

# CENTER FOR GENDER & REFUGEE STUDIES

## STATEMENT FOR THE HEARING RECORD ON “RENEWING AMERICA’S COMMITMENT TO THE REFUGEE CONVENTION: THE REFUGEE PROTECTION ACT OF 2010”

BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY,  
MAY 19, 2010<sup>1</sup>

### Introduction

The Center for Gender & Refugee Studies (CGRS), a non-profit organization based at the University of California, Hastings College of the Law, is the nation’s leading organization supporting women asylum-seekers fleeing gender-related harm, at both the practice and policy levels. Each year, CGRS advises hundreds of attorneys representing asylum seekers with gender-based claims and tracks developments and decisions in gender-based cases at the immigration courts, Board of Immigration Appeals (BIA), and federal courts. CGRS founder and director, Karen Musalo, has litigated several of the most significant gender asylum cases of the last 15 years, including *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), and *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999) (en banc), *vacated* 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I&N Dec. 694 (A.G. 2005), *remanded* 24 I&N Dec. 629 (A.G. 2008). CGRS attorneys have published numerous articles on asylum claims generally, and gender claims specifically. Through its scholarship, expert consultation, national advocacy, and impact litigation, CGRS has played a central role in the development of refugee law and policy on a wide range of issues.

Congress enacted the Refugee Act of 1980 (Public Law 96-212) with the intention of bringing the United States into compliance with the United Nations Protocol relating to the Status of Refugees (606 U.N.T.S. 267, entered into force October 4, 1967) (1967 Protocol), which the U.S. ratified in 1968. Both the 1967 Protocol and United States law define a refugee as a person with a well-founded fear of persecution for reasons of, or on account of race, religion, nationality, membership in a particular social group, or political opinion.

The United States has a long tradition of providing refuge to those fleeing persecution. In recent years, however, restrictive laws and policies, as well as negative court decisions, have denied protection to many deserving individuals. The Refugee Protection Act of 2010 (S.3113) addresses many of these barriers and renews the U.S.’s commitment to safeguard refugees. While CGRS supports the Act in its entirety and encourages the Committee to endorse it, this statement focuses on three specific

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<sup>1</sup> Statement submitted May 26, 2010.

provisions, which address the greatest impediments to protection in cases of women fleeing gender-related harm: elimination of the one-year filing deadline in asylum cases, clarification of the standard for claims based on membership in a particular social group, and clarification of the standard and types of evidence required to establish nexus (the causal link) to a statutorily protected ground.

## 1) Elimination of the One-Year Filing Deadline

### **Background**

Enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), the one-year deadline bars from asylum any individual who cannot prove by “clear and convincing evidence” that she filed for asylum within one year of arrival in the United States. 8 U.S.C. §1158(a)(2)(B). Congress’s objective in passing the one-year deadline – also referred to as the “one-year bar” – was to prevent fraud, but Congress was equally concerned that “legitimate claims of asylum [not be] returned to persecution for technical difficulties.”<sup>2</sup> As a result, Congress included exceptions to the bar in cases of changed circumstances or extraordinary circumstances related to the delay in filing. 8 U.S.C. §1158(a)(2)(D).<sup>3</sup> Congressional proponents of the bar also provided assurance that the provision could be reconsidered if it was not fairly applied.<sup>4</sup> The United Nations High Commissioner for Refugees (UNHCR)<sup>5</sup> has cautioned that the use of filing deadlines to bar asylum claims from consideration could result in returning refugees to countries where they would be persecuted, which violates the U.S.’s obligations under international law.<sup>6</sup>

Despite Congressional intent, the one-year deadline regularly results in *bona fide* refugees being denied asylum. Adjudicators frequently construe the exceptions to the bar narrowly and will not excuse failure to file within a year, even in cases where an applicant demonstrates the type of extraordinary circumstances specifically mentioned in the regulations, such as suffering from mental or physical disability, including the effects of past persecution. 8 C.F.R. §208.4(a)(5). Furthermore, because judicial review of these decisions is limited by statute, there is no corrective for misguided or improper decisions at the administrative level.

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<sup>2</sup> See Statement of Senator Orin Hatch, 142 Cong. Rec. S11838, S11840 (daily ed. Sept. 30, 1996), cited in Leena Khandwala et al., *The One-Year Bar: Denying Protection to Bona Fide Refugees, Contrary to Congressional Intent and Violative of International Law*, Immigr. Briefings, Aug. 2005, at 5.

<sup>3</sup> Although Congress did not define “changed” or “extraordinary” circumstances, federal regulations provide a non-exhaustive list of circumstances that may qualify as changed or extraordinary. 8 C.F.R. §208.4(a)(4), (5).

<sup>4</sup> *Id.*

<sup>5</sup> The U.S. Supreme Court recognizes the UNHCR as a guiding authority on the interpretation and application of the 1967 Protocol. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437-39 n.22 (1987).

<sup>6</sup> See *Refugees without an Asylum Country*, United Nations High Commissioner for Refugees, Executive Committee 30<sup>th</sup> Session, 16 October 1979, No. 15 (XXX), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c960>. The 1967 Protocol incorporated the provisions of the 1951 Refugee Convention and under Article 33 of the Refugee Convention, the U.S. may not “*refoule*” (return) a person to a country where her life or freedom would be threatened on account of a protected ground. See 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 150, Article 33.

