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Gender-based Asylum Post-Matter of A-R-C-G-: Evolving Standards of the Law

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GENDER-BASED ASYLUM POST-MATTER OF A-R-C-G-: EVOLVING STANDARDS AND FAIR APPLICATION OF THE LAW

Blaine Bookey*

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INTRODUCTION

When I last studied this issue—the eligibility of domestic violence survivors for asylum in the United States—I concluded: “the absence of binding norms remains a major impediment to fair and consistent

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outcomes for women who fear return to countries where they confront unimaginable harms, or worse, death.”¹ Despite a recent decision by the highest immigration tribunal in the United States accepting that women fleeing domestic violence can meet the refugee definition and qualify for protection,² I could write the same words today. The 2014 ruling in a case known as *Matter of A-R-C-G* marked a critical advancement in U.S. law.³ Notwithstanding, in the year since that decision, arbitrary and inconsistent outcomes have continued to characterize asylum adjudication in this area of the law.

I do not mean to diminish the importance of the *A-R-C-G* precedent, a long-awaited and hard-fought victory. Issued by the Board of Immigration Appeals (BIA or Board), the decision constitutes binding precedent for immigration judges (and asylum officers) across the country who often have the final word in these life or death matters because adverse decisions are not often appealed, and if appealed, the vast majority are upheld.⁴ For thirteen years, from the vacating of the well-known and controversial *Matter of R-A* decision denying asylum to a domestic violence survivor in 2001, to the issuance of the *A-R-C-G* decision in 2014, immigration judges and asylum officers adjudicated domestic violence asylum claims without the benefit of jurisprudential (or regulatory) guidance.⁵ During that period, some

1. 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Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 110 (2013) (reviewing and analyzing unpublished decisions from immigration judges and the Board of Immigration Appeals across the country).

2. Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, 36 HARV. INT'L REV. 45, 45 (2014-15).

3. 26 I&N Dec. 388 (BIA 2014).

4. See 8 C.F.R. § 1003.1(g) (“decisions of the Board . . . shall be binding on all officers and employees of the Department of Homeland Security or immigration judges”); see also, e.g., JAYA RAMJI-NOGALES ET AL., LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY 68, 78 (2014) (discussing rates of appeals beyond the immigration court level and success of applicants in securing reversal of adverse decisions).

5. The highly publicized case of Rody Alvarado, *Matter of R-A*, has a lengthy, contentious history. After suffering a decade of brutal violence at the hands of her husband, a former soldier, Ms. Alvarado fled to the United States leaving two small children in her native Guatemala. An immigration judge granted asylum to Ms. Alvarado but the government appealed. On appeal, in 1999, the Board reversed the grant in a published decision, rejecting the gender-defined social group of “Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination,” accepted by the judge. For the next ten years, Ms. Alvarado’s case was considered by three successive U.S. Attorneys Generals. Eventually, the government reversed its position, conceding that Ms. Alvarado had established eligibility for asylum. By stipulation of the parties, the immigration judge finally, again, granted asylum on remand in 2009. During the course of her case, in 2000, the government proposed asylum regulations that would have provided guidance for handling gender cases, including removing barriers that the negative decision in Ms. Alvarado’s case presented. The gov-

immigration judges granted protection through a fair application of existing legal standards—for example, looking to the landmark *Matter of Kasinga* ruling establishing that gender-based harms (even those perpetrated by relatives or the broader community like female genital cutting in that case) could be persecution for asylum purposes.⁶ On the other hand, judges rejected domestic violence as a basis for asylum categorically, reasoning that domestic violence is “personal” or “private” in nature, and thus is not a matter of public concern or state responsibility.⁷ Women who appealed denials faced legal limbo, as the Board placed their cases on hold due to the lack of binding standards definitively recognizing domestic violence as a viable claim to asylum.⁸ During the pendency of their appeals, women often faced prolonged separation from their children, whom they made the agonizing decision to leave behind.⁹ The fact that the Board has begun resolving appeals that were pending before *A-R-C-G-* was decided, sending several cases back to the immigration courts to afford women the opportunity to submit additional evidence and argument to meet the new standard, is momentous.¹⁰

The timing of the *A-R-C-G-* decision has also proven significant for more recent arrivals. Many of the migrant women caught up in the recent rise (or “surge”) of women and children seeking asylum at the U.S.-Mexico border are fleeing domestic violence and other gender-motivated harms.¹¹ Whether these Central American women qualify

ernment never finalized these regulations. *See generally* Bookey, *supra* note 1, at 112-117 (providing more background on Ms. Alvarado’s case, and on the evolution of asylum law’s treatment of domestic violence survivors); *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999).

6. 21 I&N Dec. 357, 365 (BIA 1996).

7. *See* Bookey, *supra* note 1, at 110 (this study analyzes a unique dataset of over 200 domestic violence asylum decisions at the immigration court and BIA levels collected by CGRS over nearly twenty years; to my knowledge, it is the only study of its kind); Musalo, *supra* note 2, at 46.

8. *See* Bookey, *supra* note 1, at 109-10.

9. *See id.* at 108.

10. *See, e.g.*, Center for Gender & Refugee Studies Database Cases No. 12389 (BIA May 21, 2015) [hereinafter CGRS Database Case]; CGRS Database Cases No. 10627 (BIA April 2, 2015); CGRS Databases Case No. 11652 (BIA March 12, 2015); CGRS Databases Case No. 12276 (BIA Feb. 24, 2015); *see infra* note 49 (describing decisions in the CGRS Database).

