



Gender-Based Asylum Claims in the Wake of *Matter of A-B-*

A Supplement for Practice in the Eighth Circuit

The Advocates for Human Rights¹

Introduction

This Advisory is meant to help attorneys advocating for domestic violence survivors seeking asylum in the Eighth Circuit overcome potential obstacles to their clients’ claims for protection. Attorney General Jeff Sessions (the “AG”) issued the precedential decision *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) on June 11, 2018. *Matter of A-B-* reversed the Board of Immigration Appeals’ (“BIA”) grant of asylum to a Salvadoran victim of domestic violence and overruled the precedential decision *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), which had outlined a viable particular social group for survivors of domestic violence: “married women in Guatemala who are unable to leave their relationship.” In several unpublished decisions, the BIA had found similar particular social group formulations viable for domestic violence survivors from countries with similar factors contributing to lack of protection from abuse and also to women in domestic partnerships, in addition to married individuals. Because this particular social group and analogous formulations have been used extensively to advocate for the protection of domestic violence survivors, *Matter of A-B-* was and remains deeply concerning for advocates. The AG’s decision also has potential implications for asylum seekers whose claims are based on persecution by other types of non-state actors and may create additional obstacles for practitioners litigating these cases.

How to Use This Supplement

This supplement is for volunteer attorneys representing victims of domestic violence or other gender-based violence in asylum proceedings. It offers practical advice to address some of the challenges attorneys may face in light of *Matter of A-B-*, and incorporates lessons learned in the year since *Matter of A-B-* was initially issued. This supplement has a specific focus on the Eighth Circuit, but volunteer attorneys in other jurisdictions may find helpful insights. While the supplement focuses primarily on gender-based violence claims, attorneys representing survivors of other types of non-state actor violence, particularly survivors of gang violence, may also find

¹ The Advocates for Human Rights thanks Dean Eyler and Amanda McAllister of the law firm Gray Plant Mooty for their significant authorship contributions, and for their long-term commitment to the *pro bono* representation of asylum seekers. Alison Griffith, Staff Attorney at The Advocates for Human Rights, also contributed significant content. Bailey Metzger, Legal Fellow in The Advocates for Human Rights’ Women’s Rights Program, contributed significant resources to Appendix C. The Advocates thanks legal intern Cooper Christiancy for his contributions.

the supplement useful in advocating for their clients post *Matter of A-B*.² The materials contained herein should be used as a supplement to volunteer attorneys' own research and preparation.

This supplement is current as of September 2019. Volunteer attorneys are encouraged to research recent case law that may impact their cases as courts continue to grapple with how to interpret *Matter of A-B*.

I. *Matter of A-B*- Procedural Posture and Responses to the Decision

A. Background of Decision

Matter of A-B- involves a Salvadoran domestic violence survivor, Ms. A.B. Over the course of fifteen years, Ms. A.B. experienced prolonged physical, sexual, and psychological domestic violence perpetrated by her husband.³ Ms. A.B. sought help from Salvadoran authorities but

² The *Matter of A-B*- decision also impacts survivors of gang-based violence. The U.S. Citizenship and Immigration Services ("USCIS") released a policy memorandum on July 11, 2018 to provide guidance to USCIS officers in the wake of *Matter of A-B*-. The memorandum states, "[i]n general . . . claims based on membership in a putative particular social group defined by the members' vulnerability to harm and domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution." Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B*-, U.S. Citizenship & Immigration Servs. 6 (Jul. 11, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf> [hereinafter *USCIS July 2018 Memo*]. USCIS was enjoined from following the policies outlined in the Memorandum in the context of Credible Fear Interviews by the decision in *Grace v. Whitaker*. While the *Grace v. Whitaker* holding applies explicitly only to Credible Fear Interviews, its reasoning more broadly applies to asylum seekers in other contexts. Moreover, the USCIS Policy Memorandum providing guidance to asylum officers following the *Grace v. Whitaker* decision is directed to "Asylum Division Staff," and provides no indication that the guidance is meant to apply only to the CFI context. Moreover, the law and regulations governing the substantive adjudication of asylum on the merits are identical to the law and regulations governing CFI adjudication. This suggests that asylum officers adjudicating other claim types may be inclined to apply the reasoning of *Grace*, and that attorneys should argue for this persuasive authority to be considered.

³ See *Backgrounder and Briefing on Matter of A-B*-, CTR. FOR GENDER & REFUGEE STUD. (Aug. 2018), <https://cgrrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b> ("When she was in her early 20s, Ms. A.B. met the man who would become her husband. After they married, he began brutalizing her. Over the 15 years that followed, Ms. A.B.'s husband subjected her to horrific physical, sexual, and emotional violence. He beat and raped Ms. A.B. so many times that she lost count. He also frequently threatened to kill her, often brandishing a loaded gun or a knife. Ms. A.B.'s husband was violent even during her pregnancies, on one occasion threatening to hang her with a rope from the roof of their house. When they first met, Ms. A.B. was pursuing her education, but her husband forced her to cut her studies short. He constantly belittled and demeaned her verbally, treating her like a slave. Ms. A.B.'s husband also often falsely accused her of infidelity, going so far as ordering her to undress and show him her genitals so he could see if she had been with another man."); see *Matter of A-B*-, 27 I&N Dec. 316 (AG 2018); Nat'l Immigrant Just. Ctr., PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B*- (Jan. 2019), <https://immigrantjustice.org/sites/default/files/content-type/page/documents/2019-01/Matter%20of%20A-B-%20Practice%20Advisory%20-%20201.2019%20Update%20-%20Final.pdf>.

received no meaningful assistance.⁴ Consequently, she fled to the United States to seek protection.

Ms. A.B. was detained after entering the U.S., and the asylum officer assigned to her credible fear interview found that she had a credible fear of persecution.⁵ Her case was then sent to Immigration Judge V. Stuart Couch of the Charlotte Immigration Court. Following her Individual Hearing, Immigration Judge Couch made the following findings: 1) Ms. A.B. was not credible; 2) Ms. A.B. had not established she was persecuted due to her membership in a particular social group; and 3) Ms. A.B. had not established that the government was unwilling or unable to protect her.⁶

On appeal, the BIA unanimously reversed the Immigration Judge's findings. The BIA found that Ms. A.B.'s claim was similar to the case in *Matter of A-R-C-G*.⁷ The BIA remanded the case back to the Charlotte Immigration Court and instructed the court to grant asylum after performing the requisite background checks.⁸ However, Immigration Judge Couch called into question the legal validity of *Matter of A-R-C-G* and refused to grant asylum as ordered. Instead, Immigration Judge Couch attempted to recertify the case back to the BIA.⁹

Subsequently, the AG certified the case to his own office and sought briefing on "whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal."¹⁰

Ultimately, the AG overruled *Matter of A-R-C-G*, vacated the BIA's credibility determination, and remanded the case back to the Charlotte Immigration Court for proceedings consistent with his opinion rescinding Ms. A.B.'s protected ground.¹¹

B. Elements of the Decision

a. Overturning Matter of A-R-C-G-

Matter of A-B- not only remanded Ms. A.B.'s case back to the Charlotte Immigration Court, but it also overturned *Matter of A-R-C-G-*, a precedential case identifying a protected ground for certain victims of domestic violence, helping to establish one of the most essential aspects of asylum eligibility. 26 I&N Dec. 388 (BIA 2014). In the *Matter of A-R-C-G-* decision, the Board found that "married women in Guatemala who are unable to leave their relationship" constituted a valid particular social group under the circumstances in the case. *Id.* One of the AG's critiques in

⁴ *Backgrounder and Briefing on Matter of A-B-*, CTR. FOR GENDER & REFUGEE STUD. (Aug. 2018), <https://cgrrs.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b>

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Matter of A-B-*, 27 I&N Dec. 316, 346 (AG 2018).

Matter of A-B- is that the decision in *Matter of A-R-C-G-* was not a full analysis of every aspect of the burden of proof. In *A-R-C-G-*, the Department of Homeland Security (“DHS”) exercised prosecutorial discretion to recognize a particular social group based on which domestic violence survivors could seek protection. The BIA in *Matter of A-R-C-G-* analyzed several aspects of an asylum seeker’s burden of proof, but it acknowledged that DHS had conceded that a valid protected ground had been asserted, and, therefore, held it was not necessary to reach the issue. In *Matter of A-B-*, the AG criticized DHS’ practice of using prosecutorial discretion and also made statements suggesting that domestic violence is merely the result of individual bad actors, not of societal dynamics contributing to this violence.

b. *Adverse Credibility Determination*

Even though evidence regarding trauma-related mental health conditions and their impact on memory was part of the record before the Immigration Judge, the AG called into question the BIA’s holding that Ms. A.B. could be found credible despite minor inconsistencies in her testimony. The AG stated that “[t]he existence of only a few [inconsistencies] can be sufficient to make an adverse credibility determination as to the applicant’s entire testimony regarding past persecution.”¹²

c. *Critique of Particular Social Group Formulation*

The AG stated that Ms. A.B.’s claim did not meet the requisite particular social group definition requirements because her asserted protected group was created or defined by harm or threatened harm. The AG stated, “[m]arried women in Guatemala who are unable to leave their relationship’ was effectively defined to consist of women in Guatemala who are victims of domestic abuse because the inability ‘to leave’ was created by harm or threatened harm.”¹³ Similarly, in overturning *Matter of A-R-C-G-*, he stated that there is no evidence that the asylum seeker’s husband “attacked her because he was aware of, and hostile to, ‘married women in Guatemala who are unable to leave their relationship.’ Rather, he attacked her because of his preexisting personal relationship with the victim.”¹⁴ He quotes the BIA in the 1999 decision *Matter of R-A-*, which stated “[w]hen the alleged persecutor is not even aware of the group’s existence, it becomes harder to understand how the persecutor may have been motivated by the victim’s ‘membership’ in the group to inflict the harm on the victim.” 22 I&N Dec. 906, 919 (BIA 1999) (en banc). In so reasoning, he negated the existence of several other factors that prevent domestic violence survivors from leaving abusive relationships besides the harm threatened by their partners, particularly in countries that uphold patriarchal values and rigid gender roles.¹⁵ He implied that, for an asylum seeker to effectively demonstrate nexus to a protected ground,

¹² *Matter of A-B-*, 27 I&N Dec. 316, 342 (AG 2018).

¹³ *Matter of A-B-*, 27 I&N Dec. at 335.

¹⁴ *Id.* at 339.

¹⁵ *Id.* at 333.

the persecutor must have animus against all members of that group, an assertion discredited more than two decades ago by the BIA.¹⁶

d. *Citation to Precedent*

The AG asserted that the BIA's analysis did not properly apply the precedents established in *Matter of M-E-V-G-* and *Matter of W-G-R-* regarding social distinction and particularity due to the BIA's deference to the agreement between DHS Counsel and Counsel for Respondent that Respondent had met certain aspects of her burden of proof.

C. **Government Response to *Matter of A-B-***

After *Matter of A-B-* was decided, the United States Citizenship and Immigration Services ("USCIS") issued a policy memorandum addressed to all asylum officers stating that a "determination and ruling by the AG with respect to all questions of law shall be controlling" and "shall serve as precedents in all proceedings involving the same issue or issues."¹⁷

USCIS referred asylum officers to the Immigration and Customs Enforcement ("ICE") Office of the Principal Legal Advisor ("OPLA") for questions regarding the proper application of the decision. On July 11, 2018, ICE OPLA issued a memo that in some ways reflected a more accurate interpretation of the potential legal ramifications of the decision. The memo indicated that the most important outcome of the decision is that the particular social group articulated in the BIA case, *Matter of A-R-C-G-* was rescinded, and it acknowledged that some of the AG's other points do not constitute controlling law.¹⁸ The memo also included suggestions for ICE attorneys on opposing asylum claims by domestic violence survivors that may be helpful for advocates for domestic violence survivors in Immigration Court in planning their trial strategy.

This policy guidance has subsequently been abrogated by the policy memorandum issued to asylum officers following the D.C. federal district court's decision in *Grace v. Whitaker*, 344 F.Supp.3d 96 (D.D.C. 2018), and USCIS' July 11th Memorandum is no longer controlling guidance.¹⁹

¹⁶ *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996)(As observed by the INS, many of our past cases involved actors who had a subjective intent to punish their victims. However, this subjective "punitive" or "malignant" intent is not required for harm to constitute persecution); See also *Matul-Hernandez v. Holder*, 685 F.3d 707, 712 (8th Cir. 2012)(noting that evidence that a particular group "is at a greater risk of crime in general or of extortion, robbery, or threats" was relevant to the analysis of whether a the group was sufficiently socially distinct, but not requiring that animus against all group members be demonstrated)

¹⁷ *USCIS July 2018 Processing Memo*, *supra* note 2 at 4 .

¹⁸ Litigating Domestic Violence-Based Persecution Claims Following *Matter of A-B-*, U.S. Immigration & Customs Enf't (Jul. 11, 2018), <http://immigrationcourtside.com/wp-content/uploads/2018/07/OPLA-7-11-18.pdf>.

¹⁹ Although the *Grace v. Whitaker* decision abrogated aspects of *Matter of A-B-* as the decision is applied in the context of Credible Fear Interviews, the Policy Memorandum issued by USCIS following the *Grace v. Whitaker* decision is explicitly directed at all asylum officers. See Today's US DC District Court Decision in *Grace v. Whitaker* and Impact on CF Processing, John Lafferty, Dir. of United States Citizenship and Immigration Servs. (Dec. 19, 2019), <https://www.aclu.org/legal-document/grace-v-whitaker-uscis-guidance-re-grace-injunction>.

While the ultimate holding in *Matter of A-B-* is narrow in scope, the decision also contains harmful dicta about the validity of *any* asylum claim involving persecution by non-state actors. That dicta, while not binding, has led to some negative decisions for domestic violence-based asylum claims.²⁰

D. Analysis of *Matter of A-B-*

a. *The Holding In A-B- is Narrow and Does Not Change Asylum Framework*

Most significantly, *Matter of A-B-* does not create a new asylum framework nor does it foreclose asylum claims based on persecution committed by non-state actors, including domestic violence. Advocates are encouraged to use decades of case law from the BIA and the circuit courts to demonstrate that every asylum case is deserving of a case-by-case adjudication, including those presented by survivors of gender-based and gang violence.²¹

The holding in *Matter of A-B-* should be read narrowly. The decision does not change the standard for proving the right to asylum in domestic violence, gang violence or other private actor cases. The decision merely reversed the holding in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), requiring individuals seeking protection from domestic violence to identify different particular social group formulations than the formulation recognized in *Matter of A-R-C-G-*.

