely criticized as illogical and arbitrary.[54] They also diverge from the United Nations High Commissioner for Refugees (UNHCR) definition of particular social group as

> [a] group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[55]

This definition parallels the definition set forth in *Matter of Acosta*[56] and does not include the "social distinction" and "particularity" requirements that are necessary in the United States.[57] For instance, a group encompassing "Salvadoran women refusing gang recruitment"[58] would be viewed as a particular social group under the UNHCR definition. In this example, the gender aspect is an immutable characteristic, and "refusing gang recruitment" is socially perceived due to the prevalence of gangs

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51. *M-E-V-G-*, 26 I. & N. Dec. at 228.

52. *Id.* at 240–42.

53. *Id.* at 241–44.

54. Elyse Wilkinson, *Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 413 (2010) ("The social visibility requirement narrows the 'particular social group' definition to such an extent that it will stifle the development of future gang-based asylum social group claims and other social group claims as well."); *see also* Nicholas R. Bednar, *Social Group Semantics: The Evidentiary Requirements of "Particularity" and "Social Distinction" in Pro Se Asylum Adjudications*, 100 MINN. L. REV. 355, 379–403 (2015) (demonstrating that particularity and social distinction create evidentiary burdens for asylum applicants, and proposing an alternative system of precedential fact-finding).

55. United Nations High Comm'r for Refugees, *Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, HRC/GI/02/02, at 11–13 (May 7, 2002) [hereinafter UNHCR, *Guidelines on International Protection*] (emphasis added), http://www.unhcr.org/refworld/docid/3d36f23f4.html.

56. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

57. *See* UNHCR, *Guidelines on International Protection*, *supra* note 55, at 2; *see also M-E-V-G-*, 26 I. & N. Dec. at 248 ("We recognize that our interpretation of the ambiguous phrase 'particular social group' differs from the approach set forth in the UNHCR's social group guidelines . . . .").

58. For a case considering a similar particular social group, see Rivera-Barrientos v. Holder, 666 F.3d 641, 643 (10th Cir. 2012) ("women in El Salvador between the ages of twelve and twenty-five who resisted gang recruitment").

and their control over El Salvadoran society. Courts also use a lack of "social distinction" and "particularity" to deny gang-based asylum applicants.[59]

In sum, in order to be a member of a particular social group, an asylum applicant must provide evidence (1) that the group members share a common immutable characteristic, (2) that the group is sufficiently particular, and (3) that the group is socially distinct.[60]

II. Domestic Violence Claims to Asylum and *Matter of A-R-C-G-*

A. Gender-Related Claims and Domestic Violence Prior to Matter of A-R-C-G-

Although the U.S. Department of Justice first issued guidelines on gender-based persecution in 1995, the guidelines were not binding on immigration judges, the BIA, or the circuit courts of appeal.[61] In 1996, the BIA issued its first precedential decision in a gender-related case in *Matter of Kasinga*,[62] wherein it granted asylum to a Togolese woman who fled her country to escape female genital mutilation (FGM).[63] The court held that "young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice" are members of a particular social group.[64] The BIA, applying the criteria set forth in *Matter of Acosta*,[65] recognized a

59. *See* Alexandra Grayner, *Escaping Forced Gang Recruitment: Establishing Eligibility for Asylum After* Matter of S-E-G-, 63 HASTINGS L.J. 1417, 1428 (2012).

60. *See M-E-V-G-*, 26 I. & N. Dec. at 244; *see also* A-R-C-G-, 26 I. & N. Dec. 388, 394 (B.I.A. 2014) (clarifying the interpretation of "particular social group" and remanding the case to the immigration judge to determine whether the applicant, a Honduran national who refused to join the MS-13, was eligible for asylum based on membership in a particular social group).

61. Bookey, *supra* note 17, at 112.

62. Kasinga, 21 I. & N. Dec. 357, 357 (B.I.A. 1996).

63. *Id.* at 365–66.

64. *Id.*

65. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (deciding that a fundamental and immutable characteristic is required to form a cognizable particular social group, and recognizing that sex is an immutable characteristic).

particular social group defined by gender, ethnicity, not having been subject to FGM, and opposition to the practice to grant the applicant asylum.[66]

On June 11, 1999, the BIA issued its first decision regarding domestic violence in *Matter of R-A-*.[67] Prior to this decision, no binding precedent or regulatory guidance specifically addressed domestic abuse.[68] *Matter of R-A-* involved a woman from Guatemala, Ms. Rody Alvarado, who escaped severe domestic abuse by her husband, a former soldier.[69] The BIA held that the abuse suffered by Ms. Rody Alvarado constituted persecution.[70] However, the BIA found that her husband did not abuse her on account of her membership in a particular social group.[71] The BIA reversed the immigration judge's finding that "Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination" was a particular social group and denied Ms. Rody Alvarado asylum.[72] The BIA's decision in *Matter of R-A-* provoked criticism throughout the country and led U.S. Attorney General Janet Reno to vacate it on January 19, 2001.[73] Reno remanded the case pending final publication of proposed regulations that would address the meaning of various terms in the asylum-law context.[74] The Department of Homeland Security (DHS) issued a supplemental brief in which it took the position that Ms. Rody Alvarado was eligible for asylum on the basis of belonging to a

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66. *Kasinga*, 21 I. & N. Dec. at 357; *see* R-A-, 26 I. & N. Dec. 906 (B.I.A. 1999); *see also Matter of R-A-*, CTR. FOR GENDER & REFUGEE STUD., http://cgrs.uchastings.edu/our-work/matter-r.