11. Starting in 2011, the United States began to record a dramatic rise in arrivals of unaccompanied children from El Salvador, Guatemala, and Honduras. The numbers jumped from around 4,000 children in 2013 to close to 70,000 in 2014, nearly doubling each year in between. In addition, the number of family units (the vast majority women and their children) apprehended rose from 11,000 families in 2013 to 60,000 in 2014. *See* CGRS & NATIONAL UNIV. OF LANUS, ARG. (EDS.), CHILDHOOD AND MIGRATION IN CENTRAL AND NORTH AMERICA: CAUSES, POLICIES, PRACTICES AND CHALLENGES 27, 42-44, 207 (2015), http://cgrs.uchastings.edu/sites/default/files/Childhood_Migration_HumanRights_FullBook_English.pdf.

as bona fide refugees has implications for policies and practices for handling their claims. Most notably, the practice of detaining families (i.e., women with children), resurrected by the Obama Administration and argued as necessary to deter future migration, has been discredited in particular due to heightened obligations toward asylum seekers who have experienced trauma and express a credible fear of persecution.¹² The successful litigation of women's cases relying on the *A-R-C-G-* precedent early on in the Administration's use of family detention demonstrated that a significant number of the detained women are in fact refugees entitled to special protections. This ultimately contributed to the growing consensus that mothers and their children should be released from detention centers.¹³

Notwithstanding the undeniable contribution of *A-R-C-G-* for the broader legal principle it contains (that domestic violence may serve as a basis for asylum), the legal holding in the case is narrow and fact-specific, leaving immigration judges a great deal of discretion. This latitude, coupled with the Board's persistent attachment in *A-R-C-G-* to the muddled definition of a "particular social group" discussed below, has led to a hodgepodge of jurisprudence that undermines confidence in the fairness and efficiency of the U.S. asylum system.¹⁴ Detained women, especially those without representation, suffer uniquely and acutely as a result. Because of the deleterious effects of detention on their physical and mental health, women will waive their right to appeal erroneous decisions in the hopes of quicker release, even knowing it will result in deportation to the same dangerous conditions they escaped.¹⁵

12. Statements by several non-governmental organizations have been collected by the National Immigrant Justice Center. *Stop Detaining Families*, NAT'L IMMIGR. JUST. CENTER, <http://www.immigrantjustice.org/stop-detaining-families#Background> (last visited Nov. 6, 2015).

13. Within months of opening, the makeshift family detention center in Artesia, New Mexico shut down under pressure from advocates. Out of the 15 cases that went forward with their hearings before the immigration court, 14 won some form of protection (the one denial is being considered on appeal). *See id.* (regarding opposition to family detention); Stephen Manning, *Ending Artesia*, INNOVATION L. LAB, <https://innovationlawlab.org/the-artesia-report/> (last visited Nov. 6, 2015); *Flores v. Johnson*, CV 85-4544 (C.D. Cal. July 24, 2015) (court ordering children and their mothers be released from detention, subject to certain qualifications).

14. *See also* Rebecca Hamlin, *A Recent Shift in Immigration Law will Change Less than You*, WASH. POST (Nov. 7, 2014), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2014/11/07/a-recent-shift-in-immigration-law-will-change-less-than-you-think/> (discussing the U.S. asylum system and limitations of a decision like *A-R-C-G-* to lead to broad and consistent change). Several studies have found bias and arbitrary decisionmaking in the U.S. asylum system including the seminal study JAYA RAMJI-NOGALES ET AL., *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 1-8* (2009).

15. *See, e.g.*, CGRS Database Case No. 11428 (Immigration J. Dec. July 15, 2015); CGRS Database Case No. 11429 (Immigration J. Dec. April 24, 2015); CGRS Database Case No. 11579

MATTER OF A-R-C-G: CONTRIBUTIONS AND REMAINING
CONFUSION

For more than a decade, Aminta Cifuentes's husband beat, raped, and otherwise tormented her.¹⁶ He poured turpentine on her in an attempt to set her on fire, which resulted in permanent hearing loss. He also hit her in the stomach with such force that she gave birth prematurely, and he punched her in the face so forcefully that she still has difficulty breathing and speaking. Ms. Cifuentes sought protection from Guatemalan authorities on multiple occasions, to no avail; the police dismissed her complaints as marital problems, telling her to go home to her husband where she was exposed to his escalating threats. When she tried to leave, her husband hunted her down and demanded her return. In fear for her life, Ms. Cifuentes fled to the United States where her husband's threats renewed, unrelenting.

A U.S. immigration judge found Ms. Cifuentes to be a credible witness, but denied her applications for asylum and related humanitarian protections (withholding of removal and Convention Against Torture relief).¹⁷ Ms. Cifuentes—following the legal theories set forth in the earlier and well-known *Matter of R-A-* and *Matter of L-R-* cases¹⁸—argued that her husband harmed her on account of her gender and status as his wife (that is, on account of her membership in a particular social group of “married women in Guatemala who are unable to leave their relationship”).¹⁹ The judge referred to the harms

(Immigration J. Dec. Nov. 17, 2014); CGRS Database Case No. 11600 (Immigration J. Dec. Oct. 17, 2014).

16. CGRS Database Case No. 8767, Brief for CGRS to the BIA, CGRS Database Case No. 8767 (BIA Nov. 14, 2012).

17. The focus in this article is on asylum for simplicity. Much of the asylum analysis applies also to withholding, which, although it differs from asylum in its respective burden of proof and parameters of relief, also requires a showing of harm linked to an individual's status or beliefs. Convention Against Torture (CAT) claims differ more substantially in the legal standard and requirements from asylum and withholding and so are not examined in detail.

18. In addition to the case of Rody Alvarado discussed in note 5, *Matter of L-R-* made substantial contributions to the development of the law in domestic violence cases. The asylum seeker from Mexico in *L-R-* endured more than two decades of atrocious abuse at the hands of her common law husband, who forced her into the relationship in the first place. In 2009, the Department of Homeland Security (DHS) set forth the agency's official position in domestic violence cases, arguing that social groups defined by gender, nationality, and relationship status could meet the Board's social group test that (since the time of *R-A-*) had expanded to require social visibility and particularity. The groups DHS put forward in *L-R-* were: (1) Mexican women in domestic relationships who are unable to leave; or (2) Mexican women who are viewed as property by virtue of their position in a domestic relationship. Supplemental Brief for Petitioner at 15-16, *Matter of L-R-*, (BIA Apr. 13, 2009), http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf [hereinafter DHS Supplemental Brief].

