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## In re A-R-C-G-: A Game-Changer for Children Seeking Asylum on the Basis of Intrafamilial Violence

Sarah M. Winfield

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# *In re A-R-C-G-*: A Game-Changer for Children Seeking Asylum on the Basis of Intrafamilial Violence

SARAH M. WINFIELD\*

*After over a decade of advocacy on behalf of women fleeing their home countries because of horrific domestic violence, practitioners and legal scholars obtained a precedential legal victory in August 2014. In *In re A-R-C-G-*, the Board of Immigration Appeals recognized that domestic violence can constitute persecution within the meaning of the Immigration and Nationality Act, and that nationality, gender, and the inability to leave a marital relationship can form the basis of a proper social group under the Act.*

*Children fleeing intrafamilial violence, however, continue to face an uphill battle in seeking asylum. Widespread disparities in the outcomes of asylum adjudications in general demonstrate a need for uniformity and consistency. This Note argues that *In re A-R-C-G-*'s rationale applies to children's asylum claims that are based upon intrafamilial violence.*

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## INTRODUCTION

Ms. C-G-, a Guatemalan citizen, regularly experienced horrific, violent abuse at the hands of her husband over the course of ten years:

Ms. C-G-'s husband . . . beat her almost every week. . . . When she was eight months pregnant with one of their sons, her husband hit her in the stomach with such force that the baby was born prematurely and with a bruised leg. . . . On another occasion, [he] punched Ms. C-G- and broke her nose, causing her to have breathing problems and

affecting her speech. . . . [Her husband also] poured turpentine on her, lit a match, and tried to set her on fire. . . . [As a result, t]o this day, [Ms. C-G-] is unable to hear well out of her right ear and has scars on her breast. [Ms. C-G-'s husband] had affairs with multiple women, and even after moving in with one woman, he continued to demand sex from Ms. C-G-. Whenever she refused, he repeatedly raped her.<sup>1</sup>

Ms. C-G- sought help from the police on several occasions and went as far as filing a formal complaint against her husband, to no avail.<sup>2</sup> On one occasion, her husband threatened to kill her after she called the police to their home.<sup>3</sup> She repeatedly fled her husband and stayed with her father, but her husband found and threatened to kill her if she did not return to him.<sup>4</sup> On these occasions, Ms. C-G-'s husband also threatened her parents.<sup>5</sup> Ms. C-G- obtained a restraining order against her husband, which he continually violated.<sup>6</sup> Ultimately, Ms. C-G- fled to the United States because she feared for her safety and realized that the Guatemalan authorities would do nothing to help her.<sup>7</sup> Ms. C-G-'s husband continued to threaten her after she arrived in this country.<sup>8</sup>

It was against this backdrop that Ms. C-G- appealed an immigration judge's<sup>9</sup> denial of her asylum claim to the Board of Immigration Appeals ("BIA"), an appellate administrative law court that reviews immigration cases.<sup>10</sup> On August 26, 2014, the BIA issued a precedent-setting opinion in Ms. C-G-'s case that paved the way for Ms. C-G-, and potentially other domestic violence victims, to obtain asylum in the United States.<sup>11</sup>

By contrast, Rosa, a sixteen-year-old Mexican citizen whose situation was quite similar to that of Ms. C-G-, was not so fortunate.<sup>12</sup> Beginning when she was just three years old, her father beat her on a

1. Brief for the Ctr. for Gender & Refugee Studies as Amicus Curiae Supporting Respondent at 11, *In re A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014). The brief is on file with the Center for Gender & Refugee Studies.

2. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 389 (B.I.A. 2014).

3. Brief for the Ctr. for Gender & Refugee Studies, *supra* note 1, at 11–12.

4. *In re A-R-C-G-*, 26 I. & N. Dec. at 389.

5. Brief for the Ctr. for Gender & Refugee Studies, *supra* note 1, at 12.

6. *Id.*

7. *Id.*

8. *Id.*

9. An immigration judge adjudicates trial level immigration cases.

10. For more information about the administrative law structure, and the role of the immigration judge and the BIA within it, see *infra* Part I.B.

11. See *In re A-R-C-G-*, 26 I. & N. Dec. 388, 388–89 (B.I.A. 2014). The court defined a particular social group: "married women in Guatemala who are unable to leave their relationship." *Id.* For an explanation of the elements of an asylum claim, see *infra* Part I.A. To learn how this particular social group fits into the analysis, see *infra* Part II.B.

12. "Rosa" is a pseudonym. This case (hereinafter "Rosa's Case") is on file with the Center for Gender and Refugee Studies. For the sake of privacy, identifying information has been redacted. It is worth mentioning that the BIA decided this case long before its holding in *In re A-R-C-G-*. Nevertheless, this Note argues that if the BIA were to decide this case today, *In re A-R-C-G-* would mandate a different result. See Rosa's Case at 2.

regular basis, using objects such as a whip, tree branches, his fists, and a hose.<sup>13</sup> The abuse left Rosa with cuts and physical scars, caused a dislocated elbow on one occasion, and often rendered her unconscious.<sup>14</sup> Rosa's father did not permit her to seek medical treatment, and her mother prevented her from going to the police because she believed that Rosa's father had the right to abuse her.<sup>15</sup> On several occasions, Rosa attempted to escape to her grandfather's home, but her father always forcibly removed her, beating her in front of her grandfather.<sup>16</sup> Ultimately, Rosa's father threatened to kill her, causing her to flee Mexico in 1998, at the age of sixteen.<sup>17</sup> An immigration judge granted Rosa's claim for asylum, yet the BIA overturned that decision.<sup>18</sup> Both Ms. C-G- and Rosa experienced horrific violence at the hands of family members, and both lived in societies that were unwilling to protect them from that abuse. Yet, the BIA overturned the immigration judge's grant of asylum in Rosa's case,<sup>19</sup> but later paved the way for asylum in Ms. C-G-'s case.<sup>20</sup>

This Note argues that adjudicators should apply *In re A-R-C-G-* when reviewing children's intrafamilial violence-based asylum claims.<sup>21</sup> Doing so would effectuate the Convention on the Rights of the Child's ("CRC") best interests of the child standard and would be logical because children must satisfy the same statutory requirements as adults to obtain asylum in the United States. Additionally, even though intrafamilial violence against children is often viewed as distinct from gender-based domestic violence, it often has similar patriarchal roots. Thus, *In re A-R-C-G-*'s underlying rationale for protecting women applies equally to children. To demonstrate how this approach would make a meaningful difference in the adjudication of children's intrafamilial violence-based claims, this Note applies *In re A-R-C-G-*'s rationale to the facts of Rosa's case.

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13. Rosa's Case, *supra* note 12, at 2.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 6.

19. *Id.*

20. The BIA did not affirmatively grant Ms. C-G- asylum, but rather issued a precedent-setting opinion on one element of her claim and remanded her case to the immigration judge. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 388-89 (B.I.A. 2014). For more detail and a discussion of the legal implications of Ms. C-G-'s case, see *infra* Part II.

21. In the context of this Note, "domestic violence" refers to intimate partner violence, while "intrafamilial violence" refers to violence within a family unit. "Intrafamilial violence," as a concept, encompasses both intimate partner violence and child abuse.

## I. BACKGROUND

This Part provides background information on asylum law and procedure, briefly explains how the BIA applied the law in Ms. C-G-'s and Rosa's cases, and discusses the problematic lack of uniformity in current asylum adjudications.