In numerous cases decided since *Matter of A-B-*, federal courts have read the holding of the decision narrowly,²² and some have afforded protection to survivors of gang and family violence

²⁰ For instance, an Immigration Judge presiding at the Fort Snelling Immigration Court who in 2011 recognized the particular social group of “Guatemalan women” in granting protection to a domestic violence survivor, changed course in 2019 to deny asylum to an Ecuadoran survivor of significant sexual, physical and psychological abuse by her family members. Whereas the Judge had previously explicitly recognized the dynamics of gender--based violence in her decisions, the Judge now found that the Respondent’s father abused her and her siblings because he was a drunk and they were “handy.” The Judge discredited the Respondent’s testimony that her father did not similarly abuse other individuals who could be considered “handy,” such as friends or coworkers. Redacted Immigration Judge decision on file with the Advocates.

See also *Orellana v. Barr*, 925 F.3d 145 (4th Cir. 2019)(in which the 4th Circuit critiqued the BIA and IJ for distorting and disregarding important aspects of the evidence presented by the asylum seeker in denying her protection from return to domestic violence); *Rivera-Geronimo v. US AG*, 2019 WL 4058602 (11th Cir. August 28, 2019) (a case in which the BIA initially remanded to the IJ, after the IJ denied asylum to someone persecuted based on her domestic relationship, stating that the asylum seeker need not show she was legally married in order to show that she was persecuted based on her domestic relationship. However, after the IJ again denied, the BIA affirmed the denial, saying that a marital relationship is required).

²¹ See e.g., *Matter of M-E-V-G-*, 26 I&N Dec. 227, 251 (BIA 2014)(citing 1985 case *Matter of Acosta* for the proposition that social group analysis must be conducted on a case by case basis).

²² See, e.g., *Quintanilla-Miranda v. Barr*, No. 18-60613, 2019 WL 3437658, at *1 n.1 (5th Cir. July 31, 2019) (“Nor do we express any opinion regarding other aspects of asylum law discussed in *A-B-* . . . but not necessary to the BIA’s decision in this case.”); *Lopez v. Sessions*, 744 F. App’x 574 (10th Cir. 2018) (focusing only on the requirements of recognizability and non-circularity for particular social group formulations from *Matter of A-B-*), *Aguilar-Gonzalez v. Barr*, No. 18-3891, 2019 WL 2896442, at *3 (6th Cir. July 5, 2019) (avoiding a *per se* rejection of the PSG formulation of “indigenous Guatemalan women who cannot leave a relationship”).

post-*Matter of A-B*.²³ Moreover, in recent litigation challenging the application of the decision in the context of credible fear interviews, counsel for the Department acknowledged that the holding should be read narrowly.²⁴

In a recent unpublished decision, the Eighth Circuit denied asylum to a domestic violence survivor whose particular social group was highly similar to the formulation in *Matter of A-R-C-G*.²⁵ However, the Eighth Circuit did not find that the particular social group articulated in *Matter of A-R-C-G* was fully foreclosed by the *Matter of A-B* decision. Instead, the Eighth Circuit reasoned that the Respondent's particular social group, "Salvadoran women unable to leave domestic relationships," may have been foreclosed by *Matter of A-R-C-G*, but ultimately denied asylum because the Respondent left the home where she had resided with her abusive partner three years before she sought asylum in the United States.²⁶ The Eighth Circuit acknowledged that her partner continued to come to her mother's home during that three year period to harass her and threaten her with gang violence, but it found those threats insufficient to hold that she was unable to leave the relationship.²⁷ The Eighth Circuit also noted that the Respondent had not requested the Court's review of the other particular social group advanced before the BIA, "Salvadoran women viewed as property by virtue of their status of being in domestic relationships," and therefore that particular social group was not impacted by its decision.²⁸

b. *Conflation of Elements of Asylum*

The AG's opinion has also been criticized for conflating the elements of the asylum framework. The introduction of the opinion states that victims of persecution committed by non-state actors can establish asylum claims only in exceptional circumstances and that they must establish "government protection from such harm is so lacking that their persecutors' actions can be

²³ See, e.g., *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018) (reviewing *Matter of A-B* in detail and broadly holding that policies in expedited removal proceedings precluding credible fear determination in claims of domestic or gang violence was arbitrary and capricious); *Orellana v. Barr*, 925 F.3d 145 (4th Cir. 2019)(remanding to the BIA because both the BIA and IJ disregarded and distorted important aspects of the evidence in concluding that the Salvadoran government was willing and able to protect the asylum seeker from domestic violence, where the applicant offered un rebutted evidence that "despite repeated reports of violence to the police, no significant action was taken on her behalf); *Alvarez Lagos v. Barr*, 927 F.3d 236, 249 (4th Cir. 2019)(finding nexus to group membership present, where applicant provided un rebutted testimony from recognized experts regarding the gender-based dynamics contributing to the violence she suffered, and the ways in which Honduran culture contributes to gender-based violence, her own credible testimony demonstrating that she only began to receive threats when she became an "unmarried woman," credible testimony regarding the words of persecutor's threats reflected that persecutor sought to harm her because of status as female, as mother, and as unmarried, and evidence that similarly situated married women were not threatened)

²⁴ See ACLU & CTR. FOR GENDER & REFUGEE STUD., PRACTICE ADVISORY: *GRACE V. WHITAKER* (Mar. 2019), https://www.aclu.org/sites/default/files/field_document/grace_practice_advisory_combined.pdf.

²⁵ *Najera v. Whitaker*, 745 F. App'x 670 (8th Cir. 2018).

²⁶ *Id.* at 671 (emphasis added).

²⁷ *Id.* at 670.

²⁸ *Id.* at 671.

attributed to the government.”²⁹ However, the “exceptional circumstances” and the “attribution to the government” requirements are not elements of the burden of proof for asylum seekers under the Refugee Convention, the Immigration and Nationality Act, relevant regulations, or precedential case law. Further, the actual opinion does not introduce these two referenced elements as a requirement, but rather merely mentions them in passing and later refers to the “unable and unwilling to protect” standard that has governed asylum analysis since its inception.³⁰ Since these comments are not a part of the ultimate holding, they merely constitute nonbinding dicta.³¹

The AG specifically conflated the nexus, persecution, and particular social group elements of the asylum framework. While the AG stated that these three elements comprise persecution, they are in fact each a separate and distinct element of the “refugee” definition and conflating these distinct elements creates unnecessary confusion for adjudicators.

c. *Disregard for Societal Factors Involved in Domestic and Gender-Based Violence*

In addition, the AG’s description of the circularity of Ms. A.B.’s proposed particular social group has been criticized as ignoring the societal dynamics that contribute to high rates of domestic violence and the lack of effective government protection from that violence. The AG suggested that identifying Ms. A.B. as “being unable to leave” is the same as identifying her as a victim of domestic violence. Further, in criticizing *Matter of A-R-C-G-*, the AG questioned the BIA’s citation of evidence in that case regarding a “culture of machismo and family violence” in Guatemala and the failure of the National Civilian Police to respond to domestic violence-related requests.³² He stated, “[t]he Board provided no explanation for why it believed that the evidence established that Guatemalan society perceives, considers, or recognizes ‘married women in Guatemala who are unable to leave their relationship’ to be a distinct social group.”³³ Instead, he asserted, “[b]y contrast, there is significant room for doubt that Guatemalan society views these women, as horrible as their personal circumstances may be, as members of a distinct group in society, rather than each as a victim of a particular abuser in highly individualized circumstances.”³⁴ This is inconsistent with case law holding that both direct and circumstantial evidence may be used to prove nexus, including evidence of the harm perpetrated against similarly situated individuals.³⁵

Several factors besides the threats of violence from Ms. A.B.’s partner contributed to Ms. A.B.’s inability to leave her relationship, such as societal expectations of women in El Salvador and the

²⁹ *Matter of A-B-*, 27 I&N Dec. 316, 317 (AG 2018).

³⁰ *Matter of A-B-*, 27 I&N Dec. 316, 317 (AG 2018); see Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

³¹ *Baraket v. Holder*, 632 F.3d 56, 59 (2nd Cir. 2011) (“It is not substantive discussion of a question or lack thereof that distinguishes holding from dictum, but rather whether resolution of the question is necessary for the decision of the case.”).

³² *Matter of A-B-*, 27 I&N Dec. at 336.

³³ *Id.*

³⁴ *Id.*

³⁵ *Matter of D-R-*, 25 I&N Dec. 445, 454 (BIA 2011).

lack of effective government protection of Salvadoran domestic violence victims that permits perpetrators to act with impunity. Moreover, contrary to the AG's suggestion that the persecutor must demonstrate animus against all members of the persecutor's proposed PSG, there is no requirement that the persecutor target more than one member of a proposed particular social group.³⁶ All that is necessary is that the persecutor's animus towards or attempts to overcome the asylum seeker's protected ground constitute at least one central reason for the harm perpetrated.³⁷

Commentators have noted that the AG's reasoning demonstrates a concerning disregard for the factors that lead to domestic violence, in stark contrast to U.S. law and policy related to domestic violence survivors in other contexts. As one commentator on *Matter of A-B-* on recently observed:

The decision demonstrates continued ignorance regarding the underlying reasons for intimate partner violence against women--gender and subordination. The failure to recognize that intimate partner violence occurs because of a woman's gender is one of the primary obstacles to improvements in the treatment of asylum claims involving intimate partner violence[.]

Historically, many countries, including the United States, accepted the abuse of women by their husbands or intimate partners as a private matter that did not warrant state intervention. While U.S. state and federal domestic violence laws and judicial training have made some progress in rectifying this "private matter" perception, *Matter of A-B-* demonstrates that this perception remains alive and well in the context of asylum. The Attorney General's decision reflects a lack of understanding of the impact that social and cultural norms of gender inequality have on the treatment of victims of intimate partner violence in a country.³⁸

Given this concerning framework proposed by the AG regarding gender-based claims, advocates for domestic violence survivors should strengthen the record before the adjudicator by introducing evidence regarding the role of gender dynamics in a particular society and gender norms' impact on the prevalence of and impunity for domestic violence. Please see Appendix C, *infra*, for several reports helpful in documenting the societal factors that contribute to domestic violence and impunity for violence.

Further, advocates for domestic violence survivors should remind adjudicators that, while the applicant's membership in a particular social group or other protected group must be one of the central reasons for persecution in order to establish nexus, nothing in *Matter of A-B-* changes the

³⁶ INA § 208(b)(1)(B)(i); see also, *supra*, note 16.

³⁷ See *W.G.A. v. Sessions*, 900 F.3d 957, 963, 965–66 (7th Cir. 2018); *Matter of Kasinga*, 21 I&N Dec. at 365

³⁸ Theresa A. Vogel, *Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J.L. REFORM 343 (2019).

statutory language of the REAL ID Act and the BIA's previous holdings that a persecutor may possess mixed motives for persecution.³⁹

d. *Misstatements on Internal Relocation Requirements*

The AG also made misleading statements in the decision's dicta regarding internal relocation. The AG states: "[w]hen the applicant has suffered personal harm at the hands of only a few specific individuals, internal relocation would seem more reasonable than if the applicant were persecuted, broadly, by her country's government."⁴⁰ This analysis negates the well-established test for internal relocation inquiries that internal relocation must be both safe and reasonable under a totality of the circumstances.⁴¹

The BIA, in its most recent published case on internal relocation, laid out a two-step analysis that adjudicators must conduct. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 33 (BIA 2012). First, the adjudicator must assess whether there is a part of the applicant's country of origin where they would have no well-founded fear of return. *Id.* To find that such a place exists, the adjudicator must be satisfied that the applicant would be truly safe there, not that the applicant would just "stay one step ahead of persecution." *Id.* at 33. Second, if the adjudicator is satisfied that the record before them demonstrates that such a place exists, the adjudicator must next assess whether "under all the circumstances, it would be reasonable to expect the applicant to relocate." *See* 8 C.F.R. § 1208.13(b)(1)(i)(B). In assessing the reasonableness of requiring relocation:

adjudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.⁴²

In addition to the persecutor's ability to locate the asylum seeker if they fled to a different part of the country, an adjudicator assessing the reasonableness of requiring the asylum seeker to relocate within the country must evaluate all the factors laid out above. Advocates for survivors of private actor persecution may need to remind adjudicators of the regulations and case law requiring that all the above factors be assessed before determining the reasonableness of internal relocation.

³⁹ *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007); *see also Grace v. Whitaker*, 344 F. Supp. 3d 96, 130 (D.D.C. 2018) (agreeing with the Government's claims that *Matter of A-B-* did not change traditional nexus analysis).

⁴⁰ *Matter of A-B-*, 27 I&N Dec. 316, 342, 345 (AG 2018).

⁴¹ *See* 8 C.F.R. § 1208.16(c)(3) (requiring that the evidence must establish that "the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so"); *see also* ASYLUM OFFICER BASIC TRAINING COURSE - REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS, U.S. CITIZENSHIP & IMMIGRATION. SERVS. 19 (2008).

⁴² 8 C.F.R. § 1208.13(b)(3) (2019).

e. *Misstatements on Government's Inability or Unwillingness to Protect Requirements*

The AG discussed the government's inability or unwillingness to protect element in a few different parts of the decision, stating at one point that "[t]he applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims."⁴³ The AG also stated, "[t]he fact that the local police have not acted on a particular report on an individual crime does not mean that the government is unwilling or unable to control crime" and that "[t]he persistence of domestic violence in El Salvador, however, does not establish that El Salvador was unable or unwilling to protect Ms. A.B. from her husband."⁴⁴ These statements purport to place a heightened burden on asylum applicants to prove a level of inability or unwillingness to control the persecutor that exceeds even the heightened standard imposed on applicants for protection under the Convention against Torture, suggesting that it is inconsistent with the intent of Congress.

Moreover, this proposed heightened standard is inconsistent with decades of case law interpreting the "unable or unwilling to protect language" as a disjunctive test, pursuant to the plain meaning of the statutory language. *See, e.g., Rosales Justo v. Sessions*, 895 F.3d 154, 163 (1st Cir. 2018) (explaining that to assess whether an asylum seeker would receive adequate protection from her government from the persecutor, a reviewing court must assess whether the government is either unable or unwilling to protect the applicant). Thus, even where the government has shown some willingness to protect the asylum seeker, she may still demonstrate that she will not receive effective protection from the persecutor by showing that the government is *unable* to protect her. *See also* Appendix A, *infra*, for a compilation of case law on this prong and further guidance in countering the AG's proposed standard in the Additional Advice section below.

The AG's dicta suggesting this proposed heightened standard, in connection with other statements in the decision, appears to be intended to make all non-state actor claims invalid, particularly gang and domestic violence-based claims. In fact, in *Matter of A-B-*, the AG sweepingly stated "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."⁴⁵

In the wake of *Matter of A-B-*, volunteer attorneys should be prepared to address the above challenges in the course of their representation of asylum seekers who are victims of domestic or other gender-based violence.

8th Circuit practitioners should note that, in March 2019, the 8th Circuit found that the Guatemalan government was willing and able to control the persecutor of a Guatemalan domestic violence survivor. *Juarez-Coronado v. Barr*, 919 F.3d 1085 (8th Cir. 2019). Focusing only

⁴³ *Matter of A-B-*, 27 I&N Dec. 316, 342, 337 (AG 2018).

⁴⁴ *Id.* at 337, 344.