19. See *Matter of A-R-C-G-*, 26 I&N Dec. 388, 392 (BIA 2014).

Ms. Cifuentes suffered as “unconscionable” but found that there was “no rhyme or reason” to her husband’s abuse and therefore he did not harm her on account of her gender-defined social group.²⁰ In other words, the judge concluded she did not establish the requisite “nexus” between the persecution she endured and a protected ground.²¹

On appeal, the Board reversed the denial of protection, recognizing for the first time in a published decision that women like Ms. Cifuentes who fear domestic violence may qualify for asylum.²² Although the Board’s decision stands for this broader principle, the specific holding of the case is quite limited, focusing solely on whether the particular social group advanced by Ms. Cifuentes meets the legal test for social groups. According to the Board’s current test, a social group must be (1) composed of members who share a common immutable characteristic, (2) defined with “particularity,” and (3) socially distinct within the society in question.²³ Social groups are to be considered on

20. *Id.* at 390.

21. To establish that the applicant is a refugee, and entitled to asylum, she must establish that a protected ground (e.g., membership in a particular social group or political opinion) “was or will be at least one central reason for persecuting the applicant.” Immigration and Nationality Act § 208(b)(1)(B)(i) (2013). So long as the protected ground is at least one central reason, additional non-protected motives may be present. For example, a sex trafficker may target a girl in part for financial reasons (i.e., to make money) which is not protected. However, one central reason may likely be her membership in a social group defined by gender and other characteristics such as youth and unmarried status or ethnicity, which would be protected.

22. DHS, opposing counsel in immigration court, initially supported the judge’s decision. The government changed position on appeal, conceding that Ms. Cifuentes suffered persecution on account of her gender-defined social group and asking for remand to the judge for further proceedings on unresolved issues in the case. *See Matter of A-R-C-G-*, 26 I. & N. Dec. at 390.

23. *Matter of A-R-C-G-*, 26 I&N Dec. at 392. From 1985 to 2006, the Board applied a test for social groups set forth in the seminal decision *Matter of Acosta*, 19 I&N Dec. 211, 212 (BIA 1985), *rev’d on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). Under the Acosta framework, a social group was one defined by immutable characteristics—that individuals either cannot change (i.e., innate characteristics like sex or shared past experience), or they should not be required to change because they are fundamental to their individual identities or consciences. In 2006, the Board began to require that groups not only be defined by immutable or fundamental characteristics, but they also must demonstrate “social visibility” and “particularity.” *See Matter of C-A-*, 23 I&N Dec. 951, 960 (BIA 2006), *aff’d sub nom. Castillo-Arias v. Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006). The imposition of these requirements has been met with criticism by advocates and courts alike—the Third and Seventh Circuit Courts of Appeals rejected them as unreasonable interpretations of the asylum statute. *See Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 603 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009). The Board recently claimed to clarify these requirements in companion cases, renaming social visibility to “social distinction.” *See Matter of M-E-V-G-*, 26 I&N Dec. 227, 228 (BIA 2014); *see Matter of W-G-R-*, 26 I&N Dec. 208, 212 (BIA 2014); *see also Benjamin Casper et al., Matter of M-E-V-G- and the BIA’s Confounding Legal Standard for “Membership in a Particular Social Group,”* 14-06 Immigr. Briefings (2014) (further discussing the social group test).

a case-by-case basis, and the asylum seeker must also prove she is a member of the group.²⁴

With respect to immutability—whether a characteristic is one that cannot be changed or that individuals should not be required to change to avoid persecution—the Board held that gender is clearly immutable and that marital status can be immutable “where the individual is unable to leave the relationship.”²⁵ The Board noted that ability to leave can be determined by looking to a range of factors, such as “whether dissolution of a marriage could be contrary to religious or other deeply held moral beliefs or if dissolution is possible when viewed in light of religious, cultural, or legal constraints.”²⁶ It then directed that, when making a determination about the immutability of the relationship, adjudicators must consider the applicant’s own experiences as well as background information on country conditions.²⁷

The Board went on to consider the particularity of the group, that is, whether the terms used to describe the group have commonly accepted definitions within the society in question to create definable boundaries.²⁸ In finding that the terms “women,” “married,” and “unable to leave” are clearly understood in Guatemala based on the facts of the case, the Board looked to the social and cultural context in the country, including documentation of widespread social expectations about gender and subordination and legal constraints regarding di-

24. See DHS Supplemental Brief, *supra* note 18, at 7.

25. Matter of A-R-C-G-, 26 I&N Dec. at 393. This is unremarkable as the Board held that a group could be defined by gender plus other characteristics first in 1996 and several Courts of Appeals have recognized gender-defined groups in other contexts. See, e.g., Sibanda v. Holder, 778 F.3d 676, 681 (7th Cir. 2015) (married women subject to the bride-price custom); Cece v. Holder, 733 F.3d 662, 672 (7th Cir. 2013) (en banc) (young Albanian women living alone who were targeted for prostitution); Sarhan v. Holder, 658 F.3d 649, 651 (7th Cir. 2011) (Jordanian women who, in accordance with social and religious norms in Jordan, were accused of being immoral criminals and at risk for honor killing); Perdomo v. Holder, 611 F.3d 662 (9th Cir. 2010) (Guatemalan women); Bi Xia Qu v. Holder, 618 F.3d 602, 607 (6th Cir. 2010) (women in China who have been subjected to forced marriage and involuntary servitude); Ngengwe v. Mukasey, 543 F.3d 1029 (8th Cir. 2008) (Cameroonian widows); Hassan v. Gonzales, 484 F.3d 513, 514 (8th Cir. 2007) (Somali females); Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005) (females in the Tukulor Fulani tribe); Mohammed v. Gonzales, 400 F.3d 785 (9th Cir. 2005) (female members of the Benadiri Clan); Yadegar-Sargis v. INS, 297 F.3d 596, 605 (7th Cir. 2002) (Christian women in Iran who do not wish to adhere to the Islamic female dress code); Fatin v. I.N.S., 12 F.3d 1233, 1241 (3rd Cir. 1993) (Iranian women opposing certain gender-related laws). However, it is remarkable that, to my knowledge, *A-R-C-G-* is the first new social group recognized by the Board in a published decision since 2006 (when the Board first imposed the heightened social distinction, then-called visibility, and particularity requirements to the social group analysis).