### A. WHAT IS ASYLUM?

Asylum is a humanitarian form of immigration relief through which the U.S. government grants a specific immigration status to, and provides safe haven for, individuals who have fled extreme harm.<sup>22</sup> Individuals who obtain asylum are legally permitted to stay in the United States.<sup>23</sup> One year after a person is granted asylum, she may apply for a distinct, less temporary immigration status called lawful permanent residence (otherwise known as obtaining a green card), provided that she meets a number of statutory requirements.<sup>24</sup> For example, she must prove that she still qualifies for asylum.<sup>25</sup> By comparison, individuals who lose their asylum cases and do not qualify for other immigration relief are expelled from the United States in a legal process known as removal or deportation.<sup>26</sup> Thus, the BIA's ruling in Ms. C-G-'s case increased the likelihood that she would be able to stay in the United States permanently. Its ruling in Rosa's case, however, increased the likelihood that she would be forced to return to Mexico, where she faced further abuse.

To qualify for asylum, an individual,<sup>27</sup> regardless of age, must demonstrate that she satisfies the definition of "refugee" within the meaning of the Immigration and Nationality Act ("INA"):

The term "refugee" means [] any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on

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22. See DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* § I.I (2015).

23. *Green Card for an Asylee*, U.S. CITIZENSHIP & IMMIGR. SERV., <http://www.uscis.gov/green-card/green-card-through-refugee-or-asylee-status/green-card-asylee> (last visited Apr. 8, 2016).

24. *Id.*

25. *Id.* A detailed explanation of the statutory requirements for lawful permanent residency are beyond the scope of this Note, which is primarily concerned with asylum law.

26. Removal and deportation are formal legal terms for expelling an individual without immigration status or a valid claim to immigration relief from the United States. *Deportation*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/tools/glossary/deportation> (last visited Apr. 8, 2016); *Removal*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/tools/glossary/removal> (last visited Apr. 8, 2016).

27. See *infra* Part II.A.

account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>28</sup>

In other words, an asylum seeker must demonstrate that (1) she experienced harm in the past and/or has a well-founded fear of experiencing harm in the future that rises to the level of persecution; (2) a listed category applies to her; and (3) her abuser persecuted her on account of her membership in that category, a requirement known as nexus.<sup>29</sup> Documentation of social, legal, and other pertinent conditions in the applicant's home country is essential to establishing these elements.<sup>30</sup>

As this Note explains in further detail below, membership in a particular social group was the crucial element in Ms. C-G-'s and Rosa's cases. In *In re A-R-C-G-*, the BIA did not ultimately grant Ms. C-G- asylum, but rather paved the way for her to win her case on remand to the immigration judge by ruling favorably on the particular social group element.<sup>31</sup> Specifically, the BIA found that Ms. C-G- belonged to the particular social group of "married women in Guatemala who are unable to leave their relationship."<sup>32</sup>

By contrast, the BIA held that Rosa did not belong to a particular social group.<sup>33</sup> This holding reflects the fact that, at the time, the BIA did not acknowledge that domestic and intrafamilial violence could be tied to specific, identifiable characteristics that set their victims apart from other groups in societies. Now that the BIA has recognized that intimate partner violence may be connected to membership in a particular social group, there is a strong argument that its logic should also apply to children's intrafamilial violence-based asylum claims.

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28. 8 U.S.C. § 1101(a)(42) (2016).

29. Procedures for Withholding of Asylum and Removal, 8 C.F.R. § 208.13(b) (2016); REGINA GERMAIN, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 255 (6th ed., 2010). This is an intentionally broad overview. Detailed descriptions of each element of an asylum claim, and of the additional procedural and evidentiary requirements, could fill a treatise in and of themselves, and are therefore beyond the scope of this Note. This Note discusses only persecution and particular social groups, as they are most pertinent to *In re A-R-C-G-*'s rationale and to this Note's argument. Additionally, this Note discusses persecution as a general concept, but does not discuss well-founded fear.

30. GERMAIN, *supra* note 29, at 96 ("Supporting or corroborating evidence regarding an applicant's claim is an essential component in every asylum case. This evidence may be in the form of expert or lay testimony, documentation from the applicant's home country, newspaper articles, or human rights reports from the Department of State, Amnesty International, Human Rights Watch, or other reputable organizations.").

31. Press Release, Ctr. for Gender & Refugee Studies, Board of Immigration Appeals Recognizes Domestic Violence as a Basis for Asylum (Aug. 26, 2014) (on file with author).

32. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 389 (B.I.A. 2014).

33. Rosa's Case, *supra* note 12, at 6. For a discussion of one example of a particular social group that could be used in Rosa's case based on *In re A-R-C-G-*'s rationale, see *infra* Part II.B.

As the following subparts demonstrate, asylum seekers face a complex adjudicatory process in which there is very little predictability.<sup>34</sup> Applying *In re A-R-C-G-* to children's intrafamilial violence-based asylum claims would ameliorate the burden that this process imposes on asylum seekers by making asylum adjudication more uniform.

#### B. MECHANICS OF THE ASYLUM PROCESS AND ADMINISTRATIVE LAW STRUCTURE

An individual may assert her asylum claim either affirmatively, or as a defense to removal from the United States. When an individual makes an affirmative claim to asylum, an asylum officer in one of the eight regional U.S. Citizenship and Immigration Services ("USCIS") asylum offices interviews her in a nonadversarial setting.<sup>35</sup> An asylum officer may choose to grant her asylum or refer her claim to a trial level immigration court, where an immigration judge will adjudicate her claim.<sup>36</sup> In the immigration court context, an individual may assert an asylum claim as a defense to the Department of Homeland Security's ("DHS") efforts to remove her from the United States, and the DHS will appoint an attorney to argue against the individual's claim before the immigration judge.<sup>37</sup> Immigration judges' and asylum officers' opinions are not published and have no precedential value, making the process all the more obscure and complex for asylum seekers.<sup>38</sup>

Both asylum seekers<sup>39</sup> and the DHS<sup>40</sup> may appeal immigration judges' decisions to the BIA. The BIA reviews immigration judges' factual findings under the clearly erroneous standard of review, but reviews de novo questions of law, discretion, judgment, and all other issues in appeals from immigration judges' decisions.<sup>41</sup> The BIA's published opinions set precedents for asylum officers and immigration judges, and apply nationwide.<sup>42</sup> Unfortunately, however, the BIA chooses not to

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34. Asylum procedure occasionally varies for children. This Note's proposal revolves around the substance and interpretation of asylum law, and only has procedural implications to the extent that it argues for an approach that would make adjudications more uniform. Therefore, such procedural complexities are beyond the scope of this Note. For more information about procedure in children's cases, and how it should change, see, for example, LISA FRYDMAN ET AL., *CTR. FOR GENDER & REFUGEE STUDIES, A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM* (2014).

35. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 *STAN. L. REV.* 295, 306 (2007).

36. *Id.* at 306–09.

37. *Id.* at 309.

38. Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 *HASTINGS WOMEN'S L.J.* 107, 109 (2013).

39. Ramji-Nogales et al., *supra* note 35, at 309.

40. GERMAIN, *supra* note 29, at 255.

41. See 8 C.F.R. §§ 1003.1(d)(3)(i)–(ii) (2016); see also *In re V-K-*, 24 I. & N. Dec. 500 (B.I.A. 2008); *In re A-S-B-*, 24 I. & N. Dec. 493 (B.I.A. 2008).