⁴⁵ *Id.* at 320.

on the experience of the applicant, and not considering any evidence of Guatemalan country conditions relevant to domestic violence-based asylum more generally, the 8th Circuit found that the government was willing to protect her because she was able to obtain a protective order against her partner. *Id.* at 1089. The 8th Circuit made no reference to the AG’s decision in *Matter of A-B-* despite the almost identical protected grounds asserted by the applicant in this decision. This suggests that the Court reads the *Matter of A-B-* decision narrowly as overturning the particular social group in *A-R-C-G-*, and provides hope that the 8th Circuit will limit the application of the decision in *Matter of A-B-* to the context of social group analysis.

While the *Juarez-Coronado* decision does not apply the concerning standards regarding government protection suggested in *Matter of A-B-*, its analysis of government protection is concerningly narrow. Advocates in the 8th Circuit should argue for fuller consideration of factors relevant to the government’s ability and willingness to protect an applicant. Helpful in making this argument are decisions from similar circuits that mandate consideration of expert testimony and other evidence in the record regarding factors that limit government protection to the applicant’s protected group in her country of origin, in addition to the applicant’s own efforts to secure government protection.⁴⁶

II. Summary of Best Practices for Advocating on Behalf of Domestic Violence Survivors Following the *Matter of A-B-* Decision

Matter of A-B- contains sweeping and broad statements regarding the validity of asylum claims by victims of gender-based violence. However, the actual ramifications of the decision itself should be limited. Practitioners should consider taking the following approaches to address the effects of *Matter of A-B-* to their asylum cases.

A. In Briefing Gender-Based Claims, Dedicate an Early Section of the Brief to Distinguishing the *Matter of A-B-* Decision

Advocates for asylum seekers potentially impacted by the *Matter of A-B-* decision should address the decision directly in an early section of any legal briefing of their clients’ claims, as well as in any oral arguments on behalf of their clients. Given the possibility that the decision could be erroneously read to foreclose protection for survivors of domestic or gender-based violence, briefing a proper reading of the decision and distinguishing the facts and legal arguments of your clients’ claim as appropriate is essential.

B. Understand that the Existing Framework for Asylum Has Not Changed

⁴⁶ See e.g. *K. H. v. Barr*, 920 F.3d 470, 476 (6th Cir. 2019)(rejecting as one-dimensional an analysis of government protection that considers only the facts of a particular Respondent’s case, without assessing the “overall context of the applicant’s situation.”) In addition to mandating consideration of the broader country conditions context, the 6th Circuit suggests a non-exclusive factor-test that should be applied in assessing the adequacy of the government’s protection of an asylum seeker. *Id.* at 478

The existing framework for asylum remains the same and nothing in the *Matter of A-B*- decision has created a new asylum framework. Under INA § 101(a)(42)(A), an asylum seeker still must prove a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion.

Congress has never specifically defined "membership in a particular social group."⁴⁷ The BIA first interpreted the meaning of that phrase in 1985 through its landmark decision *Matter of Acosta*.⁴⁸ The BIA concluded, based on principals of *ejusdem generis*, that "membership in a particular social group" should be examined in the same way as the other protected grounds asylum seekers can assert, that is, race, religion, nationality, and political opinion.⁴⁹ Each of these categories consists of immutable characteristics that an individual cannot or should not have to change.⁵⁰ The BIA in *Matter of Acosta* ultimately determined that an individual seeking to demonstrate they were persecuted on account of their "membership in a particular social group" must show "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic" that defines the group.⁵¹ The *Acosta* test was used by the BIA and all circuit courts until the BIA added the elements of "particularity" and "social distinction" twenty years later. *See, e.g., Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R*, 26 I&N Dec. 20 (BIA 2014).⁵²

Now, in order to show "membership in a particular social group" an applicant must show: (1) the group is composed of members with a common immutable characteristic, (2) is defined with particularity, and (3) is socially distinct.⁵³

As described in detail below, the AG's attempts to alter this framework may require advocates to provide additional clarification and briefing in order to articulate a valid claim under the statute.

C. Demand a Proper Analysis of the "Refugee" Definition under U.S. law that Avoids Conflating Its Distinct Elements.

The AG's decision conflated several different aspects of the "refugee" definition, which is likely to cause confusion for adjudicators and challenges on appeal. Advocates for asylum seekers

⁴⁷ *See Matter of Acosta*, 19 I&N Dec. 211, 232 (BIA 1985) (explaining that there is no statutory definition of "membership in a particular social group").

⁴⁸ *Id.* *See* 157 Cong. Rec. S3,828–29 (daily ed. June 15, 2011) (statement of Sen. Leahy) (referencing *Matter of Acosta* as the first explanation of "membership in a particular social group").

⁴⁹ *Matter of Acosta*, 19 I&N Dec. at 233.

⁵⁰ *Id.*

⁵¹ *Id.* at 233–34.

⁵² For a full critique of the additions of these additional requirements of particular social group analysis and their severe, negative impact on asylum applicants, particularly *pro se* individuals, please see NAT'L IMMIGRANT JUST. CTR., APPLYING FOR ASYLUM AFTER *MATTER OF M-E-V-G*- AND *MATTER OF W-G-R*- (Jan. 2016), <https://www.immigrantjustice.org/sites/immigrantjustice.org/files/PSG%20Practice%20Advisory%20and%20Appendices-Final-1.22.16.pdf>

⁵³ *Matter of A-B*-, 27 I&N Dec. at 320.

should emphasize the proper analysis of each aspect of the “refugee” definition, using decades of case law that separately analyzes each aspect of the definition to clearly outline the applicable standard.

The AG stated that “persecution” has three specific elements: 1) “an intent to target a belief or characteristic[;]” 2) a “severe” level of harm; and 3) “harm or suffering must be ‘inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.”⁵⁴ Here, by incorporating nexus and the government’s inability or unwillingness to control into the analysis of persecution, the AG incorrectly conflated the elements of the overall asylum claim into the definition of persecution. The nexus and unwillingness or inability to control constitute separate elements of an asylum claim and should be separately briefed by advocates and assessed by adjudicators.⁵⁵

The AG’s decision also incorrectly and broadly suggested that particular social groups defined by nationality, gender, and relationship status are not socially distinct within the countries of origin of either Ms. A-B- or of the Guatemalan respondents in *Matter of R-A-* and *Matter of A-R-C-G-*.⁵⁶ The AG analyzed the group proposed in *Matter of A-R-C-G-* in his decision as if it had been articulated as “Guatemalan domestic violence victims.”⁵⁷ Advocates should push for a correct analysis of the valid particular social groups they propose before each adjudicator, based on the standards governing immutability, social distinction and particularity previously articulated by the Board. Advocates should take care in both their written and oral arguments before adjudicators to emphasize the actual particular social group formulations they have proposed, to avoid the adjudicator denying based on a weaker permutation of those proposed groups.

D. Advocate for a Correct Interpretation of the “Unable or Unwilling to Control” Standard Consistent with the Weight of Existing Case Law and with International Standards for Refugee Protection.

The AG incorrectly articulated the standard for determining whether a government is unable or unwilling to protect an asylum applicant experiencing persecution as the hands of a non-state actor or non-state actor group. He attempted to heighten the standard by stating that the “applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims.”⁵⁸ Whether or not the government is unwilling or unable to protect an applicant is a fact-specific analysis, and complete helplessness is not the standard before the BIA or any circuit courts. See Appendix A for more information on how the Eighth Circuit and the BIA have articulated this standard.

⁵⁴ *Matter of A-B-*, 27 I&N Dec. at 337.

⁵⁵ 8 C.F.R. 1208.13(b)(1).

⁵⁶ *Matter of A-B-*, 27 I&N Dec. at 328.

⁵⁷ See *Id.* at 328-333.

⁵⁸ *Id.* at 337.

This heightened standard of proof regarding government inability or unwillingness to control persecutors is inconsistent with the asylum statute and with other statutes affording withholding of removal or protection under the Convention against Torture, which are more limited protections than asylum available to individuals impacted by one or more bars to asylum. The law requires that these applicants meet a higher burden of proof because granting them withholding or Convention against Torture relief involves a decision to protect individuals who face a high likelihood of serious harm despite potentially negative factors, such as failure to file within the one year deadline or, in some cases, criminal issues that prevent the applicant from being eligible for asylum. As such, it is inconsistent with Congressional intent distinguishing the standard of lack of government protection for asylum seekers from the distinct standard that must be met to demonstrate eligibility for protection under the Convention against Torture. The Convention against Torture standard explicitly requires demonstrating “government acquiescence” to torture. As such, any comments by an IJ indicating that government acquiescence is required should be read as general, imprecise language that reflects a broad category of issues to be assessed related to lack of government protection rather than stating the precise legal burden on the asylum seeker.

Practitioners may wish to cite to the federal district court case *Grace v. Whitaker*, where the Court struck down certain aspects of the *Matter of A-B-* opinion and subsequent policy guidance applicable to expedited removal proceedings.⁵⁹ *Grace v. Whitaker* includes helpful analysis of several points related to the “unable and unwilling” standard. First, the decision contains helpful insights related to Congressional intent in implementing the unable and unwilling standard. The Court cited the legislative history of the U.S. Refugee Act in finding that “Congress was clear that its intent in promulgating the Refugee Act was to bring the United States' domestic laws in line with the [United Nations Protocol Relating to the Status of Refugees].” *Grace v. Whitaker*, 344 F. Supp. 3d 96, 106 (D.D.C. 2018). Because Congress demonstrated in promulgating the Act its intent to bring U.S. law into compliance with its UN treaty obligations, the *Grace* Court reasoned that the UN’s guidance interpreting the “unable and unwilling” standard is helpful guidance in understanding Congressional intent. *Id.* at 128. The Court cited to the UN’s Handbook on Procedures and Guidelines for Determining Refugee Status and Guidelines on International Protection,⁶⁰ in which the UNHCR explains that “‘persecution included ‘serious discriminatory or other offensive acts . . . committed by the local populace . . . if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.’ See UNHCR Handbook ¶ 65 (emphasis added).” *Id.* Based on this interpretive guidance, the Court concluded that the “unable and unwilling” definition was not ambiguous, and thus, the agency’s interpretation of the statute was not entitled to *Chevron* deference. *Id.* Second, the Court also commented that the AG’s citation to circuit court case law in support of his proposed heightened

⁵⁹ *Grace v. Whitaker*, 344 F. Supp. 3d 96, 106 (D.D.C. 2018).

⁶⁰ UNITED NATIONS, HANDBOOK ON PROCEDURES AND GUIDELINES FOR DETERMINING REFUGEE STATUS AND GUIDELINES ON INTERNATIONAL PROTECTION (Feb. 2019), <https://www.unhcr.org/en-us/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>

standard is inapposite. The Court pointed out that, in the small handful of cases that used the “condoning or complete helplessness” language, the Circuit Court ultimately found inadequate government protection, suggesting that the language was not meant to articulate the government protection standard, but rather was used to illustrate a specific point in particular cases. *Id.* at 129. The *Grace* Court’s reasoning on these points is helpful persuasive authority in cite where government protection is at issue.⁶¹

The Eighth Circuit appears to continue to read *Matter of A-B-* narrowly as overturning *Matter of A-R-C-G-* and continues to apply the “unable and unwilling to control” standard. See *Juarez-Coronado v. Barr*, 919 F.3d 1085, 1088–89 (8th Cir. 2019) (indicating that to qualify for asylum, an applicant must demonstrate that persecution was “inflicted by a country’s government or by people or groups that the government is unable or unwilling to control.”) The Eighth Circuit declined to reverse the BIA’s finding that the government was able and willing to control the persecutor, since she successfully obtained a restraining order and the police responded to her call when she sought to enforce it. Prior to the *Matter of A-B-* decision, the Eighth Circuit has not applied the heightened government protection standard in the majority of its case law. Moreover, the Eighth Circuit has applied the “unable and unwilling to protect” standard several times since it used the language stating that the government had to condone or express complete helplessness in the face of persecution.⁶² While this minority strain of Eighth Circuit case law exists, it is an outlier, inconsistent with the weight of case law which finds lack of government protection if the asylum seeker can demonstrate that government protection is ineffective.⁶³

Eighth Circuit case law requiring an “imprimatur” quotes only to itself and inappositely to cases that do not stand for the interpretation asserted. See *e.g. Menjivar v. Gonzales*, 416 F.3d 918, citing to *Galina v. INS*, 213 F.3d 955, 958 (7th Cir.2000). *Galina*, despite indicating that there needed to be some indication that the government condoned the violence by failing to protect, reversed the Board’s denial of asylum after roundly critiquing the Board for its flawed analysis. The Eighth Circuit in *Menjivar* also cites to Seventh Circuit case *Roman v. INS*, 233 F.3d 1027 (7th Cir. 2000), which used the language requiring the applicant to demonstrate that the government

⁶¹ Note that *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018) is currently pending appeal. However, the Court denied a Motion to stay the decision pending appeal and the decision is good law as of this advisory’s publication. See *Grace v. Whitaker*, No. 18-1853, 2019 WL 329572 (D.D.C. Jan. 25, 2019) (denying the government’s motion for a stay).

⁶² See *e.g., Cinto-Velasquez v. Lynch*, 817 F.3d 602, 606 (8th Cir. 2016) (identifying the proper standard for assessing government protection as whether the government is able or willing to control the persecutor), decided following the 8th Circuit’s decisions in *Salman v. Holder*, 687 F.3d 991 (8th Cir. 2012) and *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005) (introducing the notion that private actor persecution had to have some type of government imprimatur for the asylum seeker to demonstrate eligibility for protection).

⁶³ See, *e.g., Gomez-Saballos v. INS*, 79 F.3d 912, 916–17 (9th Cir. 1996); *Rosales Justo v. Sessions*, 895 F.3d 154 (1st Cir. 2018); *Matter of H–B–*, AXXX XXX 608 (BIA July 26, 2016) (unpublished) (reversing the Immigration Judge and finding that the Bangladeshi government was unable and unwilling to protect the Respondent, where there was evidence of politically motivated violence in the country, including by government officials, the Respondent’s father was advised by local leaders that it would be futile to report violence to the police, and that corruption and impunity remained a problem).

in some way condoned the violence against him. However, in that case the Court suggested the Respondent did not give the government an opportunity to protect him, and also did not provide evidence which satisfied the Court that the government would not have afforded him adequate protection had he sought it out. In both cases cited by the Eighth Circuit, the Seventh Circuit properly used the unable and unwilling analysis, just with an unfortunate turn of phrase that has led to a heightened standard in some, but not all or even a majority, of Eighth Circuit decisions that have used this language. Because the Eighth Circuit is an outlier in applying this heightened standard which has no support in statute or regulation in a minority strain of case law and because there is not any indication that Congress intended this heightened standard to apply, and appears to do so based on misreading relevant case law from sister circuits, advocates should continue to challenge this position at every opportunity.