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

27. *Id.*

28. *Id.*

voice and separation.²⁹ The Board also considered Ms. Cifuentes's experience with the police, who refused to help married women or intervene in domestic matters, as relevant to establishing that the group has meaningful boundaries in society.³⁰

Lastly, the Board held that the group is socially distinct in Guatemalan society. The Board explained that the following evidence should be considered when evaluating social distinction: "documented country conditions," "law enforcement statistics and expert witnesses," "the respondent's past experiences," and "other reliable and credible sources of information."³¹ In the domestic violence context specifically, this includes evidence that addresses "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."³² For example, country conditions demonstrating a culture of machismo and high rates of violence against women without adequate response from the police support the existence of social distinction. The enactment of special laws directed at violence against women—such as Guatemala's law against femicide (gender-motivated killings)—are especially pertinent. Enactment of such laws indicates the group's distinct status because laws directed at the general public are not enough to protect group members who are in need of special protection.³³ A woman's individual circumstances might include, like in the case of Ms. Cifuentes, unsuccessful past attempts to leave the relationship or seek protection.

After finding that the social group, "married women in Guatemala who are unable to leave their relationship," is cognizable, the Board remanded the case to the immigration court to address all remaining issues in the first instance.³⁴ The Board directed the judge to consider, for example, whether the Guatemalan government was "unable or unwilling" to control Ms. Cifuentes's abuser, a requirement for cases involving private actors as persecutors (as opposed to govern-

29. *Id.*

30. *See id.* at 393-94.

31. *Id.* at 395.

32. *Id.* at 394.

33. *See id.* at 394; *see also, e.g.,* *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (en banc) (noting that "[i]t is difficult to imagine better evidence that a society recognizes a particular class of individuals as uniquely vulnerable, because of their group perception by [their persecutors], than that a special . . . protection law has been tailored to its characteristics").

34. *See* *Matter of A-R-C-G-*, 26 I&N Dec. at 389.

ment agents, e.g., the military or police).³⁵ In addition, the Board pointed out that if the judge were to find that Ms. Cifuentes suffered persecution on account of a protected ground and that the Guatemalan government could not or would not control her persecutor, the judge would further need to consider whether the government had met its burden to prove that Ms. Cifuentes could safely and reasonably relocate to another part of her country to avoid the persecution.³⁶ On remand, the immigration judge granted asylum to Ms. Cifuentes at stipulation of the parties without analysis.³⁷

Although positive in many respects, and a leap forward for women's rights, the Board's decision in *A-R-C-G-* has not provided sufficient guidance to decisionmakers to avoid the arbitrary and inconsistent outcomes that characterized pre-*A-R-C-G-* jurisprudence. First, the Board continued to adhere to the requirements of "social distinction" and "particularity," rather than return to the "immutability" test that was the law of the land for over 20 years. Advocates (and U.S. Courts of Appeals) have criticized these requirements as confusing the law.³⁸ They also set a high burden for the type of evidence that asylum seekers must produce to establish existence of a social group (e.g., as explained in *A-R-C-G-*, country conditions, law enforcement statistics, and expert testimony), especially disadvantageous for women without representation. *Matter of A-R-C-G-* does little to eliminate confusion and provide clear legal standards—how should judges analyze cases where women are not married to their abusers but are in other domestic relationships? And, what precisely are the contours of the ability to leave determination, including in cases where women

35. *Id.* at 395.

36. Asylum based on past persecution shall be denied where the government establishes by a preponderance of the evidence that an applicant "could avoid future persecution by relocating to another part of the applicant's country of nationality. . . and under all the circumstances, it would be reasonable to expect the applicant to do so." 8 C.F.R. § 1208.13(b)(1)(i)(B) (2015); see also *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 33 (BIA 2012) (discussing the relocation standard and holding that for an applicant to be able to relocate safely, "that location must present circumstances that are substantially better than those giving rise to a well-founded fear of persecution"). The regulations do not require that the harm an individual might face in another part of the country that would make relocating unsafe/unreasonable be tied to a protected ground.

37. Because the government stipulated to a grant of relief in Ms. Cifuentes's case, the judge did not issue a reasoned opinion. See e-mail from counsel for Ms. Cifuentes to author (Feb. 27, 2015) (on file with CGRS).

38. See Benjamin CASPER et al., *supra* note 23, at 1. For a discussion of legislative fixes to the difficulties of proving nexus to a protected ground in the gender context, see Eleanor Acer & Tara Magner, *Restoring America's Commitment to Refugees and Humanitarian Protection*, 27 GEO. IMMIGR. L.J. 445, 458 (2013).

are able to physically separate from their partners, but the partners do not accept that the woman has the power to end the relationship?

Moreover, even if it is less contentious now for women to establish the existence of a recognized social group, the *A-R-C-G*- decision does not address how women can establish that their persecutor was motivated to harm them based on their membership in the group. What are the types of direct statements or actions on the part of the abuser that demonstrate his motive is gender-based? And, how should circumstantial evidence of country conditions demonstrating widespread violence and discrimination against women be weighed when considering an abuser's motivations? The decision also provides no guidance on evaluating the ability and willingness of governments to control perpetrators of domestic violence. For example, how should adjudicators weigh enactment of a special law aimed at preventing domestic violence with evidence of a lack of enforcement of such laws? Finally, because the decision reiterates the fact-specific and case-by-case nature of the analysis, will the decision help ensure that cases with similar facts have the law applied in a similar way to avoid arbitrary and inconsistent outcomes that marred adjudication in this area pre-*A-R-C-G*-? The following discussion suggests the answer to that question is: no, not yet.³⁹

DECISIONMAKING IN DOMESTIC VIOLENCE ASYLUM CASES POST-*A-R-C-G*-

The government does not make available to the public immigration judge decisions, or most non-precedential Board decisions, leading to a deficit of information on how cases are faring across the country.⁴⁰ At the Center for Gender & Refugee Studies at the University of California Hastings College of the Law (CGRS), we track out-

39. I am not arguing for 100% *consistency in outcomes* as the ultimate goal of the U.S. asylum system, which would not be attainable or desirable for a system as large as the immigration courts. However, I am arguing that there is room for improved *consistency in the quality and accuracy* of decision-making in the domestic violence area specifically. Although some judges may remain resistant to domestic violence claims and search for grounds to deny, clear and comprehensive guidance might be one way to achieve fairer outcomes that would restore public confidence in the system and improve efficiency by avoiding prolonged legal processes.