67. Bookey, *supra* note 17, at 113.

68. *Id.*

69. *R-A-*, 26 I. & N. Dec. at 908.

70. *Id.* at 927.

71. *Id.*

72. *Id.* at 945. During this time, the BIA tackled another domestic violence case, *Matter of S-A-*, 22 I. & N. Dec. 1328 (B.I.A. 2000). However, *Matter of S-A-* involved parental abuse and was based on religion, not a particular social group. *Id.* at 1329–31. Ms. Rody Alvarado was finally granted asylum by an immigration judge in San Francisco on December 10, 2009. Bookey, *supra* note 17, at 117.

73. *See* Bookey, *supra* note 17, at 109; Esta Soler & Karen Musalo, *Time to End an Asylum Limbo for Abused Women*, WASH. POST (July 18, 2009), http://cgrs.uchastings.edu/sites/default/files/KM%20and%20ESoler%2C%20Time%20to%20End%2C%2C%20WashPost%2C%2007-2009.pdf ("Senators called us [about *Matter of R-A-*], constituents flooded congressional offices with calls, attorneys wrote more briefs and generous donors sought ways to help. But the system defied the pressure to act.").

74. Soler & Musalo, *supra* note 73.

particular social group, but not because of her political opinion.[75] Thereafter, the BIA's decision in *Matter of R-A-* was no longer binding upon immigration judges.[76]

Matter of L-R-, another controversial case, involved a woman from Mexico who was severely physically and psychologically abused by her domestic partner of two decades.[77] The applicant's domestic partner raped her at gunpoint, kept her in virtual captivity, beat her regularly, threatened to kill her and her family members, and prevented her from seeing her three children.[78] Once, while the applicant was pregnant, her domestic partner set her bed on fire, almost killing her.[79] Unable to get any help from the police or the judiciary, in 2004 the applicant fled to the United States with her three children.[80]

DHS issued a supplemental brief in 2009 in which it retreated from its earlier defense of the immigration judge's decision, which had denied the applicant asylum.[81] The brief provided: "DHS accepts that in some cases, a victim of domestic violence may be a member of a cognizable particular social group and may be able to show that her abuse was or would be persecution on account of such membership."[82] The brief set forth two particular social groups that were applicable in the case: "Mexican women in domestic relationships who are unable to leave," and "Mexican women who are viewed as property by virtue of their position within a domestic relationship."[83] DHS argued that these two formulations met the immutability, visibility, and particularity requirements for particularized social groups.[84]

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75. Department of Homeland Security's Position on Respondent's Eligibility for Relief at 13–15, R-A-, File No. A73753922 (Dep't of Justice Feb. 19, 2004), http://cgrs.uchastings.edu/sites/default/files/Matter%20of%20R-A-%20DHS%20brief.pdf.

76. *See* Bookey, *supra* note 17, at 109. A decision issued by the U.S. Attorney General is binding on the BIA and immigration courts unless there is a contravening federal court of appeals decision. *See* 8 C.F.R. § 1003.1(h)(1)(i) (2012).

77. Brief of Respondents in Support of Applications for Asylum Withholding of Removal and CAT Relief at 1, L-R- (E.O.I.R. March 10, 2010) [hereinafter Brief of Respondents], http://cgrs.uchastings.edu/sites/default/files/L-R-brief_immigration_court_03_10_2010.pdf.

78. *Id.* at 70.

79. Amended Declaration of [L-R-] in Support of Application for Asylum at 8, L-R- (Dec. 30, 2005), http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-support.pdf.

80. Brief of Respondents, *supra* note 77, at 21.

81. *Id.*

82. DHS Supplemental Brief, *supra* note 20, at 12.

83. *Id.* at 14.

84. *Id.* at 15.

However, despite DHS's clear statement that domestic violence may be grounds for asylum, the BIA did not issue a precedential decision in this vein until *Matter of A-R-C-G-* in August of 2014.[85]

B. Particular Social Group Finding in Matter of A-R-C-G-

The respondent in *Matter of A-R-C-G-*, a citizen of Guatemala, was severely abused by her husband from the time she married him at the age of seventeen.[86] The abuse included weekly beatings, rapes, and threats.[87] On one occasion, he broke her nose.[88] Another time, he chemically burned her breast by throwing paint thinner on her.[89] She tried to run away from him, but he always managed to find her and resume the abuse.[90] The police refused to interfere in a marital relationship and would not arrest him when she called them for help.[91] In 2005, the respondent fled Guatemala for the United States to seek asylum, fearful that her husband would harm her if she remained in her home country.[92]