42. GERMAIN, *supra* note 29, at 349.



publish many of its opinions, which reduces the amount of guidance available to asylum officers and immigration judges.<sup>43</sup>

An asylum seeker may appeal the BIA's opinion in her case to the U.S. circuit courts of appeals, which may remand cases where the BIA issued a decision contrary to the law or abused its discretion.<sup>44</sup> Despite the fact that an asylum seeker may appeal the BIA's decision, the courts of appeals are generally deferential to the BIA.<sup>45</sup> If a court of appeals interprets the law differently from the BIA, that interpretation only applies within its own circuit.<sup>46</sup> The Supreme Court may grant certiorari to asylum seekers who have lost their cases at the circuit court level, but it rarely chooses to do so.<sup>47</sup> Thus, as a practical matter, the BIA arguably wields the most power when it comes to asylum adjudications.<sup>48</sup>

Asylum seekers, who are often indigent and speak little to no English, face an uphill battle throughout this complicated process. An asylum seeker has a basic right to seek counsel, and when she asserts her asylum claim, the U.S. Attorney General must notify her of this privilege and provide her with a list of pro bono representatives.<sup>49</sup> However, individuals in removal proceedings have no constitutional right to representation, nor will the government provide representation to an affirmative asylum seeker.<sup>50</sup> Thus, all asylum seekers—including children—face a mostly adversarial process in which they must often attempt to navigate U.S. law entirely on their own. They must frequently prepare their own cases and, in defensive proceedings, attempt to refute the legal arguments of seasoned DHS attorneys. This is a daunting task, as “the immigration laws have been termed[] second only to the Internal Revenue Code in complexity.”<sup>51</sup>

The current lack of uniformity and predictability in asylum adjudication, discussed below, aggravates the already complicated nature of this process. This lack of uniformity affects all asylum seekers, including children. The appropriate response, as this Note argues, is to make creative use of the limited precedents available to protect more individuals with colorable claims to asylum, and to make adjudications as a whole more uniform.

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43. Bookey, *supra* note 38, at 109–10.

44. Ramji-Nogales et al., *supra* note 35, at 310.

45. *Id.*

46. *Id.* at 349–50.

47. *Id.* at 310.

48. *Id.* at 349. For this reason, the discussion of the law in Part II focuses on the BIA, citing to the courts of appeals or the Supreme Court only where necessary to illustrate certain points.

49. GERMAIN, *supra* note 29, at 163.

50. *Id.* at 194–95.

51. *Id.* at 195 (quoting *United States v. Ahumada-Aguilar*, 295 F.3d 943, 950–51 (9th Cir. 2002)).

### C. CURRENT PROBLEMS IN ASYLUM ADJUDICATION: DISPARATE OUTCOMES

Well-documented disparities in asylum adjudication further exacerbate the difficulties asylum seekers face in asserting their claims. This is particularly problematic because the mistaken denial of a valid asylum claim almost always results in deportation of the asylum seeker to a country in which she is extremely unsafe.<sup>52</sup> One recent study revealed significant disparities among asylum officers, immigration courts, and federal appellate courts, as well as between geographic regions.<sup>53</sup> The authors' analysis in the study also suggests that when immigration judges are the adjudicators, factors such as prior work experience and the quality of an application's legal representation contribute to the disparate results.<sup>54</sup> Factors such as these are irrelevant to the merits of a case. The fact that they may nevertheless influence case outcomes demonstrates a lack of impartiality in asylum adjudications.

Though a detailed statistical analysis of children's asylum claims is beyond the scope of this Note, there is evidence that this problem negatively impacts case outcomes for child asylum seekers. For example, one recent study analyzed data from 3124 children's cases filed affirmatively with or adjudicated by USCIS between October 1, 2008, and April 23, 2013.<sup>55</sup> The study found that "with all variables fixed except for Asylum Office, the marginal probability [of] success (asylum granted) of a child from Latin America or the Caribbean region being granted asylum is 87% in the Arlington jurisdiction, but only 42% for children from that region by the New York Asylum Office."<sup>56</sup> Presumably children from similar regions would not experience drastically different outcomes in their cases, as country conditions are central to asylum applications. However, this data provides further proof that outcomes may in fact depend on arbitrary factors such as the geographical location of individual asylum officers. Essentially, the disparity across jurisdictions suggests that differing social and cultural norms in various regions of the country may influence individual officers' personal biases. When asylum officers allow their geographically dictated personal biases to influence case outcomes, they undermine the impartiality of the adjudicative process.

## II. *IN RE A-R-C-G*'S RATIONALE APPLIES TO CHILDREN

Adjudicators should apply *In re A-R-C-G* to children's intrafamilial violence-based asylum claims as a matter of precedent for three reasons. First, providing more protection to children with such claims would help

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52. Ramji-Nogales et al., *supra* note 35, at 296.

53. *Id.* at 372–76.

54. *Id.* at 376–77.

55. FRYDMAN ET AL., *supra* note 34, at 8 n.19.

56. *Id.* at 9 n.29.

the United States fulfill international obligations relating to children's human rights. Second, children must satisfy the same requirements as adults in order to obtain asylum. Therefore, it is only logical that substantially similar precedents should apply to children's cases, even where those precedents involve adults. Finally, the subordination and abuse of both women and children in certain societies often arises from similar patriarchal norms. Thus, using Rosa's case as an example, an analogous particular social group to that of Ms. C-G- can be articulated in children's intrafamilial violence-based asylum cases.

A. WHY PRECEDENT INVOLVING ADULTS' ASYLUM CLAIMS IS ALSO RELEVANT TO CHILDREN

As this Subpart illustrates, the United States must do more to comply with international standards on the protection of children when it comes to child asylum seekers within its jurisdiction. Applying *In re A-R-C-G-* to children's intrafamilial violence-based asylum claims would help the United States better meet international standards by providing a more predictable adjudicatory process to child asylum seekers and granting relief to vulnerable children whose claims might otherwise be denied. Applying this holding is also a sensible approach in a system that requires children to meet the same statutory requirements as adults.

1. *International Norms*

Recent treaties and developing international norms reflect the international community's growing commitment to protecting the rights of children. For example, in 1989, a United Nations ("UN") General Assembly Resolution adopted and opened for signature, ratification, and accession an international treaty on children's rights, the CRC.<sup>57</sup> The CRC mandates that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."<sup>58</sup> The treaty recognizes that children are uniquely vulnerable and need extra protection.

Subsequently, the UN's Office of the High Commissioner for Human Rights ("OHCHR") developed policies to further the CRC's goals, issuing a series of guidelines. In particular, the CRC issued the Guidelines on Determining the Best Interests of the Child, which require that the best interests of the child be a primary consideration in all actions involving children, including children's asylum and related

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57. Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

58. *Id.*

claims.<sup>59</sup> These Guidelines urge the international community to implement comprehensive child protection systems, noting that such a system “comprises laws, policies, procedures and practices designed to prevent and respond effectively to child abuse, neglect, exploitation and violence.”<sup>60</sup>

The United States has signed, but not ratified the CRC,<sup>61</sup> and therefore under customary international law is required to avoid taking action that would defeat the treaty’s purpose.<sup>62</sup> Regardless of whether the CRC is strictly legally binding, the United States has a moral obligation to apply *In re A-R-C-G*’s rationale to children’s intrafamilial violence-based asylum claims in order to better protect the interests of child asylum seekers within its jurisdiction.