40. The immigration courts and asylum offices maintain databases of case information, which can be analyzed (and have been to a great extent, *see, e.g., Refugee Roulette* and *Lives in the Balance* cited elsewhere as well as multiple studies and reports published by the Transactional Records Access Clearinghouse of Syracuse University). However, the information contained in the government databases is limited—while they record biographical information regarding the applicant's country of origin and age, for example, they do not track any information regarding the type of persecution the individual suffered or the rationale for the adjudicator's decision to grant or deny relief. Moreover, gender of the applicant is not always recorded.

comes in domestic violence and other gender asylum cases and house the largest repository of immigration judge and Board decisions in gender asylum cases nationally.⁴¹ For this article, the CGRS database produced 67 decisions from cases of women seeking asylum based on domestic violence (including 45 immigration judge and 22 Board decisions) decided in the year since *A-R-C-G-*.⁴² The immigration judge decisions come from 30 different judges sitting in 22 jurisdictions.⁴³ Most cases involve women hailing from the Northern Triangle countries of Honduras, Guatemala and El Salvador; other countries represented include Cameroon, Colombia, the Dominican Republic, Ecuador, Egypt, Mexico, and Nicaragua.

Patterns emerge from the decisions that illustrate the import as well as the limitations of the *A-R-C-G-* decision and the ongoing need for comprehensive, clear, and binding guidance from the Board, or from the Administration in the form of regulations.⁴⁴ To follow is a brief analysis of common obstacles to protection in the cases of women fleeing domestic violence brought to CGRS's attention through our tracking efforts.⁴⁵

41. CGRS collects decisions primarily through its technical assistance program, which provides consultation and litigation resources to attorneys. CGRS has also recorded several outcomes in domestic violence asylum cases heard by asylum offices around the country which hears affirmative applications. Because the asylum office does not provide written decisions with analysis, those cases were not analyzed for present purposes. *Technical Assistance and Training*, CGRS, <http://cgrs.uchastings.edu/our-work/technical-assistance-training> (last visited Nov. 6, 2015).

42. Some cases include multiple outcomes, for example, where the immigration judge denied the claim and the decision was appealed to the BIA. We have on file written decisions or transcripts of oral decisions for twenty-eight of the outcomes; for the remainder, we have on file contemporaneous notes from oral decisions of judges provided to CGRS by attorneys for the asylum seekers.

43. The judges presided over cases in the following cities: Arlington, VA; Atlanta, GA; Baltimore, MD; Chicago, IL; Dallas, TX; Denver, CO; El Paso, TX; Eloy, AZ; Honolulu, HI; Houston, TX; Los Fresnos, TX; Miami, FL; New York, NY; Orlando, FL; Philadelphia, PA; Pompano Beach, FL; Port Isabel, TX; San Antonio, TX; Seattle, WA; San Francisco, CA; Tacoma, WA; and York, PA. As of July 2015, there were 243 immigration judges in the United States and fifty-nine immigration courts. *Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions at the Southern Border Before the S. Comm. on Homeland Security and Governmental Affairs*, 113th Cong. (2014) (statement of Juan P. Osuna, Dir., Exec. Office For Immigration Review for U.S. Dep't of Justice).

44. See *supra* note 5 for discussion of the regulations proposed in 2000 that were never finalized.

45. CGRS is continuing to track these cases, which will allow for more robust analysis of the trends in jurisprudence evolving in the wake of *A-R-C-G-* in the future. To report an outcome, and search the CGRS database, please visit <http://cgrs.uchastings.edu/assistance>.

Credibility

Many immigration judges are sensitive to the dynamics of domestic violence and impacts of trauma on survivors that may bear on the credibility of women's testimony (a necessary component of a successful claim).⁴⁶ For instance, in assessing the plausibility of the testimony of a Honduran woman, a judge explained that the fact the woman returned to her abusive spouse did not undermine her fear, given elements of control and intimidation that mark violent relationships.⁴⁷ However, the historical bias against and discrediting of women's testimony as inherently unbelievable, a game of "he said-she said," which has been ameliorated in other areas of the law (e.g., in criminal law through repeal of laws requiring corroborating evidence to prove rape), remains in asylum adjudication.

A few cases illustrate the difficulties women survivors face in establishing the credibility of their claims. In one case, an immigration judge found it implausible that a local judge and a priest would participate in the forced marriage of the asylum seeker when she was a girl, ignoring evidence that the girl's family paid the officials and that such practices are common in Mexico.⁴⁸ In another case, a judge expressed disbelief that a woman's husband would be able to give permission to his brother to stay in the woman's home because they had separated and the husband no longer lived there.⁴⁹ The judge ignored testimony that, despite their physical separation, her husband continued to control her, threatening to kill her if she had other men in the house, which could plausibly explain why he sent his brother there—for surveillance.

Another judge discredited an asylum seeker, stating: "[t]he marital relationship is intensely personal and complicated. Allegations of spousal abuse compound the complexity. Because asylum proceedings are *ex parte* it is difficult and sometimes impossible for an immigration judge to ascertain the veracity of domestic violence allegations made by [an applicant] against his or her spouse."⁵⁰ Rather than applying the normal criteria for credibility in asylum cases—i.e., looking to the detail, internal consistency, and consistency with country condi-

46. See 8 U.S.C. § 1229a(c)(4)(B)-(C) (2015) (setting forth the burden placed on asylum seekers to support their claims with credible, persuasive, and detailed testimony and the factors judges may consider when making credibility determinations under a totality of the circumstances test).