It should be noted that, since the *Matter of A-B-* decision, the Board's analysis of domestic violence-based asylum claims has been generally unhelpful and appears to defer to *Matter of A-B-* without significant independent analysis in cases of domestic violence based asylum.⁶⁴ As such, at least as of the date of this practice advisory, advocates for domestic violence survivors are more likely to find helpful analysis in the case law of the circuit courts, and in Board decisions issued prior to *Matter of A-B-* and not foreclosed by the decision.

Despite significant authority mandating a disjunctive unable and unwilling analysis alongside an assessment of whether purported government protection was effective in keeping the asylum seeker safe from their persecutor, it will be particularly important to thoroughly document any and all reasons the government did not effectively protect the asylum seeker and would be unable and/or unwilling to protect the asylum seeker in the future. Potential reasons could include a lack of political will to protect individuals in the asylum seeker's protected class, lack of funding or training preventing effective implementation of any legislation meant to protect the asylum seeker's class, or factors preventing the effective implementation of the law, such as pervasive corruption within law enforcement.⁶⁵

E. Cite to Helpful Eighth Circuit Precedent

Matter of A-B- overturns *Matter of A-R-C-G-*, but other precedent still stands. *Matter of A-R-C-G-* was the first precedential decision that recognized domestic violence as a valid basis for asylum under particular social group, but its reversal does not foreclose all domestic violence cases.

⁶⁴ See, e.g., *In re Ilder Serrano-Melgar*, AXXX-XX6-848, 2019 WL 2613163, at *2 (BIA 2019) (unpublished) ("Fears of that kind generally do not warrant asylum or withholding of removal, however, because widespread criminality committed by private actors is rarely motivated by a protected characteristic or belief of the particular victim. . . .").

⁶⁵ See, e.g., *Gathungu v. Holder*, 725 F.3d 900, 908–09 (8th Cir. 2013) (citing various factors that led the Court to conclude the government was unable or unwilling to control the Mungiki ethnic group, including pervasive government corruption and evidence of government complicity in attacks, such as instances where the government arrested the Mungiki and then immediately released them, as well as evidence of protests by Mungiki defectors trying to obtain effective government protection.)

There is not a significant amount of published case law in the Eighth Circuit that specifically addresses particular social groups for domestic violence survivors.⁶⁶ However, BIA cases and case law from other circuits can be a useful tool for persuasive authority and for identifying potential social groups to advance on behalf of asylum seekers.

In the Eighth Circuit, there are a number of cases that identified viable protected groups on the basis of persecution committed by a non-state actor, and otherwise include language helpful in addressing the AG's problematic interpretation of the refugee definition. As of the publication of this advisory, the Eighth Circuit has issued one decision directly interpreting *Matter of A-B-* since the AG's decision, *Najera v. Whitaker*. The *Najera* decision reads *Matter of A-B-* narrowly as *potentially* rescinding the particular social group in *A-R-C-G-*, but it contains some helpful language for advocates.

***Najera v. Whitaker*, 745 Fed. App'x 670 (8th Cir. 2018)**

Najera, the Eighth Circuit issued its first decision analyzing a domestic violence based particular social group formulation after the decision in *Matter of A-B-*. *Najera v. Whitaker*, 745 Fed. App'x 670, 671 (8th Cir. 2018). In *Najera*, the Eighth Circuit held that the group identified as "Salvadoran females unable to leave a domestic relationship" *may* not be cognizable, but ultimately denied asylum based on the facts of the case, because the Respondent left her relationship long before she fled to the U.S. The *Najera* Court declined to rule on the applicant's alternative proposed particular social group of "Salvadoran women viewed as property by virtue of their status of being in domestic relationships," since that alternative particular social group was not raised in the

⁶⁶ When the 8th Circuit has addressed domestic violence asylum claims, it has issued several opinions which are unhelpful for domestic violence survivors. These may be useful for advocates in developing counterarguments. See *Juarez-Coronado v. Barr*, 919 F.3d 1085, 1089 (8th Cir. 2019) (citing *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 733 (8th Cir. 2013)) ("But the fact that the police could not find [the Petitioner's abuser] when she sought to enforce the protective order does not compel the conclusion that the Guatemalan authorities were unable to protect her, especially in light of the fact that she never sought their aid again."); *Fuentes-Erazo v. Sessions*, 848 F.3d 847, 853 (8th Cir. 2017) (distinguishing *Matter of A-C-R-G-*, 26 I&N Dec. 388 (BIA 2014), *overturned by Matter of A-B-*, 27 I&N Dec. 316 (AG 2018)) ("Fuentes identified her proposed particular social group as Honduran women in domestic relationships who are unable to leave their relationships . . . Here, [in] contrast [to *A-C-R-G-*], Fuentes herself testified—and the IJ and the BIA subsequently found—that she was, in fact, able to leave her relationship with Santos."); *Rodriguez-Mercado v. Lynch*, 809 F.3d 415, 419 (8th Cir. 2015) ("Rodriguez-Mercado argues the IJ erred by failing to evaluate her testimony in light of the effects of sexual abuse . . . Rodriguez-Mercado did not fail to disclose alleged sexual abuse. The relevant inconsistency was telling a border patrol officer when she first arrived in this country that she was here to seek work in Virginia and had no fear of returning to Honduras. This inconsistency suggested a willingness to overstate alleged abuse to support her claim for asylum relief. When asked to explain the inconsistencies, Rodriguez-Mercado never hinted they were due to fear, embarrassment, or memory issues."); *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005) ("[T]he fact that police take no action on a particular report does not necessarily mean that the government is unwilling or unable to control criminal activity, because there may be a reasonable basis for inaction . . . Whether a government is 'unable or unwilling to control' private actors under these refined definitions of persecution is a factual question that must be resolved based on the record in each case . . . [T]he IJ made specific findings that '[w]e are not dealing with a situation here where the crime was ignored,' and that '[t]his does not appear to be a case where the government was ignoring the claims or pleas of a target of unwanted attention or unwanted criminal contact.'").

appeal to the Eighth Circuit. *Id.* Advocates should argue that the decision leaves open protection for domestic violence survivors and appears to read the *Matter of A-B-* decision narrowly as merely rescinding the particular social group advanced in *Matter of A-R-C-G-*.

Eighth Circuit precedent on claims involving gender-based or domestic violence prior to *Matter of A-B-*

***Hui v. Holder*, 769 F.3d 984 (8th Cir. 2014)**

In *Hui v. Holder*, the Eighth Circuit treats a gender-based particular social group as a viable protected group. The IJ and BIA had recognized the applicant as part of the particular social group of “Chinese daughters [who are] viewed as property by virtue of their position within a domestic relationship.” The IJ and BIA denied relief because the applicant’s age constituted a fundamental change in circumstances such that she no longer had a well-founded fear of future persecution. The Eighth Circuit devotes little analysis to the particular social group, and instead agrees with the IJ and BIA that the proper basis for denial is the fundamental change in circumstances.

This decision is helpful in articulating a protected group that may be viable before the Eighth Circuit for survivors of domestic or family violence, where the facts of your client’s claim support a similar group articulation.

***Gathungu v. Holder*, 725 F.3d 900 (8th Cir. 2013)**

In *Gathungu v. Holder*, the Court held that “Mungiki defectors” constituted a particular social group:

[T]he BIA [has] indicated that an individual who is targeted due to her status as a former police officer may be eligible for asylum as a member of the particular social group of former police officers.” *Koudriachova v. Gonzales*, 490 F.3d 255, 261 (2d Cir.2007) (emphasis added) (citing *In re C–A–*, 23 I. & N. Dec. 951, 958-59 (2006 BIA)). Mungiki defectors are an analogous social group with shared past experiences. Thus, applying the BIA’s definition, Mungiki defectors constitute a “particular social group.”

The asylum seeker in this case was a member of the Mungiki group in Kenya. When the group suspected he wanted to defect, he was beaten and tortured. Further, he feared his wife and daughter would be kidnapped and forced to undergo FGM. He defected to the U.S. and filed a claim for asylum based on the persecution he experienced and his fears for his wife and daughter.

The Court found that “Mungiki defectors” constituted a particular social group, emphasizing that they had no power to change their shared past experience of having defected from the group:

Finally, although the BIA dismissed the immutability of membership in the Mungiki on the grounds that Gathungu voluntarily chose to join the group, “shared *past*

experiences do constitute an immutable characteristic because a past experience cannot be undone.”⁶⁷

The *Gathungu* decision can be useful for addressing the “immutable characteristic” component of the particular social group analysis, since the Court found that “shared past experience” can factor into this determination.

Next, the Court analyzed whether Mungiki defectors were sufficiently particular and socially distinct, stating that:

Mungiki defectors are socially visible, and no reasonable fact-finder could conclude otherwise based on the record. Although members of Kenyan society might not be able to identify a Mungiki defector by sight, the record amply demonstrates Kenyan society perceives “Mungiki defectors” as a specific group targeted by the Mungiki. Numerous media reports in the record detail the targeted murders of Mungiki defectors, demonstrating that Mungiki defectors “suffer from a higher incidence of crime” at the hands of the Mungiki than Kenyans in general.⁶⁸

The Court also found the nexus requirement was satisfied, stating: “[b]y the same evidence, status as a Mungiki defector “is the reason” for their persecution.”⁶⁹

This decision may help practitioners advocating on behalf of survivors of forcible gang recruitment argue that they are part of a similar particular social group, given the similarity between the targeting of young people who have left criminal gangs or have the past experience of refusing to join criminal gangs and the targeting of Mungiki defectors in Kenya. Practitioners representing survivors of forcible gang recruitment are encouraged to KeyCite or Shepardize this decision to ensure that they distinguish any proposed particular social groups from those already rejected by the BIA or Eighth Circuit for survivors of forcible gang recruitment.⁷⁰

***Malonga v. Mukasey*, 546 F.3d 546 (8th Cir. 2008)**

⁶⁷ *Gathungu v. Holder*, 725 F.3d 900, 903 (8th Cir. 2013) (emphasis added).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See e.g. *Miranda v. Sessions*, 892 F.3d 940 (8th Cir. 2018)(affirming denial of withholding to a Salvadoran Respondent seeking protection based on his membership in the group of former taxi drivers who witnessed gang murder, where the IJ had granted withholding and the Board reversed, holding that the proposed group was not cognizable. The 8th Circuit agreed with the Board that the group of “former taxi drivers from Quezaltepeque who have witnessed a gang murder” was not cognizable). See also *Garcia v. Holder*, 746 F.3d 869 (8th Cir. 2014) (affirming denial of withholding to a Guatemalan Respondent seeking protection based on his membership in the particular social group of young Guatemalan men who opposed violent gang, were beaten and extorted by gang, reported gang to police, and faced increased persecution as result, and his political opinion in support of upholding the rule of law by reporting gang violence to police); *Garcia-Carranza v. Sessions*, 720 Fed.Appx. 315 (8th Circuit, January 2, 2018)(denying asylum to an individual seeking protection as a Salvadoran youth being supported by family members in United States).

In this case, the petitioner asserted that he had been persecuted in Congo on the basis of his ethnicity as a member of the Lari ethnic group as well as his political opinion. The Immigration Judge found that the Lari ethnic group was not a particular social group for withholding of removal because it was a “substantial minority” of the population.

The Eighth Circuit reversed, finding that the Lari ethnic group was a particular social group, having shared immutable characteristics that distinguished him within the context of the Congo. The Court stated:

By myopically focusing on size, the IJ here failed to consider the other relevant factors in determining whether the Lari ethnic group of the Kongo tribe is a particular social group. Applying the uncontroverted record evidence to the standard adopted by the BIA in *In re Acosta* and *In re C-A-*, we conclude that the Lari ethnic group of the Kongo tribe is a particular social group for purposes of withholding of removal. Members of the tribe share a common dialect and accent, which is recognizable to others in Congo. Members also are identifiable by their surnames and by their concentration in southern Congo's Pool region. Our conclusion is consistent with other decisions of this court and of the BIA, in which applicants have established particular social group status for members of certain Somali ethnic clans. *See, e.g., Awale v. Ashcroft*, 384 F.3d 527, 529 (8th Cir.2004); *Hagi-Salad v. Ashcroft*, 359 F.3d 1044, 1046 (8th Cir.2004); *In re H-*, 21 I. & N. Dec. 337, 342-43 (BIA 1996).⁷¹

This language is helpful in addressing decisions that reject asylum claims because too many potential applicants could make the same claims. It also assists practitioners in reminding courts what the law requires in terms of refugee protection for members of a persecuted group that could potentially qualify for such protection. The refugee definition focuses not on the size of the group asserted by the asylum seeker, but rather on whether the asylum seeker is able to meet their burden of proof on all elements of the refugee definition.

***Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008)**

The petitioner in this case was a citizen of the Republic of Cameroon and a member of the Anglophone Bamileke tribe who was married to a Francophone Bikom tribe member. After the Petitioner's husband died in a car accident, her deceased husband's family subjected her to forceful rituals and a seizure of her assets. The deceased husband's family then attempted to force her to marry her husband's brother and beat her when she refused. She then fled to the United States and sought asylum.

The Immigration Judge found that she was not a member of a particular social group. The Eighth Circuit reversed, finding that her status as a Cameroonian widow did constitute a particular social

⁷¹ *Malonga v. Mukasey*, 546 F.3d 546, 553–54 (8th Cir. 2008)

group. The Court stated that the experience of being a widow was immutable and that all Cameroonian widows had a shared experience of losing a husband.

The Court reasoned that:

Acosta lists both gender (sex) and shared past experiences as examples of immutable characteristics. *Acosta*, 19 I. & N. at 233. Widows share the past experience of losing a husband—an experience that cannot be changed. The IJ found that although “marital status, perhaps, could be viewed as an immutable characteristic, in this case the respondent has the ability to change that characteristic.” The BIA and IJ were incorrect in determining that female, Cameroonian widows do not share an immutable characteristic.⁷² Female widows in Cameroon are viewed by society as members of a particular social group. See Jonas N. Dah, *Chieftaincy, Widowhood and Ngambi in Cameroon* 11–25 (Pforzheim-Hohenwart 1995) (describing the rituals and societal treatment of Cameroonian widows). *Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008)

In finding that the Cameroonian government is unable or unwilling to protect Cameroonian widows, the Court cited various State Department country conditions reports as well as UN documents detailing the human rights abuses against women. *Id.* at 1035. The Court then concluded based on the record evidence and the applicant’s credible testimony that discrimination against women by male relatives was pervasive in Cameroon and that it was plausible that the police were not willing to intervene on the applicant’s behalf, seeing the forced marriage as “a family issue.” *Id.* at 1035.

***Hassan v. Gonzalez*, 484 F.3d 513 (8th Cir. 2007)**

The petitioner in this case was a Somali woman who had undergone female genital mutilation (“FGM”) and who claimed that her interclan marriage to a member of the Midgan tribe meant that she was going to be subjected to similar persecution if returned to Somalia. She also feared that, if she returned to Somalia, her daughters would be forced to undergo FGM. The petitioner argued that her persecution was on the basis of her gender.