## 2. U.S. System

The best interests of the child standard forms the basis of the child welfare system in the United States, yet the U.S. government does not use it as a basis for its policies concerning child immigrants.<sup>63</sup> As a result, children seeking asylum are often treated no differently than adults, meaning that they frequently face the same complex processes and procedures outlined above, and also must satisfy the same statutory definition of refugee.<sup>64</sup> Additionally, only some jurisdictions interpret the statutory definition of refugee in a manner sensitive to children’s unique needs.<sup>65</sup> An adjudicator can achieve this by, for example, adjusting questions posed to a child, taking into account her age, maturity, and development, and applying relaxed analytical standards with regard to the elements of an asylum claim.<sup>66</sup> Moreover, the BIA has not mandated child-sensitive interpretation of the refugee definition.<sup>67</sup> For the most part, children seeking asylum in the United States are left on their own as they face procedural, evidentiary, and legal barriers that are difficult even for adult asylum seekers.

Where the BIA has interpreted a statutory requirement that every applicant, regardless of her age, must satisfy in the same way, its opinions

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59. CTR. FOR GENDER & REFUGEE STUDIES, REVIEW OF GENDER, CHILD, AND LGBTI ASYLUM GUIDELINES AND CASE LAW IN FOREIGN JURISDICTIONS: A RESOURCE FOR U.S. ATTORNEYS 4 (2014).

60. U.N. HIGH COMM’R FOR REFUGEES, UNHCR GUIDELINES ON DETERMINING THE BEST INTERESTS OF THE CHILD 17 (2008).

61. *Status of Ratification Interactive Dashboard*, OHCHR, <http://indicators.ohchr.org/> (providing information on ratification status where users viewing map click on United States and scroll down list of human rights instruments to Convention on the Rights of the Child) (last visited Apr. 8, 2016).

62. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 312(3) (AM. LAW INST. 1987); *see also id.* § 312 cmt. d, i.

63. CTR. FOR GENDER & REFUGEE STUDIES, *supra* note 59, at 3.

64. FRYDMAN ET AL., *supra* note 34, at 8.

65. *Id.* at 10.

66. *Id.*

67. *Id.*

should apply with equal force to people of all ages. Additionally, applying *In re A-R-C-G-* to children's claims would effectuate the CRC's best interests of the child standard because it constitutes a procedure or practice "designed to . . . respond effectively to child abuse" that would provide an additional avenue for relief to children fleeing intrafamilial violence.<sup>68</sup> Failure to adopt this approach, on the other hand, would defeat the object and purpose of the standard because it would leave children with colorable claims to asylum vulnerable to an unpredictable, arbitrary adjudicatory process. Furthermore, as discussed below, the rationale underlying *In re A-R-C-G-*'s particular social group holding supports the articulation of analogous particular social groups in children's intrafamilial violence-based asylum cases. Ultimately, applying *In re A-R-C-G-* to children's intrafamilial violence-based asylum claims would enable the United States to use existing tools and doctrines to remedy its legal system's shortcomings.

## B. LEGAL STANDARD AND ANALYSIS

The following discussion will explain the legal standards for two elements of an asylum claim—persecution and particular social group—and their application to Ms. C-G-'s and Rosa's cases. Persecution was a straightforward issue in both cases, but will be further discussed to provide context for the analysis. The legal argument will focus primarily on membership in a particular social group, as that was key to *In re A-R-C-G-*'s rationale.

### 1. *Background: Legal Standard for Persecution*

The INA does not define persecution, nor has the BIA precisely defined it.<sup>69</sup> However, other sources provide guidance on the definition of persecution. For example, in its Handbook on Procedures and Criteria for Determining Refugee Status, the UN High Commissioner for Refugees ("UNHCR") states:

There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success. . . . [I]t may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.<sup>70</sup>

The BIA has also provided some guidance on the definition of persecution, describing it as "the infliction of harm or suffering by a

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68. See Convention on the Rights of the Child, *supra* note 57.

69. GERMAIN, *supra* note 29, at 33.

70. U.N. HIGH COMM'R FOR REFUGEES, UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 51 (1992).

government, or [by] persons a government is unwilling or unable to control, to overcome a characteristic of the victim.”<sup>71</sup> Though this explanation reflects the UNHCR’s position and clarifies who a perpetrator must be in order for harm to amount to persecution,<sup>72</sup> it is overbroad<sup>73</sup> and appears to confuse persecution with the nexus requirement, which is distinct.<sup>74</sup> On the other hand, “[t]he lack of a precise definition or enumeration of acts that constitute persecution enables adjudicators to examine the circumstances in each case.”<sup>75</sup> This broad definition provides flexibility to decisionmakers adjudicating individualized, fact-dependent asylum claims, rather than confining them to a narrow standard.

International norms and case law further illuminate the harms that rise to the level of persecution. As one author explains, “[c]ustomary international law is generally considered to forbid . . . genocide; slavery; torture and other cruel, inhuman, or degrading treatment; and prolonged detention without notice of, and an opportunity to, contest the grounds for the detention.”<sup>76</sup> Courts within the United States have held that a variety of harms, ranging from “threats to life, confinement, and torture” to “inability to earn a livelihood, travel safely within a country, and forced expulsion from the country,” might rise to the level of persecution.<sup>77</sup> Thus, a range of harms may qualify as persecution and it need not necessarily take the form of physical violence. Additionally, an act only constitutes persecution if committed by a government or by private individuals that the government is unable or unwilling to control.

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71. *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

72. In terms of private actors, the “unable or unwilling” requirement is now a well-established part of U.S. law. This Note focuses on this requirement rather than on governmental actors as perpetrators, because domestic and intrafamilial violence involve actors whom the government cannot, or will not, control.

73. The U.S. Court of Appeals for the Seventh Circuit has criticized the BIA’s lack of guidance:

[W]e do not hold that Sahi was a victim of persecution; we merely assume it in the absence of any effort by the Board of Immigration Appeals to define the word more narrowly than is plausible without the benefit of the Board’s thinking. The primary responsibility for defining key terms in the immigration statute that the statutes themselves do not define . . . is that of the Board of Immigration Appeals as the Attorney General’s delegate. . . . The Board has failed to discharge that responsibility.

*Sahi v. Gonzales*, 416 F.3d 587, 588 (7th Cir. 2005).

74. The record in *In re A-R-C-G-* illustrates this point. The immigration judge improperly conflated the legal requirements for establishing persecution with those for establishing nexus. *See, e.g.*, Brief for the Ctr. for Gender & Refugee Studies, *supra* note 1, at 14 (“Although it is relevant to nexus, the persecutor’s motive is totally irrelevant to a determination whether harms rise to the level of persecution.”).

75. GERMAIN, *supra* note 29, at 34.

76. *Id.* at 35.