47. CGRS Database Case, No. 10784 (Immigration J. Dec. Nov. 4, 2014).

48. CGRS Database Case, No. 11429 (Immigration J. Dec. April 24, 2015).

49. CGRS Database Case, No. 10950 (Immigration J. Dec. Jan. 14, 2015).

50. CGRS Database Case, No. 11335 (Immigration J. Dec. May 28, 2015).

tions of the applicant's testimony and supporting documentation—the judge applied his personal views about the nature of domestic relationships. The judge created out of whole cloth a standard that does not exist in the law—i.e., that marital relationships are too personal and complicated to be able to make a credibility determination. This judge's evident distrust of women alleging violence by their partners infected his entire analysis of the claim, ultimately denying relief to a woman whose husband repeatedly raped and sodomized her including after Guatemalan legal authorities declined to enforce a restraining order.

Particular Social Group

As mentioned above, in *A-R-C-G-*, the Board recognized that a group defined by gender, nationality, and marital status—“married women in Guatemala who are unable to leave their relationship”—met each prong of the social group analysis (immutability, particularity, and social distinction).⁵¹ Whether social groups involving other types of domestic relationships where women are not married to their abusers should be recognized and the parameters of the “unable to leave” characteristic of domestic relationships are two issues that have presented divergent analyses among judges post-*A-R-C-G-*.

First, a split in the jurisprudence has surfaced regarding the extension of *A-R-C-G-* to cases involving women who never formally married their abusers. Some immigration judges have found the existence of social groups for unmarried women, relying on *A-R-C-G-* to recognize groups defined by gender, nationality, and relationship status, such as “women from X country in domestic relationships they are unable to leave.”⁵² In so doing, judges recognize that *A-R-C-G-* does not require existence of a formal marriage, but rather, the inquiry centers on the existence and nature of the relationship and whether it is immutable and recognized by society. This is consistent with the “official” position of the government in the *Matter of L-R-* case where the government argued that women in “domestic relationships” other than marriage could proffer viable social groups.⁵³ How-

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

52. CGRS Database Case, No. 10796 (Immigration J. Dec. May 19, 2015); CGRS Database Case, No. 11333 (Immigration J. Dec. Apr. 24, 2015); CGRS Database Case, No. 9730 (Immigration J. Dec. Apr. 2, 2015); CGRS Database Case, No. 11302 (Immigration J. Dec. Jan. 20, 2015); CGRS Database Case, No. 10283 (Immigration J. Dec. Jan. 15, 2015).

53. There, DHS argued that “Mexican women in domestic relationships who are unable to leave” or “Mexican women who are viewed as property by virtue of their positions within the relationship” could meet the social group standard. DHS Supplemental Brief, *supra* note 18.

ever, other judges have distinguished *A-R-C-G-* on this same ground. Judges have declined to apply *A-R-C-G-* even in cases where women were in long-standing relationships with their abusers, had children together, and held themselves out as husband and wife in the community (common practice in some cultures).⁵⁴

The Board has unequivocally rejected immigration judge determinations distinguishing *A-R-C-G-* based on the marital status of the asylum seeker on at least two occasions, in *Matter of D-M-R-* and *Matter of E-M-*.⁵⁵ The Board clarified in *Matter of D-M-R-* that its decision in *Matter of A-R-C-G-* “does not necessarily require that an applicant seeking asylum or withholding of removal based on domestic violence have been married to his or her abuser. Rather, we look to the characteristics of the relationship to determine its nature.” Inexplicably, the Board did not publish either decision, so judges are not bound by them, and will likely repeat the same error. Indeed, in a subsequent (also unpublished) decision, the Board upheld denial of asylum to a Honduran woman who was not married to her abuser that is at odds with the analysis in *D-M-R-* and *E-M-*.⁵⁶ In that case, the Board attached significant weight to the lack of a marital relationship without considering any of the characteristics it deemed relevant to the social group analysis in *D-M-R-* and *E-M-* regarding the nature of the relationship. The Board is currently considering a request for publication of the *D-M-R-* and *E-M-* decisions to reconcile conflicting case law and to provide guidance.⁵⁷

Whether a woman is “unable to leave” a relationship, and thus establish her membership in the social group, has also confounded adjudicators and led to disparate outcomes. The Board stressed in its *A-*

54. CGRS Database Case, No. 11018 (Immigration J. Dec. Mar. 4, 2015); CGRS Database Case, No. 11428 (Immigration J. Dec. July 15, 2015); CGRS Database Case, No. 11856 (Immigration J. Dec. Apr. 10, 2015); CGRS Database Case, No. 11564 (IJ Dec. Mar. 4, 2015); CGRS Database Case, No. 11591 (Immigration J. Dec. Dec. 10, 2014); CGRS Database Case, No. 11579 (Immigration J. Dec. Nov. 17, 2014); CGRS Database Case, No. 11600 (Immigration J. Dec. Oct. 17, 2014); CGRS Database Case, No. 11541 (Immigration J. Dec. Sept. 11, 2014).

55. *Matter of D-M-R-*, CGRS Database Case, No. 11564 (BIA June 9, 2015); *Matter of E-M-*, CGRS Database Case, No. 11541 (BIA Feb. 18, 2015) (holding “[a]lthough the legal restraints of divorce and separation may not apply to someone in a long-term, but not necessarily legally formalized relationship, such as that of the [asylum seeker in that case] and her former partner, the absence of a legal marriage is not *ipso facto* a distinguishing factor that precludes otherwise analogous claims under the particular social group rationale set forth in *Matter of A-R-C-G-*”).

56. CGRS Database Case, No. 11018 (BIA July 28, 2015).

57. Letter from the Harvard Immigration and Refugee Clinical Program, CGRS, and other signatories to Juan P. Osuna, Director, Exec. Office of Immigration Review & David L. Neal, Chairman, Board of Immigration Appeals, (June 18, 2015) (on file with CGRS).

R-C-G- decision that the unable to leave inquiry is fact-specific, and that judges should consider the asylum seeker's own experiences as well as country conditions evidence, but these general instructions provide little specific direction. The Board failed to clarify that the inquiry into a woman's ability to leave should include not only an analysis of whether legal or social constraints keep a woman from leaving, but also an analysis of whether an abuser would recognize such separation as ending his right to continue the abuse.