Refugees with claims based on domestic violence, rape, female genital cutting, forced marriage, and other gender-based harms may fail to file within one year of arrival for a number of legitimate reasons, such as suffering from a psychological disability - like Post Traumatic Stress Disorder (PTSD) - caused by their past persecution. Women and girls who have endured or fear gender-based persecution may hesitate to file for asylum because they fear being stigmatized (for having been raped, for example) or shaming their families, or because seeking asylum could mean severing relationships with family, where family members were abusers, or would feel disgraced upon disclosure of the facts. In addition, women who have suffered or who fear such harms may be poorly advised by attorneys that they do not qualify for protection because "there is no asylum" for victims of domestic violence or other gender-based harms. While these circumstances are presumably covered by the regulations' non-exhaustive list of exceptional circumstances, the bar is often applied to deny asylum to women who delayed filing for these or similar reasons.

### **L.R.'s Case – an Example of the One-Year Bar's Impact**

Ms. L.R.,<sup>7</sup> a Mexican asylum seeker, was kidnapped, raped, and forced into a relationship with an abusive man. She suffered nearly two decades of horrific domestic violence, rapes, death threats, and harassment at his hands. After numerous unsuccessful attempts to seek protection from Mexican authorities, she fled to the U.S. She arrived on May 29, 2004 and filed for asylum on December 21, 2005, a year and a half later. Ms. L.R. explained to the immigration judge that she was unable to file earlier because she suffered from depression, stress, and nightmares, and was unable to think about her painful past.

She filed affidavits from two mental health experts, a clinical psychologist and a licensed social worker, both of whom diagnosed her with PTSD stemming from the extreme violence she experienced in Mexico, and one of whom characterized the PTSD as "severe and chronic." The experts determined that Ms. L.R. suffered anxiety, flashbacks, nightmares, sleeplessness, memory impairment, and difficulty concentrating. They found that she suffered intense psychological distress whenever exposed to cues that reminded her of the trauma, and that as a result, she actively avoided anything that recalled the abuse she had endured. The experts also determined that Ms. L.R. had a "foreshortened" sense of future that prevented her from thinking beyond surviving in the present – one day at a time - and from planning for the future. On the basis of these facts, they concluded that Ms. L.R.'s PTSD affected her ability to file for asylum within one year of arrival.

Ms. L.R.'s credibility was never questioned, and the immigration judge found that she had suffered "severe physical and sexual abuse." He accepted the expert diagnosis that

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<sup>7</sup> The "L.R." case has been widely reported in the media because of the brief filed by the Department of Homeland Security in which it set forth its position that women who have been victims of domestic violence may qualify for asylum based on membership in a particular social group. *See e.g.* Julia Preston, "New Policy Permits Asylum for Battered Women," *The New York Times*, July 16, 2009.

Ms. L.R. suffered from PTSD, and noted that one symptom associated with PTSD is avoidance of situations that trigger traumatic memories – such as the asylum process. Nonetheless, the judge concluded that her ability to work and care for her children undermined her argument that PTSD delayed her from timely filing, and he consequently refused to excuse her from the one-year deadline, thus barring her from asylum. The case is now back before the immigration court on remand from the BIA.

CGRS has been informed of numerous examples, similar to that in Ms. L.R.'s case, of immigration judges refusing to waive the bar in cases of PTSD where the applicant was able to function in daily life. The judges in these cases either substitute their own opinions for those of mental health experts and conclude that the women were not suffering from PTSD, or they disregard evidence that an important aspect of PTSD is the avoidance of "people, places, thoughts, or activities that bring back memories of the trauma,"<sup>8</sup> and rule that PTSD was not related to the delay in filing. These judges are subject to the "common" misperception that PTSD affects overall functioning, but this assumption "is not borne out by the medical evidence."<sup>9</sup> The immigration judge's decision in the L.R. case, as well as the decisions in the other cases described, demonstrate that despite the exceptions for changed or extraordinary circumstances, the application of the deadline frustrates Congressional intent to protect legitimate asylum seekers.

On remand, Ms. L.R. has an opportunity to re-litigate the one-year deadline. However, most women do not have a second chance. Some of them are simply denied protection and returned to the countries they fled. Ironically, some of them are granted withholding of removal or protection under the Convention Against Torture (CAT) - which require an applicant to show a 51% likelihood of persecution or torture, as opposed to the 10% chance of persecution required for asylum - clearly demonstrating these were not fraudulent claims, yet they are denied asylum simply because of their failure to timely file. Withholding of removal and CAT do not afford the benefits that asylum does, leaving such women in a state of legal limbo – with no path to lawful permanent residence or citizenship and no right to receive refugee benefits – and no right to bring a child or spouse to the U.S.

The Refugee Protection Act eliminates the one-year filing deadline, which would remove a significant obstacle to protection of women asylum seekers, and help ensure that the

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<sup>8</sup> See PTSD Patient Page 286 JAMA 630, 630 (2001); see also Diagnostic Manual, American Psychiatric Association, 309.81 Posttraumatic Stress Disorder (2000).