77. *Id.*

a. *In re A-R-C-G-*: Domestic Violence as Persecution

In *In re A-R-C-G-*, the BIA accepted the parties' stipulation that the harm Ms. C-G- suffered rose to the level of persecution.<sup>78</sup> Indeed, as the Center for Gender and Refugee Studies ("CGRS") noted in its amicus brief, "[i]f the repeated rapes, beatings, stalking, and death threats present in this case do not constitute persecution for purposes of asylum . . . it is hard to imagine what would."<sup>79</sup> As the following Subpart demonstrates, just as domestic violence was unquestionably persecution in Ms. C-G-'s case, the intrafamilial-based violence that Rosa suffered also amounted to persecution.

b. Rosa's Case: Child Abuse as Persecution

The issue of persecution was equally straightforward for Rosa, whose father severely abused her, and whose mother facilitated that abuse. The BIA "agree[d] with the [i]mmigration [j]udge that the severe injuries sustained by the respondent rise to the level of harm sufficient to constitute persecution."<sup>80</sup> Nevertheless, the BIA went on to deny Rosa's application for asylum, identifying the "determinative issue" as "whether the harm experienced by [Rosa] was . . . on account of a statutorily protected ground."<sup>81</sup> In other words, the determination depended on whether her father harmed her because she belonged to a particular social group. Finding no cognizable social group, the BIA denied Rosa's claim.<sup>82</sup>

As discussed below, there is a strong argument that Rosa—and many other children with intrafamilial violence-based asylum claims—belong to particular social groups and therefore undoubtedly should qualify for asylum based on *In re A-R-C-G-*'s rationale. The following Subpart explains in depth the components of the particular social group element, discusses how the BIA applied this element to the facts of Ms. C-G-'s case, and finally demonstrates how it could be applied to children's cases, using Rosa's case as an example.

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78. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 390 (B.I.A. 2014). The BIA nonetheless remanded the case to the immigration judge for further factual determinations. Having accepted the parties' stipulation that Ms. C-G- had demonstrated persecution and nexus, the BIA focused its review on the issue of whether "married women in Guatemala who are unable to leave their relationship" constitutes a legally cognizable social group within the meaning of the Act. *Id.* at 392, 395.

79. Brief for the Ctr. for Gender & Refugee Studies, *supra* note 1, at 15.

80. Rosa's Case, *supra* note 12, at 5.

81. *Id.*

82. *Id.* at 6.

## 2. *The Contested Element: Legal Standard for Particular Social Group*

As noted above, an asylum seeker may win her claim if, among other elements, she can prove that she belongs to a protected category by virtue of her race, religion, nationality, political opinion, or membership in a particular social group. Of the grounds listed in the INA, “particular social group is perhaps the least well-defined and understood.”<sup>83</sup> Nonetheless, the BIA has articulated some guidelines.<sup>84</sup> For example, members of a social group must “share a common, immutable characteristic.”<sup>85</sup> In addition, the BIA has more recently noted that to establish the existence of a particular social group, an applicant must prove that the group is socially distinct within the society in question and is defined with particularity.<sup>86</sup> Finally, a social group may *not* be defined by the *type* of persecution suffered or feared, as such a formulation is “impermissibly circular”<sup>87</sup> and *should* be defined “by reference to those immutable or fundamental characteristics” that cause the persecutor to target the applicant, so that the group is not overbroad.<sup>88</sup>

A social group’s common, immutable characteristic “must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>89</sup> Examples of such a characteristic include “sex, color, or kinship ties.”<sup>90</sup> Regarding children,

the mutability of age is not within one’s control and, . . . if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual’s age places him within the group, a claim for asylum may still be cognizable.<sup>91</sup>

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83. Dep’t of Homeland Security’s Supplemental Brief at 7, *In re* [Name Redacted]. Pertinent information, such as the case name, number, and date filed have been redacted from this document. It is available at [http://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_LR\\_DHS\\_Brief\\_4\\_13\\_2009.pdf](http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf). In its brief, DHS also noted that “[t]he seminal decision interpreting the term ‘particular social group’ remains [*In re* *Acosta* . . .].” *Id.* (citing 19 I. & N. Dec. 211, 232 (B.I.A. 1985), *modified*, *In re* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987)).

84. Note that some Courts of Appeals have rejected parts of the BIA’s interpretation. Though the BIA recently responded to these Courts’ criticisms in *In re M-E-V-G-*, 26 I. & N. Dec. 277 (B.I.A. 2014) and *In re W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014), it remains to be seen how circuit courts will respond to the BIA. Practitioners representing children should be aware of these jurisdictional variations, which are beyond the scope of this Note.

85. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

86. *In re M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).

87. Dep’t of Homeland Security’s Supplemental Brief, *supra* note 83, at 6.

88. CTR. FOR GENDER & REFUGEE STUDIES, DOMESTIC VIOLENCE-BASED ASYLUM CLAIMS: CGRS PRACTICE ADVISORY 10 (2014).

89. *In re Acosta*, 19 I. & N. Dec. at 233.

90. *Id.*

91. *In re S-E-G-*, 24 I. & N. Dec. 579, 583–84 (B.I.A. 2008).



As a result, children such as Rosa, whose particular social groups are defined in part by their age, can satisfy the immutability requirement.

In addition to satisfying the immutability requirement, an asylum seeker must demonstrate that she is a member of a socially distinct group within her society. To be socially distinct, a social group need not be literally visible.<sup>92</sup> Rather, social distinction exists if “the set of individuals with the shared characteristic would be perceived as a group by society.”<sup>93</sup> This “requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way.”<sup>94</sup> Additionally, a “group’s recognition is determined by the perception of the society in question, rather than by the perception of the persecutor.”<sup>95</sup> Thus, if an immigration judge finds that an applicant’s tormentor harmed her because he viewed her as a member of a particular group, but also finds that other members of the society in which they lived would not view her as such, then the applicant will fail to satisfy the social distinction requirement.

To meet the particularity requirement, a social group must contain traits that make it clear which individuals form part of the group.<sup>96</sup> Additionally, “[i]t is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part.”<sup>97</sup> The BIA has explained: “[t]he particularity requirement clarifies the point . . . that not every immutable characteristic is sufficiently precise to define a particular social group.”<sup>98</sup> That is, “the group must . . . be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.”<sup>99</sup>

An individual need only prove that she fears harm because she belongs to one of the five protected categories in the refugee definition, and particular social group is often viewed as a last resort for applicants who do not fit into another protected category.<sup>100</sup> However, such a dismissive view of the social group category renders it meaningless when

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92. *In re M-E-V-G-*, 26 I. & N. Dec. 227, 238 (B.I.A. 2014) (“An immutable characteristic may be visible to the naked eye, and it is possible that a particular social group could be set apart within a given society based on such visible characteristics. However, [the social distinction requirement is] not intended to limit relief solely to those with outwardly observable characteristics.”).

93. *Id.* (citing *Umana-Ramos v. Holder*, 724 F.3d 667, 672 (6th Cir. 2013)).

94. *Id.*

95. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 394 (B.I.A. 2014).

96. *In re M-E-V-G-*, 26 I. & N. Dec. at 239.