The immigration judge denied her asylum application, finding that she did not demonstrate past persecution or a well-founded fear of future persecution based on membership in a particular social group comprised of "married women in Guatemala who are unable to leave their relationship[s]."[93] The judge reasoned that the abuse suffered by the respondent was the result of "criminal acts, not persecution."[94] On appeal, the BIA disagreed with the immigration judge and held that "married women in Guatemala who are unable to leave their relationship[s]" could constitute a cognizable particular social group; it thus remanded the case for additional fact finding.[95]

In reaching this decision, the BIA analyzed whether the proposed group was a "particular social group."[96] The BIA found that the defined group was both "particular" and "socially

85. A-R-C-G-, 26 I. & N. Dec. 388, 389 (B.I.A. 2014).
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 390.
95. *Id.* at 396.
96. *Id.* at 392.

distinct," and that it contained at least one immutable characteristic.[97] The BIA first noted that the group members shared the common immutable characteristic of gender,[98] and it also recognized that marital status could be an immutable characteristic under certain circumstances.[99] The group satisfied the particularity requirements because the terms used to describe the group—"married," "women," and "unable to leave the relationship"[100]—had commonly accepted definitions within Guatemalan society, and they combined to create a group with discrete and definable boundaries.[101] The BIA looked to evidence of social and cultural norms in Guatemala to establish particularity.[102] The court used the reasoning from *Matter of W-G-R-* to assert that "a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation."[103]

To evaluate social distinction, the BIA considered the Guatemalan culture of "machismo and family violence," the failed enforcement of domestic abuse laws, and other socio-political factors.[104] The BIA determined that Guatemalan society "makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave,"[105] and, therefore, that the respondent satisfied the social distinction element.[106] *Matter of A-R-C-G-* is a landmark decision recognizing domestic violence as basis for asylum. But the decision raises the question of whether an immigration court would recognize female victims of gang violence or forced gang recruitment as members of a particular social group.

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97. *Id.*

98. *Id.* at 392 (citing Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (finding sex to be an immutable characteristic)).

99. *A-R-C-G-*, 26 I. & N. Dec. at 393–94.

100. *Id.* at 393.

101. *Id.*

102. *Id.*

103. *Id.* (citing W-G-R-, 26 I. & N. Dec. 208, 214 (B.I.A. 2014)).

104. *Id.* at 394.

105. *Id.*

106. *Id.*

III. Forced Gang Recruitment as a Particular Social Group

Over the past fifteen years, Central American gangs have become stronger and more organized.[107] The gangs acquire members through "control zones," meaning people living in those areas often have no alternative to gang membership.[108] The police cannot control them,[109] and, to make matters worse, the gangs are often protected from prosecution due to their relationships with corrupt government officials and police officers.[110] The rise in gang violence continues to drive the recent surge of unaccompanied children crossing the United States-Mexico border.[111] It has also led to an immense amount of gender-related violence and crime in the region.[112]

The landmark case in the area of forced gang recruitment is the 2008 BIA decision *Matter of S-E-G-*.[113] There, the applicants were a nineteen-year-old woman and her two sixteen-year-old brothers, all of whom experienced violence and threats from the MS-13 gang in their home country, El Salvador.[114] Gang members

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107. *See* S-E-G-, 24 I. & N. Dec. 579, 580 (B.I.A. 2008). The spike in criminal deportations from the United States between 2010 and 2012 played a key role in spreading gang violence in Honduras, Guatemala, and El Salvador. *See* Chardy, *supra* note 111. In Honduras, the murder rate increased from 82.1 per 100,000 people in 2010 to 90.4 per 100,000 people in 2012. *Id.* Street-gang activity is one of the main reasons for this spike in murders. *See id.*

108. *See* Dan Bloom, *Gangs of El Salvador: Intimate Photographs Reveal Daily Violence in the Underworld of Latin America's Infamous Slum Criminals*, DAILY MAIL (June 6, 2014, 1:10 PM), http://www.dailymail.co.uk/news/article-2650813/Gangs-El-Salvador-Intimate-photographs-reveal-daily-violence-underworld-Latin-Americas-infamous-slum-criminals.html (describing the MS-13 and Barrio 18, the "18th Street Gang," as the only future available to some children living in deprived areas of El Salvador).

109. *See id.*

110. *See S-E-G-*, 24 I. & N. Dec. at 580.

111. Alfonso Chardy, *Deportation of Criminals Blamed for Exodus from Central America*, MIAMI HERALD (Aug. 3, 2014), http://www.miamiherald.com/news/local/community/miami-dade/article1978299.html (noting that the number of unaccompanied children crossing the U.S.-Mexico border went from 6,800 in 2011 to 13,000 in 2012, and jumped even higher in 2013); Miriam Jordan, *Study: Unaccompanied Minors Under Age 12 Illegally Entering U.S. Rises 117%*, WALL ST. J. (July 22, 2014, 3:57 PM), http://www.wsj.com/articles/study-unaccompanied-minors-under-age-12-illegally-entering-u-s-rises-117-1406046920.

112. *See* INT'L HUMAN RIGHTS CLINIC, HUMAN RIGHTS PROGRAM, HARVARD LAW SCH., NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR 37–68 (2007), http://www.wola.org/sites/default/files/downloadable/Citizen%20Security/past/Harvard_Gangs_NoPlaceToHide.pdf.