Some judges look to whether the asylum seeker succeeded in obtaining a divorce from her abuser, or moving out of their shared home; and, if so, find that the existence of either scenario ends the inquiry. Judges reach this conclusion even where abusers have pursued their partners, and continued to stalk, beat, rape, or otherwise terrorize them.⁵⁸ In other cases, judges consider the dynamics of domestic violence and whether divorce or other physical separation ended the relationship or whether the abuser refuses to recognize the separation as ending his right to abuse his wife or partner.⁵⁹

The facts of Ms. A's case illustrate the need for clarity. Ms. A obtained a divorce, but her ex-husband continued to stalk her before she left the country; he inspected her vagina to ensure she had not been with any other men and threatened to harm her if he believed she had because she is still his "woman."⁶⁰ Should a woman in circumstances like Ms. A's be deemed "able to leave" the relationship simply because she divorced and moved out of the marital home? It is hard to imagine that a reasonable adjudicator would reach this conclusion. Nonetheless, without more comprehensive guidance from the Board, adjudicators will continue to disregard facts relevant to cycles of violence present in abusive relationships.⁶¹

58. CGRS Database Case, No. 12489 (Immigration J. Dec. May 19, 2015); CGRS Database Case, No. 11333 (Immigration J. Dec. Apr. 24, 2015); CGRS Database Case, No. 10950 (Immigration J. Dec. Jan. 14, 2015); CGRS Database Case, No. 11541 (Immigration J. Dec. Sept. 11, 2014).

59. *See, e.g.*, CGRS Database Case, No. 12197 (Immigration J. Dec. June 29, 2015); *see also* DHS Supplemental Brief, *supra* note 18.

60. CGRS Database Case, No. 11428 (Immigration J. Dec. July 15, 2015); *see also* CGRS Database Case, No. 10950 (Immigration J. Dec. Jan. 14, 2015) (in case where persecutor continued to harass and abuse the applicant after she left, including once punching her in the vagina, the judge distinguished from *A-R-C-G-* saying that she was able to leave).

61. Although judges did not cite a different country of origin as a basis for distinction when analyzing the existence of a social group, it did come into play in the nexus and state protection steps in the analysis discussed in the sections to follow.

Nexus

In *Matter of A-R-C-G-*, the government conceded that Ms. Cifuentes's abuser was motivated to persecute her based on her gender and status in the relationship (i.e., based on her membership in a particular social group).⁶² The Board accepted this concession and did not consider the issue, so the decision provides little guidance for the type of evidence—direct and circumstantial—that supports a finding of nexus in domestic violence cases.⁶³ In the *D-M-R-* decision following *A-R-C-G-*, the Board stressed the importance of societal context when evaluating a persecutor's motives in domestic violence cases. For example, evidence regarding social and cultural norms in a country that reinforce subordination of women and superiority of men would be particularly relevant to understanding the traditional role of men and women in relationships. However, as mentioned, the *D-M-R-* decision is not precedential, and cases presenting similar facts have resulted in dissimilar analyses.

Take the cases of Ms. A (discussed above) and Ms. B.⁶⁴ In both cases, their abusers made statements to the women such as, “[Y]ou know you're mine;” called the women “prostitutes” and “whores;” and threatened to harm the women if they tried to report abuse or leave them.⁶⁵ The abusers also exhibited controlling behavior, another hallmark of domestic violence.⁶⁶ For example, in Ms. A's case, her abuser checked her vagina to ensure fidelity to him, and in Ms. B's case, her abuser followed her when she tried to separate from him and demanded her return. In addition, in both cases, the asylum seekers submitted significant background information on El Salvador (Ms. A) and the Dominican Republic (Ms. B) regarding pervasive discrimination and violence against women, and social acceptance and impunity for perpetrators. Based on her abuser's behavior and statements that correlate with country conditions on views of women and their proper

62. *Matter of A-R-C-G-*, 26 I&N Dec. 388, 395 (BIA 2014).

63. *See id.*; *see also* 8 U.S.C. § 1158(b)(1)(B)(i) (2015) (setting forth nexus standard); *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (holding that nexus may be established through either direct or circumstantial evidence). For a discussion of the significance of circumstantial evidence of country conditions in cases of gender-based violence, *see Sarhan v. Holder*, 658 F.3d 649, 662.

64. Respectively, CGRS Database Case, No. 10283 (Immigration J. Dec. Jan. 14, 2015); CGRS Database Case, No. 11428 (Immigration J. Dec. July 15, 2015).

65. CGRS Database Case, No. 10283 (Immigration J. Dec. Jan. 14, 2015); CGRS Database Case, No. 11428 (Immigration J. Dec. July 15, 2015).

66. *See* Expert Declaration of Professor Nancy K. D. Lemon (Feb. 18, 2014) (on file with CGRS) [hereinafter *Lemon Declaration*] (discussing how behaviors exhibited by batterers are based on male power and control over women, perpetuated by cultural and social norms where men are deemed superior and dominant).

roles, the immigration judge in Ms. B's case found that Ms. B's abuser was motivated to harm her based on her gender and status in their relationship as inferior. Yet, the judge in Ms. A's case found that "[w]hile country conditions evidence and some of the comments [her abuser] made indicate that he may have believed that [Ms. A] was in a subordinate position in their relationship," the judge could not conclude "that such belief played an essential or principal role in the abuse he inflicted."⁶⁷ Rather, the judge found that the abuse was "related to his own criminal tendencies and jealousy."⁶⁸ This rationale defies logic: an abuser's "jealousy" is inherently linked to a woman's gender and status in a relationship as the property of her partner.⁶⁹ Precedential guidance on this point is lacking.