97. *Id.*

98. *Id.*

99. *Id.*

100. *See, e.g.*, Marisa Silenzi Cianciarulo, *Batterers as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims*, 35 HARV. J.L. & GENDER 117, 142 (2012) (“[T]he social group category remains the ‘ugly stepsibling’ of the other four protected grounds—it is the last resort.”).

in fact it has been a crucial factor in many cases, *In re A-R-C-G-* included. Specifically, the BIA found that Ms. C-G- satisfied the complex particular social group requirements because her gender and relationship status were immutable, patriarchal norms in Guatemala cause women to be viewed as a subordinate class, and her particular social group was sufficiently specific to meet the particularity requirement.<sup>101</sup> As the discussion below demonstrates, using Rosa’s case as an example, it is possible to articulate analogous particular social groups in children’s cases because the subordination of women and children in societies often arises from the same patriarchal norms.

a. *In re A-R-C-G-*: Use of Particular Social Group in the Domestic Violence Context

In *In re A-R-C-G-*, the BIA held that, as a matter of law, “married women in Guatemala who are unable to leave their relationship can constitute a cognizable particular social group that forms the basis of a claim for asylum.”<sup>102</sup> The BIA noted that gender is an immutable characteristic, and additionally held that “marital status can be an immutable characteristic where the individual is unable to leave the relationship.”<sup>103</sup> On this point, the BIA further explained that “a married woman’s inability to leave the relationship may be informed by societal expectations about gender and subordination.”<sup>104</sup>

After addressing immutability, the BIA analyzed the social distinction requirement. The BIA held that the group was “socially distinct within the society in question.”<sup>105</sup> The court noted:

When evaluating the issue of social distinction, we look to the evidence to determine whether a society, such as Guatemalan society in this case, makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave. Such evidence would include whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors.<sup>106</sup>

Applying these evidentiary requirements to Ms. C-G-’s asylum claim, the BIA then explained that “the record in [Ms. C-G-’s] case include[d] un rebutted evidence that Guatemala has a culture of

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101. *In re A-R-C-G-*, 26 I. & N. Dec. 388, 388–93 (B.I.A. 2014).

102. *Id.* at 388. The BIA said this “can” constitute a cognizable social group because each asylum claim must be adjudicated on an individual basis and is heavy fact- and context-dependent. That is, not every Guatemalan wife who cannot leave the relationship will qualify for asylum. *Id.* at 388–89.

103. *Id.* at 392–93.

104. *Id.* at 393.

105. *Id.*

106. *Id.* at 394.

machismo,” or male chauvinism, “and family violence.”<sup>107</sup> Moreover, while laws purporting to protect domestic violence victims exist in Guatemala, the country’s National Civilian Police often fail to act on requests to assist domestic violence victims.<sup>108</sup>

Finally, the court also found that Ms. C-G’s social group was defined with particularity, stating that “[t]he terms used to describe the group—‘married,’ ‘women,’ and ‘unable to leave the relationship’—have commonly accepted definitions within Guatemalan society based on the facts in [the] case, including the respondent’s experience with the police.”<sup>109</sup> Essentially, Ms. C-G’s particular social group was narrow, specific, and included terms that reflected the role of women in Guatemalan society based on objective, expert reports and based on her personal experiences. Though the BIA did not ultimately grant Ms. C-G-asylum, it nonetheless paved the way for her to win her case on remand by directing the immigration judge to rule favorably on the particular social group element.<sup>110</sup>

It is difficult to know the exact impact of this ruling on subsequent domestic violence cases because of the “lack of publicly available information from the government on individual asylum outcomes.”<sup>111</sup> Nonetheless, there is evidence that it has had a positive impact, and “[i]n many instances, attorneys have succeeded in getting cases sent back to the immigration courts to afford women the opportunity to submit additional evidence and argument to meet the new [*In re*] *A-R-C-G*-standard.”<sup>112</sup> Additionally, an immigration judge in Artesia, New Mexico “called [*In re A-R-C-G*] ‘a textbook case’” and her decision to grant a woman asylum based on its rationale “met . . . no opposition from the [DHS].”<sup>113</sup> By contrast, children like Rosa continue to face uphill battles. As the next Subpart demonstrates, adjudicators can and should extend *In re A-R-C-G*’s particular social group rationale to children’s intrafamilial violence-based asylum claims.

b. Rosa’s Case: An Analogous Particular Social Group Can Be Articulated in the Child Abuse Context

The issues that children face in Mexico allow for the articulation of an analogous particular social group to that in *In re A-R-C-G*—that meets

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107. *Id.*

108. *Id.*

109. *Id.* at 393.

110. See Press Release, Ctr. for Gender & Refugee Studies, *supra* note 31.

111. Press Release, Ctr. for Gender & Refugee Studies, Matter of *A-R-C-G*—One Year Later (Aug. 26, 2015) (on file with author).

112. *Id.*

113. Press Release, Ctr. for Gender & Refugee Studies, First Asylum Victory from Artesia Detention Center (2014) (on file with author).

the requirements of immutability, social distinction, and particularity. Research on children's roles within the family and the limited resources available to protect them demonstrate that, just as Guatemalan women in intimate partner relationships are viewed as subordinate to their male partners, Mexican children like Rosa are often also viewed as subordinate to adult family members.<sup>114</sup> Therefore, after *In re A-R-C-G-*, there are a number of different social group formulations that can and should be applied in cases like Rosa's. The strongest formulation in Rosa's case would likely be "Mexican children who are unable to leave the parent-child relationship."

First, this particular social group contains the immutable characteristics of age and family ties. Age is beyond one's control, and an asylum claim may still be cognizable in the sense that age was beyond the applicant's control at the time of persecution.<sup>115</sup> The family relationship is immutable not only because a child is tied to her parents by biology or by adoption, but also because, as a result of patriarchal norms, children in Mexico are subordinate within their families and thus cannot escape abusive parents who will not allow them to leave.<sup>116</sup> Their situation is analogous to that of married women in Guatemala, who, as a result of social norms viewing women as subordinate within families, are unable to escape abusive partners. The fact that Rosa's parents prevented her from seeking help and thwarted her attempts to live with her grandfather provides additional evidence of children's lack of autonomy and of the immutability of the parent-child relationship.<sup>117</sup>

Second, this particular social group is distinct within Mexican society. Similar to the chauvinism and family violence that pervade Guatemala,<sup>118</sup> patriarchal norms in Mexico cause children to be "perceived as subordinate to adults" and "situated at the bottom of the family hierarchy," while "fathers and elder male relatives are situated at the top of the hierarchy."<sup>119</sup> These patriarchal norms influence the belief that both women and children are subordinate within the family and cause pervasive violence against women and children within families.<sup>120</sup> The complex gender norms

114. See UNICEF, *THE RIGHTS OF CHILDREN AND ADOLESCENTS IN MEXICO: A PRESENT DAY AGENDA 80* (2011) ("One of the causes of violence against children and adolescents in Mexico—and probably in other countries as well—is the social perception that children are the property of adults."); see also GAIL MUMMERT, *CTR. FOR GENDER & REFUGEE STUDIES, CHILD ABUSE IN MEXICO: DECLARATION OF GAIL MUMMERT* ¶ 5 (2010).

115. See *supra* note 98 and accompanying text.

116. See UNICEF, *supra* note 114, at 80 ("Viewing [children] as rights-holders and therefore, worthy of respect and care, is not a very widespread notion and achieving a true culture of rights remains a challenge.").