113. *See S-E-G-*, 24 I. & N. Dec. at 582; *see also* Lindsay M. Harris & Morgan M. Weibel, *Matter of S-E-G-: The Final Nail in the Coffin for Gang-Related Asylum Claims?*, 20 BERKELEY LA RAZA L.J. 5 (2010) (analyzing the problematic elements of *S-E-G-* and the potential impact of the decision on other social-group cases).

114. *S-E-G-*, 24 I. & N. Dec. at 582.

threatened to rape and harm the nineteen-year-old girl and stole money from, harassed, and beat her two brothers for refusing to join the gang.[115] MS-13 members also warned the family that if they did not join the gang, "their bodies might end up in a dumpster or in the street someday."[116] The siblings fled to the United States to seek protection, but they were refused asylum.[117]

The BIA refused to recognize either "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities" and "family members of such Salvadoran youth" as particular social groups.[118] According to the BIA, the proposed social groups did not satisfy the particularity or social visibility requirements.[119] Neither proposed group was "particular" because the defining characteristics were too "amorphous," and there was no evidence that gangs exclusively recruited members of those groups.[120] Following the decision in *Matter of S-E-G-*, immigration judges, the BIA, and circuit courts have continued to almost uniformly deny asylum on the basis of forced gang recruitment to both male and female victims.[121]

IV. Extending the Holding of *Matter of A-R-C-G-* to Women Who Are Victims of Forced Gang Recruitment or Gang Violence

A. Claims Related to Forced Gang Recruitment of Women Should Be Differentiated From Those of Men

In recent years, courts have increasingly recognized gender-based and sexual-orientation asylum claims under the particular social group category.[122] For example, "women who refuse to be subject to FGM" has been a widely accepted and recognized

115. *Id.* at 580.

116. *Id.*

117. *Id.* at 581.

118. *Id.*

119. *Id.* at 583 (reasoning that past experiences do not necessarily suffice to define a particular social group).

120. *Id.* at 584–85; *see also* Davila-Mejia v. Mukasey, 531 F.3d 624, 629 (8th Cir. 2008) (finding that a proposed group comprised of "competing family business owners" was too amorphous to constitute a particular social group); A-M-E- & J-G-U-, 29 I. & N. Dec. 69, 73–74 (B.I.A. 2007) (finding that the proposed group of "wealthy" Guatemalans was not so identifiable as to meet the requirements of a particular social group).

121. *See, e.g.*, W-G-R-, 26 I. & N. Dec. 208, 208–09 (B.I.A. 2014).

122. *See* Marouf, *supra* note 41, at 88.

particular social group since the decision in *Matter of Kasinga*.[123] Sexual orientation has also become an established basis for a finding of a particular social group.[124] In 1990, in *Matter of Toboso-Alfonso*, the BIA first recognized "persons identified as homosexuals by the Cuban Government" as a particular social group.[125] Since then, over the past twenty years, hundreds of lesbian, gay, bisexual, transgender, and intersex individuals have been able to obtain asylum in the United States.[126] Further, the BIA's first grant of asylum to a domestic violence victim in *Matter of A-R-C-G-* was another successful step toward recognizing gender-based asylum claims.[127] However, despite these triumphs, decision-makers still struggle to recognize many gender-based claims, including the asylum claims of women who resist forced gang recruitment.[128]

Courts at all levels have categorically denied the asylum applications of individuals who resist forced gang recruitment,[129] which may be due in part to a broader policy of denying all gang-based asylum claims.[130] Thus, despite the increased recognition of gender-based claims, those involving gang persecution have been

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123. *See* Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996); *see also* Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007) (holding that, in being subjected to FGM, an applicant was persecuted on account of her membership in a particular social group of "Somali females").

124. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., RAIO COMBINED TRAINING COURSE: GUIDANCE FOR ADJUDICATING LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) REFUGEE AND ASYLUM CLAIMS 14–22 (2011) [hereinafter U.S. CITIZENSHIP & IMMIGRATION SERVS., GUIDANCE], http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf.

125. Toboso-Alfonso, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990) (holding that Fidel Armando Toboso-Alfonso, a gay man from Cuba, was eligible for withholding of removal because of his sexual orientation).

126. *See, e.g.*, Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005) ("[A]ll alien homosexuals are members of a 'particular social group' within the meaning of the INA."); U.S. CITIZENSHIP & IMMIGRATION SERVS., GUIDANCE, *supra* note 124, at 18 (providing possible particular social group formulations including "lesbian women from Uganda" and "men from Ghana imputed to be gay").

127. *See* Preston, *supra* note 19.

128. *See* Bazelon, *supra* note 22.

129. Grayner, *supra* note 59, at 1420; *see also* Frydman & Desai, *supra* note 8, at 28 ("The often cursory denials of asylum claims based on resistance to gangs seem to be largely a function of fear of floodgates . . . .").