⁷² The Court cited the following sources in support of its conclusion that female Cameroonian widows did share an immutable characteristic. “*Hassan*, 484 F.3d at 518 (all Somali females form a particular social group due to the prevalence of female genital mutilation); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir.1994) (stating that while “no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender,” Iranian women who advocate women’s rights or oppose Iranian customs relating to dress and behavior constitute a particular social group), superseded by statute on other grounds, as recognized in *Rife v. Ashcroft*, 374 F.3d 606, 614-15 (8th Cir.2004); *Niang*, 422 F.3d at 1199–1200 (gender plus tribal membership meet requirements of particular social group); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir.1993) (“[The requirement of wearing the chador or complying with Iran’s ... gender-specific laws would be [for certain women] so profoundly abhorrent that it could aptly be called persecution.”]).

In its analysis, the Eighth Circuit cited their rejection of “Iranian women” as a particular social group for being overly broad. *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994). The Court distinguished the instant case, however, finding that:

[A] factfinder could reasonably conclude that all Somali females have a well-founded fear of persecution based solely on gender given the prevalence of FGM. As the Ninth Circuit noted in *Mohammed*, “there is little question that genital mutilation occurs to a particular individual because she is a female. That is, possession of the immutable trait of being female is a motivating factor—if not a but-for cause—of the persecution.” *Mohammed*, 400 F.3d at 797. We, therefore, conclude that Hassan was persecuted on account of her membership in a particular social group, Somali females.⁷³

The petitioner submitted a State Department report stating that 98% of Somali women had undergone FGM.

F. Ensure that all potential arguments are made before the Immigration Court

Practitioners should ensure that all potential legal arguments are laid out in the record before the Immigration Court. Practitioners should ensure that all forms of persecution are well-documented and should include case law laying out the proper standard to assess persecution.

It is essential that practitioners provide multiple articulations of the asylum seeker’s proposed particular social group. This will ensure that all potential particular social groups can be considered on appeal, per the BIA’s 2018 requirement that any particular social groups the asylum seeker wishes to advance on appeal be clearly delineated before the Immigration Judge. *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018).⁷⁴ This will also ensure that asylum seekers’ claims for protection remain viable in a post-*Matter of A-B-* environment that may see unpredictable changes from courts, the AG, and Congress. While there is no limit to the proposed protected grounds that can be advanced, it is essential that the record include evidence of the asylum seeker’s membership in each group advanced. For instance, if a practitioner argues that the asylum seeker was persecuted based on her feminist political opinion or imputed feminist political opinion, it is essential that the record demonstrate both: (1) that the asylum seeker has a feminist political opinion or that one was imputed to her; and (2) that the persecutor’s desire to overcome her feminist political opinion or animus towards her feminist political opinion was

⁷³ *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007).

⁷⁴ If representing an asylum seeker on appeal, there is a helpful decision post *W-Y-C- & H-O-B-* from the 9th Circuit. It remands for consideration of the particular social group “Guatemalan women,” because it was the “gravamen” of the asylum seeker’s claim, even though the asylum seeker did not advance that precise particular social group formulation before the BIA or IJ. *Silvestre--Mendoza v. Sessions*, 729 F. App’x 597 (9th Cir. 2018). See also *Post Matter of A-B– Litigation Update*, Ctr. for Gender & Refugee Stud. (Dec. 2018) (providing more helpful recent case law from sister circuit courts interpreting *Matter of A-B-*). Access *Post Matter of A-B-* via a technical assistance request at <https://cgrs.uchastings.edu/article/practice-advisories-available-domestic-violence-and-childrens-asylum-claims>.

at least one central reason for the harm she suffered. This can be done through testimony discussing her beliefs about the rights of women and what treatment they deserve and providing evidence, through witness testimony and any other available documentation regarding the persecutor's actions in response to her expression or perceived expression of that feminist political opinion.

G. Avoid Particular Social Group Articulations Defined Solely by the Harm Suffered.

In the wake of *Matter of A-B-*, avoid defining the particular social group by the harm suffered by members of that group. For instance, using gender as a basis for persecution as opposed to women who have suffered domestic violence can help to avoid obstacles in light of the AG's statement that the persecutor should know of the existence of the group. For instance, "Salvadoran married women viewed as property by virtue of their role within a domestic relationship" may be a better articulation than "Salvadoran women who are victims of domestic violence."⁷⁵ Furthermore, practitioners should be sure to advance other protected grounds (race, religion, political opinion, or nationality) wherever relevant to the claim, in addition to any particular social group claims the applicant may have.

Before the Fort Snelling, Minnesota Immigration Court, the following are a few examples of particular social groups used in gender-based or gang-based claims have been recently successful:

- 1) Ecuadoran women (relief granted, DHS appealed)
- 2) Salvadoran women (recognized in a decision denying relief on other grounds)
- 3) Honduran former transit police officers (relief granted, DHS appealed)
- 4) Guatemalan indigenous widows (relief granted, DHS declined to appeal)
- 5) Mexican women (recognized in a decision denying relief on other grounds)
- 6) Family members of former Salvadoran military (decided pre L-E-A- II)
- 7) Egyptian women resistant to traditional gender roles

The Advocates encourage any practitioners representing asylum seekers to share other groups successful for domestic and gang violence survivors in the 8th Circuit with our office, to be shared with volunteer attorneys and our network of 8th Circuit asylum practitioners.

The trend of recognizing gender + nationality as a protected ground is not new in this jurisdiction. In 2007, the 8th Circuit recognized that Somali nationality plus female gender could qualify as a valid particular social group. Before the Fort Snelling Immigration Court, in 2011, an Immigration Judge recognized the particular social group of Guatemalan women, in granting protection to a domestic violence survivor.⁷⁶ In that decision, the Immigration Judge noted that the prevalence of gender-based violence in Guatemala lent support to the finding that certain types of violence

⁷⁵ ASYLUM PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER MATTER OF A-B--: MATTER OF A-B- CHANGES THE COMPLEXION OF CLAIMS INVOLVING NON--STATE ACTORS, BUT ASYLUM FUNDAMENTALS REMAIN STRONG AND INTACT, NAT'L IMMIGRANT JUSTICE CTR. 18 (2018).

⁷⁶ Decision on file with The Advocates for Human Rights

inflicted on women in Guatemala occur because of their status as Guatemalan women and recognized that respondent's credible testimony established that the violence she suffered at her partner's hands was of such a sort. However, the same Immigration Judge declined to grant at least one similar domestic and sexual violence-based claim in 2019, reasoning that the abuser's behavior resulted from the fact that he was a violent drunkard and his family was handy, and disregarding differences in how the persecutor treated others in close proximity, such as male friends, as well as evidence in the record of pervasive dynamics promoting impunity for domestic violence in the applicant's home country.⁷⁷

Although the Chicago Asylum Office has issued extremely few decisions on unaccompanied minor asylum claims in the past year,⁷⁸ two Salvadoran brothers who survived daily child abuse for seven years were granted asylum by the Chicago Asylum Office following the issuance of *Matter of A-B-*. The children's pro bono attorney advanced the particular social groups (1) children lacking family protection, (2) children in a family relationship they are unable to leave, (3) relatives of [children's aunt], and, in the case of one of the two children, and, for one of the boys (4) as a gay Salvadoran youth. The attorney advocated for a child-sensitive assessment of the persecution suffered.⁷⁹

Given that DHS appears to be routinely appealing domestic violence-based decisions in our jurisdiction, and given that the Immigration Court has not had consistent views on domestic violence based claims across all judges, it is recommended that advocates for domestic violence survivors advance additional protected grounds. Some particular social groups that our colleagues have reported as successful in courts around the country include:

- Family based claims (e.g., wife of [name of persecutor], wife of MS-13 member, or wife of ex-military officer)⁸⁰
- [Nationality] + women who have violated controlling social norms
- [Nationality] + viewed as property by virtue of their role within a domestic relationship
- [Nationality] + gender + other protected ground [race, ethnicity, religion]
- Political opinion: e.g., imputed feminist political opinion

⁷⁷ Decision on file with The Advocates for Human Rights.

⁷⁸ US Citizenship & Immigration Servs. Chicago Asylum Office, *Outreach Meeting, Thursday, January 24, 2019*, <http://www.scottimmigration.com/wp-content/uploads/2019/02/1.24.19-Liaison-Stats.pdf> (indicating that, as of January 2019, the Chicago Asylum Office has 22,324 asylum applications pending adjudication before it and 3,223 pending TVPRA asylum applications). The Chicago Asylum Office indicated that they had completed 49 TVPRA asylum adjudications during the 10/1/2018--12/31/2018 time period, in comparison to a total of 1,313 total cases adjudicated during that time period.

⁷⁹ For a redacted copy of the attorney's letter brief, please review the resources uploaded by The Advocates to Immigrant Advocates Network

⁸⁰ But note that these decisions were issued prior to the issuance of *Matter of L-E-A-* 27 I&N Dec.581 (A.G.2019), and the AG's decision in *L-E-A-* may impact the Courts' assessment of family-based claims

For more ideas of potential particular social groups, see the advisories from our colleagues at the National Immigrant Justice Center and Center for Gender and Refugee Studies addressing the *Matter of A-B-* decision which are cited *infra* Appendix B.

H. Emphasize that the Decision Contains Primarily Non-Binding Dicta

Most of the harmful sentiment from the decision is dicta, and, as such, is not binding.⁸¹ For instance, the AG stated: “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum” and “[w]hen the applicant has suffered personal harm at the hands of only a few specific individuals, internal relocation would seem more reasonable than if the applicant were persecuted, broadly, by her country’s government.”⁸² In fact, these statements are not a part of the ultimate holding or opinion, rather, they reflect the AG’s anti-immigrant rhetoric and are not a part of his legal reasoning for overturning *Matter of A-R-C-G-*. The AG’s first statement is not entirely supported by the Office of the Principal Legal Advisor for ICE’s July 11th Memorandum, which states that “[t]he analysis of whether a particular social group is cognizable must always be case-by-case and society-specific” and that “[t]he AG did ‘not decide that violence inflicted by nongovernmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group.’”⁸³ Further, in *Grace v. Whitaker*, the government argued that “the only change to the law in *Matter of A-B-* is that *Matter of A-R-C-G-* was overruled” and that “no such general rule against domestic violence or gang-related claims exists.”⁸⁴

I. Argue the *Matter of A-B-* is Not Entitled to *Chevron* Deference

However, even if the harmful language is not dicta, the decision is unreasonable and is not entitled to deference. In fact, according these statements deference would lead to absurd or unreasonably harsh results and blanket rejections of asylum claims.⁸⁵ Generally, courts will give deference to an agency’s decision in the construction of a statute if the statute is ambiguous and the agency’s interpretation of the statute is reasonable.⁸⁶ This is known as *Chevron* deference. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837 (1984). *Chevron* deference requires courts to defer to the agency charged with enforcement of a statute’s interpretation of

⁸¹ *Kastigar v. U.S.*, 406 U.S. 441, 455 (1972) (“[B]road language . . . [which] was unnecessary to court’s decision . . . cannot be considered binding authority.”).

⁸² *Matter of A-B-* 27 I&N Dec. at 320, 345; *Kastigar v. U.S.*, 406 U.S. 441, 455 (1972) (“[B]road language . . . [which] was unnecessary to court’s decision . . . cannot be considered binding authority.”).

⁸³ U.S. IMMIGRATION & CUSTOMS ENF’T, LITIGATING DOMESTIC VIOLENCE--BASED PERSECUTION CLAIMS FOLLOWING MATTER OF A--B--5 (July 11, 2018), <http://immigrationcourtside.com/wp--content/uploads/2018/07/OPLA-7-11-18.pdf>.

⁸⁴ See, e.g., *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

⁸⁵ *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 (2002) (“It is not [the Court’s] job, [in construing statute,] to find reasons for what Congress has plainly done, and it is our job to avoid rendering what Congress has plainly done . . . devoid of reason and effect.”).

⁸⁶ *Cazun v. Att’y Gen.*, 856 F.3d 249, 259 (3d Cir. 2017); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1994); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

that statute if the meaning of the statute is ambiguous. However, the agency’s interpretation of the statute must be reasonable and a permissible construction. Otherwise, courts need not accord deference to the agency’s interpretation. Further, “[a]dministrative agencies are not free, under *Chevron*, to generate erratic, irreconcilable interpretations of their governing statutes; consistency over time and across subjects is a relevant factor under *Chevron* when deciding whether the agency’s current interpretation is reasonable.”⁸⁷ Recently, in *Pereira v. Sessions*, Justice Kennedy critiqued the Circuit Courts for easily affording *Chevron* deference to a Board of Immigration Appeals interpretation of the appropriate contents of the Notice to Appear, where the interpretation had little basis in statute. *Pereira v. Sessions*, 138 S.Ct. 2105, 2120 (S. Ct. 2018) (Kennedy, J., concurring). Justice Kennedy admonished the Circuit Courts for engaging in this type of “troubling” deference and urged them to more rigorously review the determinations of an agency of the executive branch, in keeping with the proper role of the judiciary. *Id.* at 2120.

Practitioners should consider utilizing the *Chevron* two-part framework to argue that *Matter of A-B-* is not entitled to deference.⁸⁸ First, argue that the INA’s language is not ambiguous, and therefore deference to the Department of Justice’s interpretation is unwarranted. Moreover, practitioners should point out that the relevant legislative history makes the inclusion of a particular social group in the definition of “refugee” clear and unambiguous and that the U.S. Supreme Court has found “‘abundant evidence’ that Congress intended to conform the definition of refugee and the asylum law of the U.S. ‘to the United Nation’s (sic) Protocol to which the United States has been bound since 1968.’”⁸⁹ Indeed, the drafters of the Refugee Convention intended “particular social group” to “protect groups and individuals that did not fall within the categories of race, religion and political opinion. Social group classification was meant to have flexible boundaries that would enable it to perform this function.”⁹⁰ Further, “[t]he drafters recognized that groups worthy of refugee status would inevitably appear whose persecution they could not foresee. Accordingly, they inserted the social group category and left it to posterity to flesh out its meaning.”⁹¹ Further, courts have set forth the controlling law on “particular social group” and have repeatedly emphasized the requirement of a case-by-case adjudication.

Further, practitioners should call attention to the fact that courts have used the “unable or unwilling” language of the statute for decades to analyze the level of governmental protection

⁸⁷ *Valdiviezo-Galdamex v. Att’y Gen.*, 663 F.3d 582 (3d Cir. 2011).

⁸⁸ Practitioners formulating arguments around *Chevron* deference are also strongly encouraged to review Professor Maureen Sweeney’s recent law review article arguing that, under modern *Chevron* jurisprudence, a more rigorous review by the Courts of Immigration Judge and Board of Immigration Appeals decisions is appropriate, particularly given the primarily prosecutorial function of the Department of Justice, and the stakes for asylum seekers presenting their claims for protection before an agency with this chief aim. Maureen Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127 (2019).