State Protection

In many, if not most, domestic violence asylum cases, the persecutors are "private" actors, which requires that women prove their government is "unable or unwilling" to protect them to establish eligibility for protection. The "unable or unwilling" test is a disjunctive one; each prong must be considered independently (that is to say, a government may be willing to control an abuser but that does not mean it is able to do so, and vice versa).⁷⁰ U.S. law does not require that women report their abuse to the police or to other authorities to meet the unable or unwilling standard if doing so would have been futile or would have placed the woman in danger (for example, at risk for retaliation by her abuser or discrimination and mistreatment by the police).⁷¹ The Board, as mentioned, did not reach this issue in

67. CGRS Database Case, No. 10283 (Immigration J. Dec. Jan. 14, 2015).

68. *Id.*

69. See Lemon Declaration, *supra* note 66 (discussing how abusers typically exhibit jealousy which reflects their "belief that men have the right to own the women to whom they are married or intimately related").

70. See, e.g., Garcia v. Att'y Gen., 665 F.3d 496, 503 (3d Cir. 2011) (even if a government has "displayed great willingness to protect," this willingness "sheds no light on [the government's] ability to protect [an applicant]"); Hassan v. Gonzales, 484 F.3d 513, 519 n.2 (8th Cir. 2007) (noting fear of rape may still be well-founded even if laws prohibiting rape exist, if they're not generally enforced).

71. See, e.g., Ngengwe v. Mukasey, 543 F.3d 1029, 1036 (citing Makatengkeng v. Gonzales, 495 F.3d 876, 885 (8th Cir. 2007)); Lopez v. Att'y Gen., 504 F.3d 1341, 1345 (11th Cir. 2007); Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1058 (9th Cir. 2006); Fiadjoe v. Att'y Gen., 411 F.3d 135, 161-62 (3d Cir. 2005); Matter of S-A-, 22 I&N 1328, 1330 (BIA 2000). The test is whether government action reduces a woman's fear to below the "well-founded fear" threshold required for asylum, which the U.S. Supreme Court has explained is a one in ten chance. For withholding, the threshold is higher requiring that an applicant have more than a 50% chance of persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 440 (1987).

Matter of A-R-C-G-, and it has not provided guidance for evaluating the record in this regard in domestic violence cases.

When determining whether a woman's failure to report was reasonable, some immigration judges consider a woman's testimony about why she did not report, and also take into account country conditions evidence regarding lack of enforcement of laws and a culture of accepting violence against women.⁷² By contrast, other judges fail to look to conditions in the country as corroborating a woman's testimony for why she did not trust the police or other authorities would be able and willing to protect her. Judges also rely on the fact that women successfully obtained protective orders against their partners from the courts in order to find that the government was able and willing to protect, notwithstanding repeated and unsanctioned violations of the orders.⁷³ The Board has deemed a failure to consider country conditions and violations of protective orders as legal error when assessing the "unable or unwilling" element in a domestic violence case. However, it did so in an unpublished, non-binding decision.⁷⁴

Relocation

Few decisions on file with CGRS reach an analysis of safe and reasonable relocation options for women in their home countries. In one case where relocation was considered, the immigration judge found that this was not an option for a Guatemalan woman whose abuser knew where her family lived, and she did not have anywhere else to move.⁷⁵ To draw this conclusion, the judge looked to the applicant's circumstances, including her indigenous status, which limited her relocation options due to, among other things, language barriers and discrimination. In another case, the Board faulted a judge for failing to look at the individual circumstances of the woman.⁷⁶ In reversing, the Board instructed the judge to consider on remand the woman's testimony that her abuser found her after her previous attempt to escape and whether, given those undisputed facts, relocation would actually ensure her safety.

72. CGRS Database Case, No. 9730 (Immigration J. Dec. Apr. 2, 2015); CGRS Database Case, No. 10283 (Immigration J. Dec. Jan. 15, 2015).

73. CGRS Database Case, No. 11579 (Immigration J. Dec. Nov. 17, 2014).

74. CGRS Database Case, No. 10627 (BIA Apr. 2, 2015); CGRS Database Case, No. 11335 (BIA Mar. 17, 2015).

75. CGRS Database Case, No. 10784 (Immigration J. Dec. Nov. 4, 2014).

76. CGRS Database Case, No. 11335 (BIA Mar. 17, 2015).

The regulation governing the relocation test is relatively sparse. Therefore, the Board's analysis in the referenced case provides helpful guidance for adjudicators by reiterating that "safe and reasonable" relocation must take into account individual circumstances including in domestic violence cases, for example, barriers to relocation for women without economic resources and potential dangers they might face. Because the Board did not publish its decision, the admonition to consider certain relevant facts applies only to the judge in that case.

CONCLUSION

Women survivors of domestic violence seeking asylum in the United States, including Central American women who are part of the recent "surge," have fled unimaginable horrors—beatings, rape, verbal abuse, and death threats. They request protection from the U.S. government where their own has failed them.⁷⁷ The long-standing and contentious debate over whether these women, if they succeed in proving their cases, deserve such protection, has finally been resolved in their favor. The highest immigration tribunal in the United States ruled in August 2014 that domestic violence may be a basis for asylum. The 2014 *Matter of A-R-C-G-* ruling advances women's rights, consistent with evolving precedent that recognizes gender-based persecution as asylum-worthy. However, the ruling is narrow and does not provide specific guidance for how to analyze all elements of these claims, leaving significant discretion to immigration judges. This initial study of post-*A-R-C-G-* jurisprudence demonstrates that a dearth of binding standards as well as the lack of training for immigration judges on the dynamics and sensitivities of domestic and other gender-based violence has continued to result in inconsistent and arbitrary decision-making in immigration courts. Additional, comprehensive and clarifying guidance is needed to ensure consistent adjudication and fair outcomes in individual cases and engender confidence and efficiency of the system as a whole.

77. The Northern Triangle countries have some of the highest rates of femicide and violence against women in the world. A significant number of femicides occur in the context of domestic relationships, even in situations where women have attempted to leave their abusers. See, e.g., CHILDHOOD AND MIGRATION IN CENTRAL AND NORTH AMERICA, *supra* note 11 (including statistics on rates of violence against women in Honduras, El Salvador, and Guatemala); Karen Musalo & Blaine Bookey, *Crimes Without Punishment: An Update on Violence Against Women and Impunity in Guatemala*, 10 HASTINGS RACE & POVERTY L.J. 265, 269 (2013) (discussing femicide in Guatemala and connection with domestic violence).