130. Bazelon, *supra* note 22 ("This is about denying gang-based asylum claims across the board."). Courts have denied gang-based claims since *Matter of S-E-G-*, regardless of the applicant's country of origin or how one frames the particular social group. *See id.*

rejected by federal courts.[131] While some gang recruitment claims in front of immigration judges have been successful,[132] the BIA and federal courts have not decided the issue, which has led immigration judges to treat gang persecution of women analogously to such claims by men.[133] However, courts should use a different approach when analyzing gang persecution of women, because women's experiences differ considerably from those of male asylum seekers.

For one, women's subordinate status in many Central American societies makes them easy targets for gang persecution.[134] Although gang members may harm women for the same reasons they do men, e.g., refusal to join a gang, the harms perpetrated against women are often different.[135] For example,

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131. *See, e.g.*, Mendez-Barrera v. Holder, 602 F.3d 21, 25–28 (1st Cir. 2010) (affirming the BIA's finding that "young [El Salvadoran] women recruited by gang members who resist such recruitment" lacked a "recognized level of social visibility" and "particular and well-defined boundaries"); Escobar-Batres v. Holder, 385 F. App'x 445, 446–47 (6th Cir. 2010) (rejecting as too broad a particular social group comprised of "Salvadoran females under the age of [eighteen] who refuse to join a gang because they oppose gang practices").

132. *See, e.g.*, Memorandum of Decision & Order of U.S. Immigration Judge Phillip T. Williams of May 2, 2011 at 15 (U.S. Immigration Ct.), http://www.uscrirefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_1%20Asylum%20Research/5_4_1_2_Gang_Related_Asylum_Resources/5_4_1_2_3_Immigration_Judge_Decisions_Briefs_and_Affidavits/ES_018.pdf (granting asylum to a woman whose identity was redacted on account of her membership in a particular social group of "Salvadoran women who are viewed as gang 'property' by virtue of the fact that [they were] successfully victimized by gang members once before").

133. Frydman & Desai, *supra* note 8, at 9–11.

134. *See, e.g.*, U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM OFFICER BASIC TRAINING COURSE, FEMALE ASYLUM APPLICANTS AND GENDER-RELATED CLAIMS 5 (2009), http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf (explaining that experiences that cause women to flee their home countries are often different from those of men, and arguing that adjudicators should be sensitive to this difference in order to properly evaluate women's claims).

135. *See, e.g.*, *id.* ("Women may be subject to, among other things, forced female genital mutilation, forced abortion, involuntary marriage, societal stigma that prevents marriage, 'honor' killings, and forced prostitution.").

women are often threatened with sexual abuse for resisting joining a gang.[136] Refusing to become the "girlfriend" of a gang member can also lead to persecution.[137]

In addition, even as members of gangs, women have different roles and suffer different harms from men. First, initiation rituals for women are different.[138] In order to join a gang, members must complete certain tasks assigned to them by gang leaders.[139] While men receive beatings for their initiations, women are usually given a choice: receive a beating or be raped by several gang leaders.[140] Such treatment both reflects and reinforces the gender dynamic in *machismo* culture.[141] Further, gangs are increasingly using women to commit crimes traditionally carried out by men,[142] which has escalated female gang recruitment.[143] And although gangs are increasingly using women to commit these crimes, the male-dominant gang structure continues to assign women tasks confined to traditional gender roles.[144] Furthermore, gangs employ women in ways that take advantage of their physical attractiveness and their image of innocence in order to avoid arousing the suspicion of victims or the police.[145]

Gang-recruitment asylum cases are broadly barred by immigration courts because gangs are seen as targeting everyone in society and because they are extremely pervasive in Central

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136. *See* AM. CIVIL LIBERTIES UNION, UNACCOMPANIED GIRLS: REAL CASES OF VICTIMS FLEEING RAPE, SEXUAL VIOLENCE, TORTURE, AND TRAFFICKING IN HONDURAS, EL SALVADOR, AND GUATEMALA (2014), https://www.aclu.org/sites/default/files/assets/14_7_16_unaccompanied_girls_-_real_case_stories.pdf (describing real cases of girls who fled Central America to avoid sexual violence used by gangs as part of the "price" girls have to pay). A growing number of unaccompanied children entering the United States are girls fleeing sexual violence from gangs. *Id.* at 1.

137. ISABEL AGUILAR UMANA & JEANNE RIKKERS, INITIATIVE FOR PEACEBUILDING, VIOLENT WOMEN AND VIOLENCE AGAINST WOMEN: GENDER RELATIONS IN THE *MARAS* AND OTHER STREET GANGS OF CENTRAL AMERICA'S NORTHERN TRIANGLE REGION 11 (2012), http://www.ifp-ew.eu/pdf/201204IfPEW ViolentWomenAndViolenceAgainstWomen.pdf.

138. *See id.*

139. *Id.*

140. *Id.* at 10.

141. *Cf.* INT'L HUMAN RIGHTS CLINIC, *supra* note 112, at 31–32 (describing the use of sexual violence in the process of initiating girls into gangs).

142. This is partially due to Guatemalan society's view that women are more innocent and less likely to be suspected by police. *See* UMANA & RIKKERS, *supra* note 137, at 12.

143. *Id.* at 11.

144. *Id.* at 12 (explaining that women's traditional roles as family and household caretakers continue in gang culture).