⁸⁹ U.N. HIGH COMM’R FOR REFUGEES, UNHCR’S VIEWS ON GENDER BASED ASYLUM CLAIMS AND DEFINING “PARTICULAR SOCIAL GROUP” TO ENCOMPASS GENDER 2 n.9 (Nov. 2016) (citing *Murray v. The Charming Betsy*, 6 US 64, 80 (1804); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987)); *Cardoza-Fonseca*, 480 U.S. at 437–38.

⁹⁰ DEBORAH ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* 14 (2d ed. 1992).

⁹¹ T. David Parish, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of Refugee*, 92 COLUM. L. REV. 923, 928–29 (1992).

available to the asylum seeker in her country of origin, and the AG’s attempt to use “complete helplessness” or “condone” instead runs afoul of this well-established standard. Practitioners should also refer to the detailed discussion of the “unable and unwilling standard,” *supra* Part II.D, for further guidance on addressing a proposed heightened standard.

Second, practitioners should argue that, even if the Court finds that the statute is ambiguous, the AG’s interpretation of the statute is an impermissible interpretation of the statute due to its faulty analysis. As discussed in depth above, treating the AG’s statements as anything other than dicta would conflate the well-established elements of asylum claims in immigration precedent and be incompatible with the controlling asylum framework.⁹² There is no support for the AG’s heightening of the legal standards provided under the asylum framework solely for victims of non-state actor violence. Many of his statements in *Matter of A-B-* are unfounded conjecture or speculation about the dynamics of asylum seekers’ personal relationships with their persecutors or the viability of internal relocation, not well-reasoned analysis grounded in precedent.⁹³

Further, finding gender-based violence to be based solely on the personal relationship with the victim is unreasonable. There is ample evidence that certain acts of violence committed against women are gender-based, such as female genital mutilation, forced marriage, and sexual violence.⁹⁴ The USCIS (formerly Immigration and Naturalization Service) has stated domestic violence is gender-based violence in its Manual for Asylum Officers, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*.⁹⁵ Further, testimony from experts can and should be provided to adjudicators by advocates for asylum seekers. Experts can help rebut the AG’s assertion that gender-based claims are just “personal” or “domestic” claims by testifying to social, cultural, and other factors that give further context to the violence or harm committed against women. *See* Appendix C, *infra*, for further information on the nexus between persecution and gender-based violence.

Finally, according deference to the AG’s interpretation would effectively write out “particular social group” from the asylum statute, rendering part of the statute void, superfluous, and redundant. If all of the AG’s dicta from *Matter of A-B-* is treated as binding and accorded deference, it would be virtually impossible to articulate a valid asylum claim on the basis of

⁹² 8 C.F.R. § 208.13(b).

⁹³ Indeed, some have argued that the AG’s bias, as evident in his public statements and the political nature of his attempt to constrict future grants of asylum in *Matter of A-B-*, may be a violation of constitutional due process due to a lack of impartiality. Further, the likelihood that the outcome of the case was pre-determined and contrary to the requirement to analyze the facts on a case-by-case basis further underscores that *Matter of A-B-* should not be entitled to deference.

⁹⁴ The Center for Gender and Refugee Studies has on file an expert declaration from Nancy Lemon, an experienced legal advocate for domestic violence survivors and university lecturer on domestic violence law, which outlines how gender dynamics in a particular society contribute to the pervasiveness of domestic violence as well as impunity of perpetrators of domestic violence. To request a copy, please go to <https://cgrs.uchastings.edu/request-assistance/requesting-assistance-cgrs>.

⁹⁵ U.S. IMMIGRATION & NATURALIZATION SERV., CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN (1995), <https://www.refworld.org/docid/3ae6b31e7.html>.

persecution based on a particular social group committed by non-state actors. Statutes cannot be construed in a way that would lead to absurd results. Here, the AG's assertions are an attempt to severely narrow the circumstances that could provide a basis for particular social group claims. This constriction would lead to the absurd result of foreclosing the possibility of asylum on the basis of particular social group for persecution committed by non-state actors and would eliminate the dynamic nature of the particular social group category intended by Congress.

In *Matter of A-B-*, the AG is simultaneously attempting to delete language that is in the statute—"particular social group"—while simultaneously attempting to add in language and requirements that are not there or that have not been established by case law. This concurrent attempt at deleting what the AG does not want in the statute and adding in requirements the AG does want that have not been set forth by courts is clearly an unreasonable interpretation of the statute. In fact, the AG is not interpreting the statute, but instead attempting to revise the statute to his own liking. Permitting administrative agencies revision powers over the statutes they are charged with enforcing is clearly absurd. Therefore, *Matter of A-B-* is not entitled to deference by courts.

J. Strongly Corroborate Your Client's Claims

The REAL ID Act, passed in 2005, amended certain provisions of the INA and included corroboration requirements for asylum claims. It states:

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.⁹⁶

Significantly, the Eighth Circuit has held that "the weaker an alien's testimony, the greater the need for corroborating evidence."⁹⁷ In the wake of *Matter of A-B-*, corroboration of all elements of an asylum applicant's burden of proof is even more important. While the standard asylum claim will usually contain the petitioner's affidavit as well as country condition reports, practitioners should attempt to corroborate as much of the claim as possible with evidence such as medical records, police reports, death certificates, affidavits from firsthand witnesses, and forensic medical or psychological reports. To avoid allegations that evidence has been fabricated,

⁹⁶ INA § 208(b)(1)(B)(ii).

⁹⁷ *Bropoleh v. Gonzales*, 428 F.3d 772, 777–78 (8th Cir. 2005).

practitioners may want to ask their clients to have any evidence sent from country of origin mailed directly to the attorney's office. The attorney or some member of the attorney's staff should complete an affidavit confirming how and when the evidence was received and provide a copy of the envelope along with the evidence submitted to the Court. The attorney should also either submit the evidence to DHS significantly in advance of the final hearing so that they are able to conduct any forensic review of the evidence or the attorney may conduct their own forensic evaluation of the documents.

For those aspects where no evidence is available despite the efforts of both practitioner and client, practitioners may want to submit explanations as to why corroboration for those particular facts or claims is not obtainable as well as documentation of efforts to obtain the relevant evidence. For instance, the attorney should work with the client to include in their affidavit and testimony information about efforts to obtain particularly key evidence, if unavailable.

K. Cite to International Law

Practitioners may consider citing to international law to help bolster their arguments. The United Nations High Commissioner for Refugees (UNHCR) has been relied on by U.S. courts in their determinations of asylum claims.⁹⁸ Further, "under U.S. jurisprudence, U.S. courts have an obligation to construe U.S. statutes in a manner consistent with U.S. international obligations whenever possible."⁹⁹ The UNHCR has taken the view that the definition of "refugee" in Article 1 of the 1951 Convention relating to the Status of Refugees "may, depending on the circumstances of each case, encompass claims from Central American women facing gender-

⁹⁸ *N-A-M- v. Holder*, 587 F.3d 1052, 1061–62 (10th Cir. 2009) (Henry, C.J. concurring). In *Grace v. Whitaker*, the Court "also notes that domestic law may supersede international obligations only by express abrogation, *Chew Heong v. United States*, 112 U.S. 536, 538 (1884), or by subsequent legislation that irrevocably conflicts with international obligations, *Reid v. Covert*, 354 U.S. 1, 18 (1957). Congress has not expressed any intention to rescind its international obligations assumed through accession to the 1967 Protocol via the Refugee Act of 1980." *Grace v. Whitaker*, 344 F.Supp.3d 96, 126 n.14 (D.D.C. 2018).

⁹⁹ U.N. HIGH COMM'R FOR REFUGEES, UNHCR'S VIEWS ON GENDER BASED ASYLUM CLAIMS AND DEFINING "PARTICULAR SOCIAL GROUP" TO ENCOMPASS GENDER 2 n.9 (Nov. 2016) (citing *Murray v. The Charming Betsy*, 6 US 64, 80 (1804); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987)).

based violence.”¹⁰⁰ The Eighth Circuit has cited UN documents for evidence of country conditions.¹⁰¹

The UNHCR has prepared numerous helpful guidelines on interpretation of refugee law.¹⁰² For instance, in its Guidelines on interpretation of membership in a particular social group, the UNHCR notes that there may be cases of domestic violence where the applicant lacks documentation or evidence to show that her persecutor is targeting her based on her gender or other gender-based particular social group formulation.¹⁰³ The UNHCR suggested that, where this is the case, the asylum applicant may still be able to show that the persecution she suffered in the form of domestic violence was on account of a valid particular social group by demonstrating that her country’s government has declined to protect individuals like her because of the state’s animosity towards or unwillingness to protect individuals in her protected group. This state attitude towards domestic violence survivors can be seen in many countries in the world today, where protections of domestic violence survivors are being rolled back despite high rates of violence against women.¹⁰⁴ The UNHCR explains in this note that the nexus analysis can be satisfied either if the applicant can show that her persecutor is targeting her based on a protected characteristic and that the state is unwilling or unable to protect her for any reason, or if she can

¹⁰⁰ *Id.* See also additional resources on claims from Central American applications, including Central American domestic violence survivors and survivors of gang--violence: *Claims from Central America: Attorney Resources*, UN HIGH COMMISSIONER FOR REFUGEES, <http://www.unhcr.org/en-us/claims-from-central-america.html>; *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum--Seekers from El Salvador*, UN HIGH COMMISSIONER FOR REFUGEES (Mar. 15, 2016), <http://www.refworld.org/docid/56e706e94.html>; *Women on the Run: First-hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico*, UN HIGH COMMISSIONER FOR REFUGEES (2005), <http://www.unhcr.org/56fc31864.html>; *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum--Seekers from Honduras*, UN HIGH COMMISSIONER FOR REFUGEES (July 27, 2016), <http://www.unhcr.org/56fc31864.html>; *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, UN HIGH COMMISSIONER FOR REFUGEES (Mar. 31, 2010), <http://www.refworld.org/docid/4bb21fa02.html>.

¹⁰¹ *Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008).

¹⁰² For more resources of this nature, visit the UNHCR’s Attorney Resources page, at <https://www.unhcr.org/en-us/attorney-resources.html>

¹⁰³ See UNHCR, *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*, available at <https://www.unhcr.org/en-us/attorney-resources.html> [last accessed October 18, 2019], at paragraphs 21 and 22.

¹⁰⁴ See e.g., Pamela Neumann, Ph.D., *Transnational Governance, Local Politics, and Gender-Violence Law in Nicaragua* (explaining how the recent rollback of legal protections of the rights of Nicaraguan domestic violence survivors has put women at heightened risk within Nicaragua); Yulia Gorbunova, *The Chilling Inaction on Domestic Violence in Russia is Endangering Women’s Lives*, Human Rights Watch, July 29, 2019, available at <https://www.hrw.org/news/2019/07/29/chilling-inaction-domestic-violence-russia-endangering-womens-lives#> (describing the European Court of Human Rights’ ruling against Russia, in which the Court critiqued Russia’s “reluctance to acknowledge the seriousness and extent of the problem of domestic violence in Russia and its discriminatory effect on women.” The article notes that, in 2017, certain forms of violence against women were decriminalized. In the case considered by the ECHR, a woman had been repeatedly brutally abused, and made seven police reports. On each occasion, the police refused to investigate.)

show that her persecutor is able to target her with impunity because the state refuses to protect her because of the protected characteristic, for instance, her gender, that she asserts.¹⁰⁵

Further, practitioners may consider citing to the *travaux preparatoire* of the Refugee Convention to demonstrate the broad intent of drafters that the particular social group classification have flexible boundaries and cover persecution they could not foresee at the time of drafting.¹⁰⁶

L. Emphasize the case-by-case adjudication requirement

The dicta of *Matter of A-B-* vastly overreaches the scope of the decision in an attempt to change the standard for asylum. However, nothing in *Matter of A-B-* changes the requirement that each asylum case must be decided on a case-by-case and individualized basis.¹⁰⁷ Practitioners should strongly emphasize that each case is decided on an individualized basis to further distinguish their own case from *Matter of A-B-* and *Matter of A-R-C-G-*.

Further, the rejection of *Matter of A-R-C-G-* was due to the depth of its analysis and not its outcome. As such, the rejection of *Matter of A-R-C-G-* does not stand as a blanket rejection of all domestic violence or other non-state actor claims. Instead, each asylum case must be decided on a case-by-case and individualized basis.¹⁰⁸

Conclusion

Matter of A-B- will present some new challenges for practitioners litigating asylum claims based on persecution committed by non-state actors. While the actual ramifications of the case should be narrow, practitioners must be prepared to address the wide range of challenges that have arisen in the wake of *Matter of A-B-*. Practitioners should reach out to The Advocates with any questions or concerns on representing asylum seekers potentially impacted by this decision.

¹⁰⁵ *Id.*

¹⁰⁶ DEBORAH ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* 14 (2d ed. 1992); T. David Parish, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of Refugee*, 92 COLUM. L. REV. 923, 928–29 (1992).

¹⁰⁷ See *Matter of Acosta*, 19 I&N Dec. 211, 232–33 (BIA 1975) (“The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.”); *Matter of L-E-A-*, 27 I&N Dec. 40, 42 (BIA 2017) (“A determination whether a social group is cognizable is a fact-based inquiry made on a case-by-case basis, depending on whether the group is immutable and is recognized as particular and socially distinct in the relevant society.”); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 251 (BIA 2014) (“Social group determinations are made on a case-by-case basis.”).

¹⁰⁸ See *Matter of Acosta*, 19 I&N Dec. 211, 232–33 (BIA 1975).

ADDITIONAL RESOURCES FOR POST A-B- ADVOCACY

Appendix A:

Case Law on Government's "Inability or Unwillingness to Protect"

The AG in *Matter of A-B-* cites *Galina v. I.N.S.*, 213 F.3d 966 (7th Cir. 2000) in support of his assertion that an asylum seeker must show government acquiescence in persecutor actions, or "complete helplessness" on the part of the government to protect against such actions. *Galina* was an appeal from a Deportation order. At issue was the review of the INS reliance on statements in the U.S. State Department's 1998 Country Report for Latvia in support of its finding that conditions in the country had improved such that the petitioner, a Russian Jew living in Latvia, could no longer have a reasonable fear of persecution if she was returned. The Seventh Circuit found that the Report was insufficient to rebut the presumption that the petitioner had well-founded fear of persecution if returned to Latvia.

The Court stated "a finding of persecution ordinarily requires a determination that government authorities, if they did not actually perpetrate or incite the persecution, *condoned* it or at least demonstrated a *complete helplessness* to protect the victims." (Emphasis added). Note, however, that this is not the holding of *Galina*. The Court uses this language while recognizing that the BIA found that the petitioner had been the victim of persecution notwithstanding the police response to her husband's call reporting threatening phone calls.

Furthermore, the AG still uses the "unable or unwilling to control" language in his *Matter of A-B-* opinion ("an applicant for asylum on account of her membership in a purported particular social group must demonstrate . . . (3) that the alleged harm is inflicted by the government of her home country or by persons that the government is unwilling or unable to control." *Matter of A-B-*, at 320. However, this language is tempered by his gratuitous comment that "[w]hile I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address. The mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim." *Id.* at 320.