117. See Rosa's Case, *supra* note 12, at 4.

118. See *supra* note 92 and accompanying text.

119. See MUMMERT, *supra* note 114, ¶ 5.

120. *Id.*

involved are so pervasive that many wives and even children accept and justify male authority within the home and the violence that accompanies it.<sup>121</sup> Additionally, “mothers are frequently perpetrators of physical abuse, very often because of their own fears of abuse by a violent husband, and their subordinate status with respect to their husbands.”<sup>122</sup>

The traditional perception that children are subordinate in society and in families perpetuates a permissive attitude toward the physical and sexual abuse of children.<sup>123</sup> The view of children “as unpossessing of rights, and as necessarily obedient and subordinate to adults subject children to continuing harm *without redress*.”<sup>124</sup> Indeed, “human rights groups technically recognize children in Mexico as a vulnerable group.”<sup>125</sup> Statistics about child abuse cases in Mexico demonstrate their subordinate position in society and thus vulnerability to abuse. For example, in a 2013 Human Rights Report on Mexico, the U.S. government noted that “child abuse cases reported increased by 266 percent between 2006 and 2012.”<sup>126</sup>

Mexico’s legal system and the behavior of Mexican authorities reflect a permissive attitude toward child abuse and provide additional proof that children are a subordinate group. Legal redress for child abuse is uncommon primarily because the prejudices of “law enforcement officials, social workers, doctors and judges . . . inhibit effective legal protection [for children] because of the discretion with which [these individuals] are allowed to act with respect to child abuse.”<sup>127</sup> For example, of 24,563 complaints of child mistreatment in 2006, “only fourteen percent of those cases went on to be prosecuted.”<sup>128</sup> Given the biases and social norms surrounding the role of children in Mexican society, this severe lack of follow-through suggests that child abuse cases are a low priority for Mexican authorities. Moreover, “[b]ecause reporting suspected abuse is not mandatory under Mexican law, statistics that purport to reflect the prevalence of abuse more likely represent only a small percentage of actual instances of abuse.”<sup>129</sup> To make matters worse, parents control their children’s access to the courts until they turn eighteen, causing further obstacles to relief.<sup>130</sup> In sum, attitudes about

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121. *Id.* ¶ 6 (“Male authority is accepted and even justified by many wives and offspring, often because of fear of retaliation, deeply-ingrained underestimation of their own worth as persons and lack of knowledge of human rights.”).

122. *Id.* ¶ 11.

123. *Id.*

124. *Id.* ¶ 13 (emphasis added).

125. *Id.* ¶ 28.

126. U.S. DEP’T OF STATE, MEXICO 2013 HUMAN RIGHTS REPORT 35 (2013).

127. MUMMERT, *supra* note 114, ¶ 26.

128. *Id.* ¶ 9.

129. *Id.*

130. *Id.* ¶ 27.

children in Mexican society—which are reflected in the country’s laws and prosecutorial practices—severely inhibit children’s access to justice.

Efforts to change Mexico’s legal framework have been insufficient. Much of the time, legislation fails to adequately address the enormity of the problem of child abuse.<sup>131</sup> For example, in 2000 Mexico’s federal legislature passed the Law on the Protection of the Rights of Boys, Girls and Adolescents, in an attempt to remedy Mexico’s failure to comply with international standards on children’s rights.<sup>132</sup> This legislation is largely ineffective, as “current legal structures are still inadequate, and the principles embodied in th[e] law[] have not been implemented at the state level.”<sup>133</sup> Moreover, “aspirational laws” such as this one have overall proved unsuccessful because “effective measures and the budgetary allocations to implement them have been slow to arrive in many places and non-existent in others.”<sup>134</sup> On balance, it appears that while Mexico’s lawmakers have made some symbolic gestures, the country lacks the political will to effectively implement and enforce laws intended to protect children. As a result, the current legal regime furthers impunity for the physical and sexual abuse of children.<sup>135</sup>

Anecdotal evidence underlines the fact that, compounding the negative effect of an inadequate legal framework, government officials simply do not prioritize existing programs designed to protect women and children.<sup>136</sup> In one case, a father drowned his infant daughter as a warning to his older daughters, whom he abused physically and sexually.<sup>137</sup> After murdering the infant, he obtained a certificate from local officials claiming that the cause of death was an intestinal infection.<sup>138</sup> The Mexican authorities’ permissive attitude towards child abuse perpetuates the status of children in families as a subordinate class within Mexican society, with less rights and legal protections than adults.<sup>139</sup>

Third, the social group is defined with particularity and is not diffuse, amorphous, or overbroad. The group includes the child’s nationality—Mexican—giving the adjudicator a cultural framework in which to conduct her analysis. Additionally, rather than focusing on *all* Mexican children, this particular social group definition is narrowed to the family unit. Further, it is narrowed to children who are unable to leave that unit specifically because they cannot escape their parents. Finally, traditional views of children as subordinate within the family remain pervasive in

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131. *Id.* ¶ 23.

132. *Id.*

133. *Id.*

134. *Id.* ¶ 24.

135. *Id.* ¶ 23.

136. *Id.* ¶ 24.

137. *Id.* ¶ 17.

138. *Id.*

139. *Id.* ¶ 26.

Mexican society, making “Mexican children unable to leave the parental relationship” a group easily recognized as a narrow, specific group of individuals by other members of that society.<sup>140</sup>

In sum, expert reports on Mexican laws, social norms, and practices, as well as Rosa’s personal experiences, demonstrate that the rationale behind *In re A-R-C-G*’s holding also applies to children whose societies turn a blind eye to severe abuse based on the notion that children are subordinate within the family. Adjudicators should apply *In re A-R-C-G* when reviewing children’s claims for asylum based on intrafamilial violence for the following reasons: it would effectuate the CRC’s best interests of the child standard; children must satisfy the same statutory requirements as adults in order to obtain asylum; and analogous particular social groups can be articulated in children’s cases. Moreover, as a general matter of policy, adjudicators should seize upon any published precedent available as a means of protecting more vulnerable individuals and helping to make asylum adjudications more uniform. As the discussion below demonstrates, this policy-based approach would fulfill the legislative purpose of the Refugee Act of 1980 (“Refugee Act”) and, contrary to what some may believe, would not lead to the assertion of an overwhelming number of asylum claims.

### III. POLICY CONSIDERATIONS

There are significant policy reasons for extending *In re A-R-C-G* to victims of child abuse, rather than limiting it to victims of intimate partner violence. First, this approach comports with legislative intent. Second, the vast majority of children around the world who might qualify for asylum under *In re A-R-C-G* simply would not have the resources to come to the United States. Thus, even if such children knew about asylum law and this precedent, the approach would not result in an uptick in asylum claims. Third, as a matter of foreign policy, the appropriate response to a fear of “floodgates” is to attempt to address the roots of human rights violations rather than returning vulnerable individuals to dangerous situations.

#### A. EXTENDING *IN RE A-R-C-G* TO CHILDREN IS CONSISTENT WITH THE GOALS OF THE REFUGEE ACT OF 1980

Following World War II, decades of international humanitarian crises combined with unsettled asylum and refugee law in the United States, culminated in the enactment of the Refugee Act of 1980, which amended the INA.<sup>141</sup> The Refugee Act arose from a developing

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<sup>140</sup> *Id.* ¶ 34.