145. *Id.* at 11.

America.[146] However, because young girls and women are more vulnerable to recruitment, they should be recognized as socially distinct.[147] Although gangs commit criminal acts against and recruit members from their general communities to increase their strength and power, their members also specifically target certain vulnerable social groups.[148] Girls and women are such targets.[149] Specifically, gangs are more likely to target an individual who resists gang activity, for example, by refusing demands for sex.[150] Since individuals who belong to this group—women who refuse to join gangs—are more vulnerable to gang violence *because of* their connection to it, courts should recognize them as a particular social group.

Some immigration courts have held that domestic violence victims comprise a particular social group due in part to the male-dominant culture in Central America.[151] But the ineffective protection of women in this region is even more rampant in the context of gang violence.[152] Though the government is reluctant to interfere in a domestic abuse environment,[153] it is even more hesitant to attempt to control gang violence.[154]

As the UNHCR noted, proper consideration of the gender aspect of a claim is particularly important, and it is "essential that [gender's] relevance not be overlooked or underestimated during the assessment claims."[155] A social group defined by gender and nationality, as well as by resistance to forced gang associations, such as being "dating" a gang member or becoming his "property"; forced gang membership; or sexual exploitation should fulfill the social distinction and particularity requirements. A woman

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146. *See supra* Part III.

147. INT'L HUMAN RIGHTS CLINIC, *supra* note 112, at 60–61.

148. UNITED NATIONS HIGH COMM'R FOR REFUGEES, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS 4 (2010) [hereinafter UNHCR, GUIDANCE NOTE ON REFUGEE CLAIMS], http://www.aila.org/content/default.aspx?docid=31688 (stating that people who are marginalized in society are more likely to be forcefully recruited and harmed by gangs).

149. *Id.*

150. *Id.*; *see also El Salvador's Horrifying Culture of Gang Rape*, N.Y. POST (Nov. 6, 2014, 11:57 AM), http://nypost.com/2014/11/06/the-youth-are-theirs-el-salvadors-horrifying-culture-of-gang-rape/ (reporting on the murder of a gang "girlfriend" by a member of a rival gang).

151. A-R-C-G-, 26 I. & N. Dec. 388, 393 (B.I.A. 2014).

152. INT'L HUMAN RIGHTS CLINIC, *supra* note 112, at 60–61.

153. BUREAU OF HUMAN RIGHTS, DEMOCRACY & LABOR, U.S. DEP'T OF STATE, EL SALVADOR 2014 HUMAN RIGHTS REPORT 16 (2014), http://www.state.gov/documents/organization/236900.pdf.

154. INT'L HUMAN RIGHTS CLINIC, *supra* note 112, at 37–75.

155. UNHCR, GUIDANCE NOTE ON REFUGEE CLAIMS, *supra* note 148, at 6–7.

threatened and forced to be the "girlfriend" of a gang member would have a straightforward case to prove under the analysis in *Matter of A-R-C-G-*. However, it remains unclear whether courts would recognize a group comprised of women fleeing forced gang recruitment or sexual exploitation as a particular social group.[156]

While some commentators believed that a BIA decision approving a domestic-violence based claim would increase the likelihood of women's success in gang-based claims, the narrow holding of *Matter of A-R-C-G-* and the strong resistance to individuals who claim forced gang recruitment make such an advancement in this area less likely.[157] For a long time, adjudicators misinterpreted domestic violence and other gender-related harms as "private" violence and thus refused asylum to victims.[158] *Matter of A-R-C-G-* recognized that women who are unable to leave an abusive relationship are being persecuted *on account of* their membership in that particular social group.[159] Therefore, courts should use the same analysis on asylum claims by women who (1) are persecuted by gangs and (2) live in a society that fails to protect them. Though, in the past, courts have rejected particular social groups of women for being too amorphous and broad,[160] there are several formulations of social groups comprised of women that may qualify as particular social groups if courts expand the holding of *Matter of A-R-C-G-*.

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156. *See, e.g.*, Bazelon, *supra* note 22 (describing the recent victory in granting asylum to a victim of domestic abuse, but noting "that [being granted asylum] is far less true for kids who seek asylum to escape the gangs whose power is pushing many of them across the border").

157. *See, e.g.*, Frydman & Desai, *supra* note 8, at 11 ("A published [BIA] decision approving a social group in the domestic violence context . . . would significantly impact the treatment of gender-based gang claims.").

158. Jessica Marsden, *Domestic Violence Asylum After* Matter of L-R-, 123 YALE L.J. 2512, 2524 (2014), http://www.yalelawjournal.org/note/domestic-violence-asylum-after-matter-of-l-r ("[I]t would be wrong to infer that because women are persecuted *differently* from other groups, they are not persecuted because of their gender or at all."); *see also* Marouf, *supra* note 41, at 50–51 ("Initially, gender-related forms of harm, such as sexual violence, domestic abuse, female genital cutting, and honor killings were dismissed as 'private matters' that did not constitute persecution.").