I. EIGHTH CIRCUIT CASE LAW

1. *Menjivar v. Gonzales*, 416 F.3d 918 (8th Cir. 2005)

Facts: Petitioner had rejected romantic advances by a gang member named Moncho. She was subsequently shot at by an unidentified man while walking with her grandmother and niece. Her grandmother was killed and her niece severely injured. Police were called but the nearest police station was an hour and a half away, and the police did not arrive until two hours after the shooting. A bystander reported that Moncho was responsible for the shooting and that he wanted to kill the petitioner because she refused to be his girlfriend. Moncho did not reappear

in petitioner's town, although about a year and half after the shooting she heard that he was looking for her, and she moved away.

Opinion: The Court determined that Moncho's actions should not be considered persecution attributable to the government of El Salvador because police responded to the shooting incident, and evidence was presented that Moncho knew the police were looking for him. The Petitioner submitted several newspaper articles describing the gangs in El Salvador in support of her contention that the police were "unable or unwilling" to control Moncho. However, the Court rejected the contention that those materials could override the evidence that the police conducted a thorough investigation of Moncho's criminal acts. The Petition was denied.

In reviewing the definition of "persecution" adopted by the BIA, the Court noted that it accepts as reasonable the BIA's view "that an applicant seeking to establish persecution by a government based on violent conduct by a private actor must show more than 'difficulty . . . controlling' private behavior." *Id.* at 921, quoting *In re Mullen*, 17 I. & N. Dec. 542, 546, 1980 WL 121935 BIA 1980). "Rather, the applicant must show that the government 'condoned it or at least demonstrated a complete helplessness to protect the victims.'" *Id.*, quoting *Galina v. INS*, 213 F.3d 1027, 1034 (7th Cir. 2000).

Analysis: Significantly, the articulation delineated above is an outlier relative to the standards utilized by other circuit courts and the BIA. Even in the Eighth Circuit, this higher standard is applied inconsistently. However, practitioners in the Eighth Circuit should be prepared to argue against with this heightened standard.

2. *Saldana v. Lynch*, 820 F.3d 970 (8th Cir. 2016)

Facts: The petitioner, his wife and children petitioned for review of the BIA's denial of their asylum application after the application was denied because the BIA determined that the petitioner lacked a well-founded fear of persecution or repatriation due to the Mexican government's unwillingness or inability to control certain gang members. These gang members targeted the family because two family members dated rival gang members.

Opinion: The Court ruled that to establish persecution based on actions of a private person, an applicant must show "that the government either condones the conduct or is unable to protect the victims." *Id.* at 976. "Whether a government is 'unable' to control a private actor such that nongovernmental actions constitute persecution 'is a factual question that must be resolved based on the record in each case.'" *Id.* Here, the petitioners did not report a home invasion and abductions until one to two months after the incidents, and evidence showed that the police did act on their complaint and continued to investigate. The court ruled that the fact that the police were unable to solve the crime does not dictate a finding that the government is unable to control persecution by the gang. *Id.* "But a government that is 'unable' to control criminal activity cannot mean anything and everything short of a crimefree society; the standard is more akin to a government that has demonstrated 'complete helplessness' to protect victims of private violence." *Id.* at 976. The Petition was denied.

Analysis: This case uses the “complete helplessness” language to further define what is meant by a government that is “unable” to control criminal activity. It is useful, however, in that it repeats that whether a government is “unable” to control such activity is a factual question that must be resolved based on the record of each case, reaffirming that this is well-established law.

However, in its analysis of the facts, the Court consistently evaluated whether the actions undertaken by the police supported a finding that the government was “unable or unwilling to control” the private actor, using that language throughout the remainder of the opinion to describe the standard against which the government’s activity must be measured. In its holding denying review of the BIA’s denial of petitioner’s application for asylum, the Court held that “we do not believe that a reasonable factfinder was compelled to conclude that the government of El Salvador was ‘unable or unwilling’ to control [the perpetrator], such that his criminal activity must be attributed to the government . . .” *Id.* at 922.

Analysis: Despite the Court’s citation to *Galina*, and its assertion that an applicant must show that the government condoned the violence perpetrated against the applicant, or at least demonstrated a “complete helplessness” to protect victims, the Court consistently uses the “unable or unwilling to control” standard in reviewing the government’s role in the violence. Nowhere does the Court indicate that *Galina* raises the burden on an asylum seeker from the “unable or unwilling to control” standard to something that requires a higher showing of acquiescence on the part of the government. Additionally, the Court states that whether a government is “unable or unwilling to control” private actors is a fact-based inquiry that must be reviewed on a case-by-case basis, affirming that this is well-established law.

3. *Gathungu v. Holder*, 725 F.3d 900 (8th Cir. 2013)

Facts: Petitioner, wife, and two young daughters petitioned for review of the BIA order denying asylum and withholding of removal. Petitioner defected from the Mungiki group in Kenya; he had been beaten and tortured prior to defection to the U.S. when the Mungiki suspected he wanted to leave. Petitioner filed a claim for asylum based on his persecution and his wife and daughter’s fears of kidnapping and forced female genital mutilation (“FGM”) by the Mungiki if they returned to Kenya. Petitioner offered evidence that his sister had been forced to undergo FGM when she would not tell Mungiki where petitioner had gone.

Opinion: “To be eligible for asylum, an applicant must show that she is unable or unwilling to return to her country of origin ‘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.’” *Id.*, at 906, quoting *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 577 (8th Cir. 2009) (quoting 8 U.S.C. § 1101(a)(42)(A)). “[P]ersecution’ requires the harm applicant fears to be inflicted either by the government of a country or an organization that the government was unable or unwilling to control.” *Id.*, quoting *Salman v. Holder*, 687 F.3d 991, 994-95 (8th Cir. 2012). “Whether the Kenyan government is unwilling or unable to control the Mungiki is a question of fact.” *Id.* at 907. Here, the record contained numerous reports detailing the murders of defectors and formation of Mungiki death squads. Reports also suggested the Kenyan government was complicit in attacks by Mungiki, and that the Kenyan police force is widely corrupt, with some

members bribed by Mungiki or Mungiki members themselves. The Court found that Mungiki defectors were a “particular social group” for purposes of their asylum application, and that the record supported the conclusion that the Kenyan government was “unable or unwilling” to stop the Mungiki’s attacks on defectors. The case was remanded to allow testimony from the applicant’s sister regarding the applicant’s membership in Mungiki and his subsequent defection, as well as on fears of harm to him and his family if he returned to Kenya. The court concluded that the sister’s testimony was very significant and would likely change the result in this case.

Analysis: This case is significant because the Eighth Circuit found that an applicant could possibly meet the burden of showing that the government of his home country was “unable or unwilling to control” the activity of non-government actors that caused his persecution. Note that the Court does not use the “complete helplessness” language, and that the country conditions evidence submitted by Petitioner was considered essential to the Court’s conclusions re: government protection.

4. Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007)

Facts: Petitioner sought asylum on grounds of persecution due to her sexual orientation in her home country of Uganda. The Immigration Judge, and the BIA in affirming the IJ’s decision denying application for asylum, limited analysis of the facts to whether actions suffered by petitioner amounted to persecution at the hands of government officials. The record indicated that petitioner had been injured by a mob attacking a meeting of lesbian women and was subjected to a family-arranged rape. The IJ found that the attack and incidents at school were isolated and did not rise to the level of persecution and that the rape was “private family mistreatment” not in any way government sponsored or authorized abuse.

Opinion: The Court found that the IJ failed to make any findings as to whether the government was “unable or unwilling to control person who had harmed, or would harm” the petitioner, and that, therefore, the BIA should have remanded the case to the IJ for further factfinding on this issue. The Court therefore remanded the petition because the IJ erred in concluding that to qualify for asylum, the petitioner had to demonstrate persecution at the hands of government officials. “Persecution may be ‘a harm to be inflicted either by government of a country or by persons or an organization that the government was unable or unwilling to control.’” *Id.* at 1118 (quoting *Suprun v. Gonzales*, 442 F.3d 1078, 1080 (8th Cir. 2006)).

Analysis: This case demonstrates that sufficient fact-finding must be done by the IJ on the issue of whether a government was “unable or unwilling to control” persons who had harmed, or would harm, the petitioner. Note also that the Court did not invoke the “complete helplessness” language in its opinion.

5. Maria Dolores Fuentes-Erazo v. Sessions, 848 F.3d 847 (8th Cir. 2017)

Facts: Petitioner citizen of Honduras sought asylum, withholding of removal, and relief under the Convention against Torture (“CAT”). Petitioner testified that she was repeatedly beaten and raped by a domestic partner. She did not report abuse to police because the nearest police

station was three hours away, it was uncommon for people in her village to report things to the police, and she was afraid her partner would take revenge on her. The IJ found that petitioner left the perpetrator with their son and continue to live in Honduras for five years, moved freely to different locations, had employment, had no contact with the perpetrator after she left him, and that he had no interest in locating her. The IJ determined that she would be able to relocate within Honduras to avoid her persecutor if she were returned. In denying her application for asylum, the IJ also found that while the documentary evidence showed a lot of difficulty on the part of the Honduran government in addressing the problems of domestic violence, and the government was “not helpless.” Further, the petitioner never gave the government the opportunity to try to protect her because she never called the police. The BIA dismissed her subsequent appeal.

Opinion: In its discussion of the petitioner’s identification as a member of a particular social group of Honduran women in domestic relationships who are unable to leave their relationships, the Eighth Circuit distinguished the facts in the present case from those in *Matter of A-R-C-G-*, where the petitioner in that case attempted to flee her relationship several times but was tracked down each time by her husband, who threatened to kill her. The Court also concluded that the Petitioner “had not established that the government generally consents to or acquiesces in domestic violence,” citing *Garcia v. Holder*, 746 F.3d 869, 873 (8th Cir. 2014). See above suggestions regarding combatting the use of a heightened burden of proof in showing government inability or unwillingness to protect asylum seekers. The Court further stated that the “[i]nability to control private actors is an imprecise concept that leaves room for discretion by the [BIA],” quoting *Saldana v. Lynch*, 820 F.3d 970, 977 (8th Cir. 2016). The Petition was denied.

Analysis: Even though the Court concluded that the petitioner failed to establish that she was a member of a recognized social group, or that the Honduran government “will consent to or acquiesce in her mistreatment” in denying her petition for review, this case should not stand for any deviation from the established “unable or unwilling to control” standard for asylum seekers. The quoted *Garcia* language was contained in the *Garcia* court’s discussion of the petitioner’s claim for relief under the Convention against Torture, which is a more onerous standard than that for asylum and requires a showing that the government consented to or acquiesced in torture. The Court appears to conflate the two standards in its analysis of the petitioner’s claims.

6. *Khrystodorov v. Mukasey*, 551 F.3d 775 (8th Cir. 2008)

Facts: Ukrainian citizens sought asylum alleging persecution on account of their Baptist faith at the hands of a private organization that petitioner asserted was supported by the government.

Opinion: The Eighth Circuit denied Petitioners’ petition for review of BIA’s order dismissing their appeal from IJ’s denial of their applications for asylum, withholding of removal, and relief under CAT. The Court rejected petitioner’s assertion that the Ukrainian government “condones their harassment or tolerates violence by the group.” *Id.* at 783. Citing *Menjivar*, the Court noted that eligibility for asylum “requires proof of persecution by the government or an organization that

the government is unable or unwilling to control or that the government either condones or is helpless to protect against.” *Id* at 783.

Analysis: Here, the court seems to assert that showing either (1) that the government is unable or unwilling to control the perpetrator of violence, or (2) that the government condones or is helpless to protect against the violence, satisfies this prong of the analysis.

II. PROPOSED DHS REGULATIONS

Before turning to the BIA opinions, we would like to refer to the 2000 proposed Department of Justice (INS) regulations that reflect the cumulative jurisprudence and standard developed by the BIA and circuit courts over the years. Although the regulations proposed in 2000 regarding the asylum and withholding definitions have not been finalized, they confirm, based on the principles established by prior precedent, the highly factual nature of the cases involving private actors. They serve as a helpful outline to advocates considering what to include in creating a record regarding lack of government protection. In the Preamble, the Department states:

“[T]he decisionmaker should consider the government’s policies with respect to the harm or suffering at issue, and what steps, if any, the government has taken to prevent the infliction of such harm or suffering. In addition, the decisionmaker should consider what kind of access the individual applicant has to whatever protection is available, and any steps the applicant has taken to seek such protection. Any attempts by an applicant to seek protection within the country of persecution are relevant but are not determinative of the state’s inability or unwillingness to control the infliction of suffering or harm. An applicant’s failure to attempt to gain access to protection is not in itself determinative of the state’s inability or unwillingness to control nor does this failure bar an applicant from establishing by other evidence the state’s inability or unwillingness to control the infliction of suffering or harm. The adequacy of access to protection may vary within a given society depending on the individual applicant’s circumstances and general country conditions. For example, in some countries, there generally may be reasonable access to state protection, but an applicant’s access to such protection may be limited if the persecutor is influential with government officials. As another example, in some countries a female victim of spousal abuse may be able to obtain state protection if she has the support of her family of origin in seeking it, but her access to such protection may be more limited without such support. In each case, all factors relevant to the availability of and access to state protection should be examined in determining

whether the government of the country in question is unwilling or unable to protect the applicant from a nonstate persecutor.”¹⁰⁹

The proposed definition of “persecution” also outlines the same framework as above for determining whether the government is unable or unwilling to control the nonstate actor:

“[i]n evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, the immigration judge or asylum officer should consider whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the state protection that exists.”¹¹⁰

Significantly, the focus of these regulations is the adequacy of access to protection for the persecuted, rather than complete helplessness on the part of the government to control nonstate persecutors.

III. BIA OPINIONS

1. *In re O-Z- & I-Z-, 22 I&N Dec. 23 (BIA 1998)*

A Jewish resident of Ukraine was repeatedly subjected to physical assaults, vandalism to his property and humiliation of his son at school by Ukrainian nationalists. The government asserted that the violence was not government-directed or condoned and that the country conditions demonstrated that anti-Semitism ceased to be a government policy. Both the Immigration Judge and the BIA on appeal found to the contrary. The police in Ukraine did nothing to assist the persecuted individual beyond filing a report. The BIA also gave significant weight to the evidence of country conditions demonstrating that local officials take no action against those who foment ethnic hatred. The Board made its findings despite reports that the Ukrainian government was officially speaking out against anti-Semitism. Based on the country conditions in the record, as well as the experience of the particular applicant, the Board found that the INS failed to rebut the presumption of a well-founded fear or persecution based on prior persecution suffered by the asylum seeker.

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

In cases where the applicant did not seek government protection, the BIA, consistent with numerous Circuit Court decisions, has found that the applicant may succeed in showing lack of government protection if she can demonstrate that seeking government protection would be futile, under the facts and circumstances of the particular case. The decision in *In re S-A-* is an example of the BIA’s analysis where government protection was not sought. In this decision, the BIA did not articulate helplessness as the standard for finding government’s inability or unwillingness to control private persecutors. Rather, it considered the specific facts of the case

¹⁰⁹ 65 Fed. Reg. 76,588 (Dec. 7, 2000).