<sup>141</sup> Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 11 (1981) (“The culmination of these developments was

“consensus [favoring] a humanitarian, nondiscriminatory policy” and represented “the effort to develop a coherent and flexible refugee admission policy.”<sup>142</sup> The Refugee Act “incorporate[d] the international definition of refugee from the United Nations Convention Relating to the Status of Refugees,” and “[i]n so doing . . . eliminate[d] the geographical and ideological preferences that . . . dominated” the U.S. immigration policies in the decades following World War II.<sup>143</sup> The international definition of refugee can be found in the UN Convention Relating to the Status of Refugees (“Refugee Convention”) and reads, in relevant part:

For the purposes of the present Convention, the term “refugee” shall apply to any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.<sup>144</sup>

In essence, the Refugee Act “adopt[ed] a universal approach to refugee admissions consistent with international standards and norms,” thereby “plac[ing] primary emphasis on ‘special humanitarian concerns.’”<sup>145</sup>

A major theme underlying the Refugee Convention, on which the Refugee Act was modeled, was the idea that States recognize the importance of human rights and avoid repeating past mistakes, such as the failure to provide safe haven to Jewish people and other Holocaust victims.<sup>146</sup> A growing recognition that women’s rights are human rights contributed to the BIA’s decision to articulate a particular social group for domestic violence cases.<sup>147</sup> Similarly, developing international norms recognizing the importance of children’s rights<sup>148</sup> suggest that applying *In re A-R-C-G-* to children’s intrafamilial violence claims would fulfill the

the Refugee Act of 1980 [], the most comprehensive [U.S.] law ever enacted concerning refugee admissions and resettlement. . . . This legislation, the result of extensive efforts by Congress and the executive branch, create[d] for the first time a legal framework for the admission of refugees to the United States that is coherent, comprehensive and practical.”)

142. *Id.* at 9. It should be noted that refugees and asylum seekers are different in the eyes of U.S. law. The former are people seeking refuge in the United States from the outside, while the latter seek refuge after arriving in the United States. Both groups seek refuge because of persecution, and both must satisfy the statutory definition of “refugee.” The humanitarian concerns and crises that culminated in the passage of the Refugee Act of 1980 apply equally to both groups.

143. *Id.* at 11.

144. Convention and Protocol Relating to the Status of Refugees (1951) as incorporated into U.S. law by the United Nations Protocol Relating to the Status of Refugees (1967), art. 1, 19 U.S.T. 6223, 606 U.N.T.S. No. 267 (entered into force with respect to the United States on Nov. 1, 1968).

145. Anker & Posner, *supra* note 141, at 11.

146. Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, HARV. INT’L REV., Jan. 2015, at 46.

147. *Id.*

148. *Our History: UNICEF Past, Present and Future*, UNICEF, [http://www.unicef.org/about/who/index\\_history.html](http://www.unicef.org/about/who/index_history.html) (last visited Apr. 8, 2016).



humanitarian goals of both the Refugee Convention and the Refugee Act. Nonetheless, the Refugee Act's creators did acknowledge that the United States cannot provide refuge to an unlimited number of people.<sup>149</sup> However, as the following discussion demonstrates, applying *In re A-R-C-G-* to children's claims would not lead to an overwhelming number of asylum claims.

B. APPLYING *IN RE A-R-C-G-* TO CHILDREN WOULD NOT OPEN THE "FLOODGATES"

Some express concern that applying *In re A-R-C-G-*, which involved an adult woman, to children's cases would open the floodgates, overwhelming the U.S. immigration system and draining its resources. However, this is unlikely to occur. In a prior case, the government itself addressed—and dismissed—this argument as applied to women fleeing domestic violence.

In its supplemental brief before the BIA in *In re A-R-C-G-*, the DHS examined the possibility of a social group based on nationality, gender, marital status, and inability to leave the relationship, with domestic violence as the underlying form of persecution.<sup>150</sup> The DHS "accept[ed] that in some cases, a victim of domestic violence may be a member of a cognizable particular social group and may be able to show that her abuse was or would be persecution on account of such membership."<sup>151</sup> The DHS then addressed the implications of this approach, noting that not all domestic violence victims would be eligible for asylum because each asylum seeker would still need to prove eligibility for relief based upon the facts of her individual case.<sup>152</sup> Additionally, the DHS observed that, as a practical matter, most domestic violence victims abroad lack the resources or ability to escape to the United States in the first place.<sup>153</sup> In this vein, the DHS remarked that Canada, which recognized claims based on domestic violence in 1993, experienced a *decrease* in the total number of gender-based asylum claims asserted each year between 1995 and 1999.<sup>154</sup> Additionally, the DHS noted, though asylum officers operating under USCIS began granting asylum to domestic violence victims in 2004, the number of claims asserted before USCIS remained steady between 2004 and 2009.<sup>155</sup> Thus, women who are able to assert their domestic violence-based claims face heavy evidentiary burdens, which will limit the number who are actually granted asylum.

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149. *Id.*

150. See Supplemental Brief for the Dep't of Homeland Security, *supra* note 83.

151. *Id.* at 12.

152. *Id.*

153. *Id.* at 13 n.10.

154. *Id.*

155. *Id.*

Additionally, common sense and hard data support the conclusion that most women simply do not have the resources to assert asylum claims at all.

This reasoning applies equally to children fleeing intrafamilial violence. First, child asylum seekers, the majority of whom are indigent and speak little to no English, must represent themselves and will also face heavy evidentiary burdens. Moreover, any child who attempts to assert a successful asylum claim will be at a significant disadvantage in attempting to do so because of the intellectual limitations caused by her age. Second, children are more likely than adults to be totally economically dependent on family members simply because they are children. As a result, children fleeing intrafamilial violence are even less likely to have the resources to flee to the United States than are their adult counterparts.

For the reasons outlined above, it is highly unlikely that extending *In re A-R-C-G-* to children's intrafamilial violence-based asylum claims would lead to an overwhelming number of asylum applications. Additionally, even if an increase in applications were to occur, fear and worry are insufficient reasons to deny life-saving protection to vulnerable individuals. Moreover, protecting human rights internationally is a core part of U.S. foreign policy.<sup>156</sup> In fact, as a matter of foreign policy the United States "seeks to . . . [p]romote greater respect for human rights," including children's rights specifically.<sup>157</sup> Therefore, the appropriate response is to encourage foreign governments to address the root causes of the persecution, actively assisting them where possible.<sup>158</sup> In so doing, the United States would foster a long-term solution to the problem.

#### CONCLUSION

Adjudicators should apply *In re A-R-C-G-* when reviewing children's intrafamilial violence-based asylum claims. Children must generally satisfy the same legal standards as adults to gain asylum in the United States and this approach would effectuate the CRC's best interests of the child standard by using existing doctrine to provide more protection to children. Moreover, *In re A-R-C-G-*'s rationale is as pertinent to children as it is to women because in many countries the subordination of women to their male romantic partners is interconnected with the subordination of children to their adult family members. Finally,

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<sup>156</sup> *Human Rights*, U.S. DEP'T OF STATE, <http://www.state.gov/j/drl/hr/index.htm> (last visited Apr. 8, 2016).

<sup>157</sup> *Id.*

<sup>158</sup> See Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 120 (2007) ("[T]he response to a fear of floodgates should not be to return victims to situations where their rights will be violated, but rather to address the human rights violations that are the root cause for the refugees' claims.").

applying *In re A-R-C-G-* to children's claims would promote consistency in asylum adjudications and would effectuate the Refugee Act's humanitarian goals.

APPENDIX: LIST OF COMMON ABBREVIATIONS

USCIS	United States Citizenship and Immigration Services
DHS	Department of Homeland Security
INA	Immigration and Nationality Act of 1952
BIA	Board of Immigration Appeals
UN	United Nations
OHCHR	Office of the High Commissioner for Human Rights
CRC	Convention on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugees
CGRS	Center for Gender and Refugee Studies

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