159. A-R-C-G-, 26 I. & N. Dec. 388, 390 (B.I.A. 2014).

160. *See, e.g.*, Rreshpja v. Gonzales, 420 F.3d 551, 555–56 (6th Cir. 2005) (holding that the group "young Albanian women" was too broad); Safie v. Immigration & Naturalization Serv., 25 F.3d 636, 640 (8th Cir. 1994) (rejecting as overbroad a proposed social group of "Iranian women").

B. Applying Matter of A-R-C-G- *Analysis to Gang-Related Asylum Claims*

Gang-related asylum claims can be grouped into four broad categories of social groups: "(1) persons resistant to gang recruitment; (2) former gang members; (3) witnesses and informants against gangs; and (4) the family members of persons in the aforementioned groups."[161] Most courts refuse to recognize any of the classes as a particular social group due to a lack of social distinction and/or particularity.[162] However, these courts fail to recognize the key differences of gender-based claims in the four categories.

Consider the two following possible particular social group formulations: (1) "young Salvadoran women who have been subject to sexual predation by gangs and oppose the practice"[163] and (2) "Salvadoran women who are viewed as property by gang members."[164] By applying the analysis of *Matter of A-R-C-G-* to the first proposed group, a court could find that the group meets the immutability, particularity, and social distinction requirements for several reasons. First, the group is comprised of members who share the immutable characteristic of gender.[165] Second, the terms "subject to sexual predation," "by gangs," and "oppose such practice" are defined with particularity and are informed by societal expectations.[166] Third, Salvadoran society recognizes that young women living in gang-dominated areas of El Salvador are often subject to sexual predation by gang members.[167] Further, such sexual violence is due in part to societal expectations of

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161. KATE M. MANUEL, CONG. RESEARCH SERV., ASYLUM LAW AND GANG VIOLENCE: LEGAL OVERVIEW 18 (2014).

162. *Id.*

163. Formulation of this particular social group is based on *Matter of Kasinga*. 21 I. & N. Dec. 357, 357 (B.I.A. 1996) (recognizing "young women who are members of the *Tchamba-Kunsuntu* Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice" as a particular social group).

164. Formulation of this particular social group is based on the Department of Homeland Security's brief in *Matter of L-R-*. *See* DHS Supplemental Brief, *supra* note 20, at 14 (stating that "Mexican women who are viewed as property by virtue of their position in a domestic relationship" would be an accepted particular social group).

165. *See* A-R-C-G-, 26 I. & N. Dec. 388, 392 (B.I.A. 2014) (citing Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (holding that sex is an immutable characteristic)).

166. *See* W-G-R-, 26 I. & N. Dec. 208, 214 (B.I.A. 2014) (stating that courts may need to take into account the social and cultural context of the applicant's country of nationality when evaluating a group's particularity).

167. Frydman & Desai, *supra* note 8, at 8–9.

gender and subordination[168]: Salvadoran society expects women to engage in, or, at least, does not adequately protect women from, unwanted sexual behavior due to their subservient status to men.[169]

Cultural and societal norms are relevant in analyzing the social distinction of the group.[170] There must be evidence "showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group."[171] For example, to determine the existence of a social distinction in *Matter of A-R-C-G-*, the court paid close attention to whether the society in question recognized a need to offer protection to victims of domestic violence, whether the country protected victims with criminal laws, and whether those laws were enforced effectively.[172]

Applying such an analysis to the first proposed particular social group formulation shows that such a group is socially distinct. While El Salvador has laws criminalizing sexual violence, the laws are rarely enforced, partially due to the culture of *machismo* and male dominance.[173] Further, women who "oppose the practice" by resisting gang members' advances are more likely to be targeted for violence and further recruitment. Thus, in light of the decision in *Matter of A-R-C-G-*, "young Salvadoran women who have been subject to sexual predation by gangs and oppose the practice" meets the particularity and social distinction requirements for membership in a particular social group.

The second possible formulation of a particular social group, "Salvadoran women who are viewed as property by gang members," aligns more closely to the group in *Matter of A-R-C-G-*. Although the proposed group in *Matter of A-R-C-G-* was "married women in Guatemala who are unable to leave their relationship[s]," DHS conceded that "Mexican women who are viewed as property by virtue of their positions within a domestic relationship" would meet the immutability, particularity, and

168. *See A-R-C-G*, 26 I. & N. Dec. at 393.

169. *See* Ramirez & Ream, *supra* note 10.

170. *See* M-E-V-G-, 26 I. & N. Dec. 227, 229 (B.I.A. 2014) ("To be socially distinct, a group . . . must be perceived as a group by society.").

171. *W-G-R-*, 26 I. & N. Dec. at 217.

172. *A-R-C-G-*, 26 I. & N. Dec. at 394 (observing that, although Guatemala has laws in place to prosecute domestic violence crimes, enforcement is a problem).