¹¹⁰ *Id.* at 76,591.

to determine whether reasonable protection was available to the alien. In this case, a young Muslim woman in Morocco consistently experienced physical and emotional abuse from her father, who followed strict Islamic beliefs. The young woman, however, adhered to far more liberal beliefs. Although the young woman never sought protection from the police, the court found that in the Moroccan society such efforts would have proven futile and even dangerous. The court considered various reports on the country conditions that demonstrated the law in Morocco was skewed against women and violence against women was commonplace without legal remedies available to survivors.

In this decision, like in many others, the BIA reiterated a general principal that the AG completely overlooks. Namely, the Board pointed out that, when adjudicating an alien's eligibility for relief, decisionmakers "are mindful of 'the fundamental humanitarian concerns of asylum law'" (citing *Matter of S-P-*, 21 I&N Dec. 486, 492 (BIA 1996)).

3. *In re H-*, 21 I&N Dec. 337 (BIA 1996)

Furthermore, the BIA found that persecution may occur whether or not a functioning government exists. For instance, in *In Re H-*, 21 I&N Dec. 337 (BIA 1996) (quoting *Matter of Villalta*, 20 I & N. Dec. 142 (BIA 1990)) the government recognized that a Somali individual persecuted because of his clan membership should receive asylum. In *In re H-*, the applicant became a victim of interclan violence in Somalia after power shifted from his clan to rival clans. Despite some efforts by the United Nations, [Somali] authorities "have often withdrawn from their historical function, leaving the clans and sub-clans without the restraints that would serve to protect human rights." *Id.* at 345. In analyzing the total lack of protection in this case, the BIA did not resort to a "helplessness" or "condoning" threshold for its analysis.

4. *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996)

A young woman, a member of the Tchamba-Kunsuntu Tribe of northern Togo, resisted forced FGM, fled the country and applied for asylum in the United States. The applicant was forced by her family into a polygamous marriage that required her to undergo severe genital mutilation before the marriage could be consummated. According to her testimony, upon return to Togo, the police would return her to her husband, a prominent member of the police. Upon examining evidence in the case, including reports regarding country conditions, the Court found that in Togo, women remain without effective legal recourse" and may face threats to their freedom, threats or acts of physical violence, or social ostracization for refusing to undergo this harmful traditional practice." *Id.*, at 361-362. The Board emphasized the President's poor human rights record and that government forces have been known to engage in human rights abuses. The Board outlined the particular social group in this case as "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice." *Id.*, at 365. The persecutors are imposing harm at least in part in order to "overcome" (pursuant to *Matter of Acosta*) the sexual characteristics of the female members of this social group.

5. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014) (rescinded and replaced by *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

A Guatemalan woman with three minor children was seeking asylum to avoid abhorrent physical and emotional abuse from her spouse. The Board recognized in this case the particular social group defined as “women in Guatemala who are unable to leave their relationship.” The Board found it significant for purposes of its analysis that the respondent made efforts to seek protection from the police but was unable to receive protection because the police refused to “interfere” in a marital relationship. The Board noted factors to be considered in determining whether governmental protections are available to an alien, including “evidence . . . [of] whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors.” *Id.* at 394. Notably, Guatemala has laws in place against domestic violence. However, enforcement of the law is problematic because, for various reasons, the police do not always respond to requests for assistance. The case was remanded for the respondent to prove that the government was unable or unwilling to protect her. However, the Board’s analysis indicated its favorable outlook on the respondent’s case.

6. *In re Juan Manuel Montesinos, AXX XX9 304, 2008 WL 655977 (BIA Feb. 12, 2008)*
(unpublished opinion)

This case provides helpful dicta, as the facts of the case are less important (a criminal deportee to El Salvador who rejected a gang lifestyle). The Board articulated a standard in this case that underscores a spectrum of analysis in this type of cases. The BIA opines: “an asylum applicant seeking to establish persecution by a government based on violent conduct of a private actor must show more than difficulty controlling private behavior; the applicant must show the government’s acquiescence in the persecutor’s acts or its inability or unwillingness to investigate and punish those acts, and not just a general difficulty preventing the occurrence of particular future crimes.” Mere difficulty is not enough in the Board’s opinion, and there is a whole host of issues between acquiescence and mere difficulty. And within that range is where “unwillingness or inability” to protect lies. In another unpublished opinion, the Board determined that where an abused unmarried Honduran woman was able to obtain a restraining order against her abuser but was not always able to reach the police for reasons unrelated to the police willingness to respond to her, the applicant failed to meet her burden of proof. *In Re: Yessica Rusio Alvarado-Euceda Jessica Yarexi Rivas-Alvarado Roberto Jahir Giron-Alvarado, 2015 WL 7074213 (BIA 2015)*. Again, specific factual situations are key in resolving issues in these cases. Complete helplessness is never the underlying rationale in BIA’s decisions.

7. *In re V-T-S-, 21 I. & N. Dec. 792 (BIA 1997)*

Tensions in the BIA’s decisions are illustrated well in *In re V-T-S-*, where the applicant was denied asylum. The majority found that the Filipino government afforded the applicant, a wealthy Filipino-Chinese citizen and his family, extraordinary protection against persecution by a guerrilla group, the Moro National Liberation Front (“MNLF”). The applicant and his family were allegedly persecuted for his political activities. In the eyes of the majority, the government mounted a massive rescue effort on the applicant’s behalf in the instances that his siblings were kidnapped

by MNLF. Several members of the Board, however, including its Chairman, dissented, viewing evidence of kidnappings themselves and other factors as sufficient to show the government's reluctance to protect wealthy Filipino-Chinese persons and a specific inability of the police to provide effective protection to the applicant. *Id.* at 803. One of the dissenting members expressed skepticism that good faith efforts on the part of the government to render assistance negates the government's inability or unwillingness to control Muslim separatist groups. *Id.* at 810. The Board members finds that "[a]fter-the-fact intervention seems a far cry short of "control." *Id.*

Appendix B: Practice Advisories and Trainings on Advocating for Asylum Seekers

After Matter of A-B-

Recorded Webinars:

The Advocates for Human Rights post *Matter of A-B-* webinar, conducted in collaboration with former Immigration Judge Jeffrey Chase:

<https://gpmevents.webex.com/gpmevents/lsr.php?RCID=bcc1ee9bab11c9ff51edf09fb03a8ef5>

NIJC post *Matter of A-B-* webinars and Practice Advisory:

<https://immigrantjustice.org/matterofab>

Note that additional The Advocates for Human Rights post *Matter of A-B-* resources are posted to Immigrant Advocates Network.

Practice Advisories:

National Immigrant Justice Center gender-based asylum page:

<https://immigrantjustice.org/resources/genderbasedasylumclaimsandaftermatter-rcg?q=resources/resourcesgenderbased-asylum-claims>

National Immigrant Justice Center amicus brief on government protection prong of Refugee Definition:

http://immigrantjustice.org/sites/immigrantjustice.org/files/Unable%20to%20Leave%20Amicus%20Brief-5COA-2016_0.pdf

ACLU Advisory on Grace v. Whitaker can be viewed [here](#).

Please note that the Center for Gender and Refugee Studies has many resources available to volunteer attorneys. To access these resources, attorneys can make a technical assistance request via the CGRS [link](#).

Appendix C: Sources to Demonstrate that Gender-Based Violence is Influenced by Societal Norms¹¹¹

NGO/Government Sponsored Research Reports

Equality Institute, Piecing Together the Evidence on Social Norms and Violence against Women (2017)

- Link to PDF: <https://static1.squarespace.com/static/5656cae6e4b00f188f3228ee/t/59e6d1fe9f8dceb811b67f50/1508299266604/Social+Norms+Booklet+Final.pdf>

KIND, Neither Security nor Justice: Sexual and Gender-based Violence and Gang Violence in El Salvador, Honduras, and Guatemala (2017)

- Link to PDF: https://supportkind.org/wp-content/uploads/2017/05/Neither-Security-nor-Justice_SGBV-Gang-Report-FINAL.pdf

KIND, Latin America Working Group Education Fund, & Women's Refugee Commission, Sexual and Gender-based Violence (SGBV) & Migration Fact Sheet (2018)

- Link to PDF: <https://supportkind.org/wp-content/uploads/2019/02/SGBV-Fact-Sheet.-December-2018-new-1.pdf>

OXFAM, Breaking the Mould: Changing Belief Systems and Gender Norms to Eliminate Violence against Women in Latin America and the Caribbean (2018)

- Link to PDF: <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620524/rr-breaking-the%20-mould-250718-en.pdf>

OXFAM, 'Let's Stop Thinking It's Normal': Identifying Patterns in Social Norms Contributing to Violence against Women and Girls Across Africa, Latin America and the Caribbean and the Pacific (2018)

- Link to PDF: https://d1tn3vj7xz9fdh.cloudfront.net/s3fs-public/file_attachments/rr-lets-stop-thinking-normal-evaw-social-norms-251118-en.pdf

¹¹¹ Many thanks to The Advocates' staff working on women's human rights for providing many of these resources.

- Discusses attitudes in Bolivia, Colombia, Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Nigeria, Papua New Guinea, Solomon Islands and Tunisia

Pan American Health Organization & CDC, Violence against Women in Latin America and the Caribbean: A Comparative Analysis of Population-Based Data from 12 Countries (2012)

- Link to PDF: <https://www.paho.org/hq/dmdocuments/2014/Violence1.24-WEB-25-febrero-2014.pdf>
- Executive Summary on pages xv-xx

World Health Organization/London School of Hygiene and Tropical Medicine. Preventing intimate partner and sexual violence against women: taking action and generating evidence. Geneva, World Health Organization, 2010.

Discussion of the community and societal risk factors for IPV, e.g., male dominance, societal acceptance of wife beating, etc. This elaborates on some of what was discussed in a Chapter on “Violence by Intimate Partners” in the WHO World Report on Violence and Health (2002).

Irena Lieberman, Women and Girls Facing Gender-Based Violence, and Asylum Jurisprudence, 29 Hum. Rts. 9 (2002).

“An age-old false distinction between the ‘public and private spheres’ continues to infect our perceptions of who does and does not merit international protection.” This is from a 2002 article, so suggests that the AG’s view is a throwback to what was long-ago identified as a problem and one inconsistent with US obligations under the UN Convention relating to the Status of Refugees.

Naila Kabeer, Violence against Women as ‘Relational’ Vulnerability: Engendering the Sustainable Human Development Agenda, 2014 UNDP Human Development Report Office OCCASIONAL PAPER.

“Studies have shown that violence against women tends to be higher in societies and communities that associate ideas about manhood with dominance and aggression, and in which men control family wealth, family decision-making structures are highly patriarchal, and there are divorce restrictions on women. In addition, societies characterized by very rigid models of gender roles and the division of labour, often backed by strict controls over women’s sexuality and reproductive capacity, also tend to produce higher levels of violence than others.” Pg. 13.

WHO Intimate Partner Violence Fact Sheet

Notes the societal and community factors that raise the risk of IPV, e.g., gender inequitable social norms (especially those that link manhood to dominance and aggression), low social and economic status of women, weak legal sanctions against IPV, broad social acceptance of violence to resolve conflict.

Guedes S. Bott, A, Goodwin M, Mendoza JA (2012) *Violence Against Women in Latin America and the Caribbean: A comparative analysis of population-based data from 12 countries*. Washington, DC: Pan American Health Organization.

“Policy makers and programmers should address norms and attitudes in the region that support gender inequity or that view violence against women as a ‘private matter.’ These norms are still widespread in many parts of the region.”

Lori Heise and Claudia Garcia-Moreno *Violence by Intimate Partners*, in *World Report on Violence and Health*, World Health Organization, 2002: 87-121.

“In more traditional societies, wife-beating is largely regarded as a consequence of a man’s right to inflict punishment on his wife . . . In developing countries, many women agree with the notion that men have a right to discipline[.]” 94-95.

Bonita Meyersfeld, *Domestic Violence, Health, and International Law*, 22 *Emory Int'l L. Rev.* 61 (2008)

Notes state resistance to regulating private matters, which, with respect to IPV, diminishes women’s ability to vindicate their rights.

Nandita Bhatla, Nata Duvvury and Swati Chakraborty. 2010. “Women’s vulnerability, risk and social protection: an exploration of links between property ownership and domestic violence” in S. Cook and N. Kabear, eds., *Social protection as development policy: Asian perspectives*. New Dehli: Sage Publications

Article discusses the connections between women’s property ownership rights and their risk of domestic violence. Findings from this study suggest that increased ownership of property is inversely correlated with their risk of domestic violence.

Stephanie R. Montesanti, and Wilfreda E. Thurston. “Mapping the Role of Structural and Interpersonal Violence in the Lives of Women: Implications for Public Health Interventions and Policy.” *BMC Women’s Health* 15 (2015): 100. PMC. Web. 13 July 2018.

Article discusses “how structural and symbolic violence contributes to interpersonal violence against women; and . . . the relationships between the social determinants of health and interpersonal violence against women.”

A Vandello, Joseph & Cohen, Dov. (2003). *Male Honor and Female Fidelity: Implicit Cultural Scripts that Perpetuate Domestic Violence*. *Journal of personality and social psychology*. 84. 997-1010. 10.1037/0022-3514.84.5.997.

Two studies explored how domestic violence may be implicitly or explicitly sanctioned and reinforced in cultures where honor is a salient organizing theme.

Jacqui True, *The Political Economy of Violence against Women: A Feminist International Relations Perspective*, 32 *Austl. Feminist L.J.* 39 (2010).

Applies political economy approach to violence against women in global context. Provides evidence that increasing women's access to productive resources and social and economic rights lessens their vulnerability to violence across all societies.

UN Materials

UNODC, *Global Study on Homicide: Gender-Related Killing of Women and Girls* (2018)

- Link to PDF: https://www.unodc.org/documents/data-and-analysis/GSH2018/GSH18_Gender-related_killing_of_women_and_girls.pdf
- Source is a little long (64 pages) but executive summary is forthcoming. Does have section on key findings on pages 10-12.

Convention on the Elimination of All Forms of Discrimination against Women, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, U.N. Doc. CEDAW/C/GC/35 (July 26, 2017).

- Link to PDF: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf

Rashida Manjoo (Special Rapporteur on Violence against Women, its Causes and Consequences), *Twenty Years of Developments to Combat Violence against Women*, U.N. Doc. A/HRC/26/38 (May 28, 2014)

- Link to Report: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/037/00/PDF/G1403700.pdf?OpenElement>
- Paragraphs 61-75 may be especially useful

Rashida Manjoo (Special Rapporteur on Violence against Women, its Causes and Consequences), *Gender-related Killings of Women*, U.N. Doc. A/HRC/20/16 (May 23, 2012)

- Link to Report: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/136/00/PDF/G1213600.pdf?OpenElement>
- Provides a more global overview of gender-related killings of women with good discussion of structural and institutional factors.