173. *See* BUREAU OF HUMAN RIGHTS, DEMOCRACY & LABOR, *supra* note 153, at 15–16 (stating that, though the law criminalizes rape and sexual harassment, sexual crimes and violence against women are widespread and serious problems).

social distinction requirements.[174] Thus, once again, the possible formulation meets the particular social group requirements. Members of the proposed group share the common immutable characteristic of gender.[175] The terms "viewed as property" and "by gangs" provide clear boundaries for designating who falls within the group. In addition, gang members' treatment of women as property is informed by societal norms and expectations[176]: Gender roles and female subordination in Salvadoran culture are important for understanding society's definition of how women are "viewed as property." And again, these are significant factors to consider in evaluating the group's particularity.[177]

"Salvadoran women who are viewed as property by gangs" is also perceived as a group by Salvadoran society and is thus socially distinct. First, there is undisputed evidence that sexual violence—including rape and harassment—is a serious problem in El Salvador.[178] The nation fails to protect women from rape, sexual abuse, and domestic violence, despite its laws criminalizing those harms.[179] El Salvador and other Central American governments are struggling to a greater extent with controlling gang violence, which is so widespread that it has, unfortunately, become a part of society.[180] The strength of gangs and the weak position of women in Salvadoran society help establish "Salvadoran women who are viewed as property by gangs" as a particular social group in accordance with particular social group standards.

V. Adding Gender as a Protected Ground

Another route for expanding protection to women persecuted by gang violence is to incorporate "gender" as a sixth protected ground for asylum. The BIA and circuit courts may fail to expand their holdings on gender-violence related claims to encompass asylum claims based on resistance to forced gang recruitment and sexual exploitation. As an alternative, the Department of Justice should propose, and Congress should adopt, legislation to incorporate gender as a sixth protected ground. Many nations

174. *Id.*; *see also Matter of L-R-*, CTR. FOR GENDER & REFUGEE STUD., http://cgrs.uchastings.edu/our-work/matter-l-r (stating that the 2009 Department of Homeland Security supplemental brief in *Matter of L-R-* is broadly relevant to gender-based asylum claims and is not limited to domestic-violence claims).

175. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

176. UMANA & RIKKERS, *supra* note 137, at 3.

177. *See* W-G-R-, 26 I. & N. Dec. 208, 214 (B.I.A. 2014).

178. BUREAU OF HUMAN RIGHTS, DEMOCRACY & LABOR, *supra* note 153, at 15.

179. *Id.*

180. INT'L HUMAN RIGHTS CLINIC, *supra* note 112, at 37–68.

have incorporated gender into their own interpretations of the Refugee Convention definition.[181] And if the United States adopted this sixth ground for protection, the change would eliminate the need for applicants to articulate convoluted definitions of particular social groups. Furthermore, it would allow adjudicators to grant asylum to women who have been persecuted on account of their gender if they meet all of the other necessary elements. Additionally, adding gender would provide clarity to the definition of "refugee" and would protect women who are being persecuted by gangs on the basis of their gender.

Some commentators have argued that adding gender as another ground for asylum would open the floodgates for individuals seeking asylum in the United States, which would overwhelm the court system.[182] But the size of the group should not and does not matter: Under the 1980 Refugee Act, the United States is still obligated to protect women from human rights violations.[183] Furthermore, refugees seeking protection because of gender would still be subject to the nexus and one-year deadline requirements. Identically to those seeking asylum under the protected grounds of race, religion, nationality, political opinion, or membership in a particular social group, an individual seeking relief on a gender-based claim would still be required to prove all of the elements of an asylum claim, including persecution by an actor the government is unwilling or unable to control.

Conclusion

Matter of A-R-C-G- successfully recognized a gender-based claim for asylum and allowed a woman fleeing domestic abuse to gain asylum based on her membership in a particular social group. However, women who are sexually exploited and forced into gang recruitment are still not protected. One problem is that courts

181. *See, e.g.*, 4 ch. 1 § Utlänningslag [Act Amending the Aliens Act] (Svensk författningssamling [SFS] 2005:716) (Swed.), http://www.unhcr.org/refworld/docid/3ae6b50a1c.html; GINBOT ABRAHA, NTN-ASYLUM & INTEGRATION, A HANDBOOK FOR ASYLUM SEEKERS IN SWEDEN 9 (2007), http://www.temaasyl.se/Documents/NTG-dokument/A+Handbook+for+Asylum+Seekers+in+Sweden.pdf ("Recently some countries including Sweden have added sex and sexual disposition as ground for granting a refugee status.").

182. Jesse Imbriano, *Opening the Floodgates or Filling the Gap?:* Perdomo v. Holder *Advances the Ninth Circuit One Step Closer To Recognizing Gender-Based Asylum Claims*, 56 VILL. L. REV. 327, 350 (2011) ("Reluctance by the United States to recognize gender-based asylum claims is largely a result of the unfounded fear that allowing eligibility for women persecuted as women will immediately inundate the United States with asylees.").

183. *See* 8 U.S.C. § 1101(a)(42) (2012).

treat gang violence and forced gang recruitment of women under the same standards as the forced gang recruitment of men. However, women's resistance to gang recruitment differs significantly from that of men and analyzing them in the same manner ignores the unique nature of gang violence against women. Courts should expand the holding of *Matter of A-R-C-G-* to treat women resisting forced gang recruitment similarly to women who are victims of domestic abuse. Or, in the alternative, gender should be adopted as a sixth protected ground to ensure protection of women who resist forced gang recruitment, forced relationships with gang members, or sexual exploitation by gang members.