<sup>9</sup> Dr. Stuart Lustig, M.D., M.P.H., and an Assistant Professor of Psychiatry at the University of California, San Francisco who has published a number of articles on refugees and trauma, has trained Asylum Officers on issues related to diagnosing trauma in asylum seekers, and has been an invited speaker at the Annual Meeting of the National Association of Immigration Judges (NAIJ), submitted an affidavit in Ms. L.R.'s case specifically addressing the common misperception that the ability to work and care for one's children demonstrates that the individual should have been able to file for asylum. He explains that PTSD commonly causes people to avoid anything that reminds them of their trauma and may make them unable to participate in activities unrelated to immediate survival, such as seeking asylum, "while leaving intact their ability to function and survive on a day to day basis." Declaration of Dr. Stuart Lustig 3/29/2010, on file with CGRS.

U.S. meets its obligation under international law not to return a refugee to a country where she would be persecuted on account of a protected ground.

## **2) Providing Much Needed Clarity and Consistency for Claims Based on Membership in Particular Social Group**

### **Background**

Women's claims for protection have often encountered a number of interpretive obstacles, one of them arising from the fact that "gender" is not one of the five enumerated grounds in the refugee definition. Since 1985, UNHCR has recommended that the "particular social group" ground could be the basis for claims where women are persecuted because of their gender.<sup>10</sup> In a landmark decision issued in 1985 and known as *Matter of Acosta*, the Board of Immigration Appeals (BIA) defined "particular social group" as a group of individuals who share a common characteristic that is immutable or so fundamental to identity or conscience that an individual should not be required to change, and recognized that sex is one such characteristic. (*Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985)).

Although *Acosta* was not a gender case, its social group ruling was to become the basis for subsequent positive developments in gender cases, such as the BIA's 1996 grant of asylum to Fauziya Kassindja, a Togolese woman who fled her country to escape female genital cutting (FGC). This seminal decision, known as *Matter of Kasinga*, recognized that women could qualify for refugee status based on violations of their fundamental rights (in this case FGC) and that gender could be a defining characteristic of a particular social group. (*Matter of Kasinga*, 21 I & N Dec. 357, (BIA 1996)).

However, the U.S. commitment to protecting women who flee serious human rights violations was brought into question by a 1999 BIA decision known as *Matter of R-A-*. (*Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999) (en banc), *vacated* 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I&N Dec. 694 (A.G. 2005), *remanded* 24 I&N Dec. 629 (A.G. 2008)). In that case, the BIA denied protection to Rody Alvarado, a Guatemalan asylum seeker who suffered extreme violence at the hands of her husband, in a situation in which neither the police nor the courts would extend her protection. Notwithstanding the precedent of *Acosta* and *Kasinga*, the BIA rejected Ms. Alvarado's social group, which was defined by her gender.

In response to sustained advocacy by women's rights, refugee rights, and immigrants' rights advocates, Attorney General Janet Reno intervened in the case. In 2000, the Department of Justice issued proposed regulations<sup>11</sup> to address the barriers that *Matter of R-A-* posed in domestic violence asylum claims based on membership in a particular social group. In 2001, A.G. Reno certified *Matter of R-A-* to herself, vacated the BIA's

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<sup>10</sup> See *Refugee Women and International Protection*, United Nations High Commissioner for Refugees, Executive Committee Conclusion No. 39 (October 18, 1985).

<sup>11</sup> 65 Fed. Reg. No. 236, December 7, 2000.

decision, and remanded the case to the BIA with an order to stay a decision until final regulations were issued.

In 2003, A.G. Ashcroft certified *Matter of R-A-* for review. Attorneys for the Department of Homeland Security (DHS) filed a brief to A.G. Ashcroft, setting forth the Department's official position that *Matter of Acosta's* immutable or fundamental characteristics approach was the correct standard for evaluating social groups, and taking the position that under a fair application of the relevant law, Ms. Alvarado could demonstrate that she was a member of a particular social group defined in part by gender. A.G. Ashcroft ultimately returned the case to the BIA without issuing a decision, and ordered the BIA to continue staying the case for the issuance of final regulations.

The failure to decide R-A-, or to finalize regulations left great uncertainty regarding the viability of gender claims. Compounding this situation of legal limbo was the fact that beginning in 2006, the BIA imposed requirements making it more difficult to establish social group claims. It did this by explicitly departing from its earlier precedent in *Acosta*, and by ruling that a social group not only required immutable or fundamental characteristics, but a showing that the group has “social visibility” and particularity.”<sup>12</sup>

### **Matter of R-A- Recent Developments**

In 2008, A.G. Mukasey certified *Matter of R-A-* for a third time. He lifted the stay and remanded the case because he believed that the BIA decisions requiring social visibility and particularity, in addition to immutable or fundamental characteristics, provided sufficient guidance for the BIA to rule absent final regulations.<sup>13</sup>

*Matter of R-A-* was ultimately remanded to the immigration court for additional evidence and argument. Soon after it was remanded, a brief submitted by DHS Headquarters in the case of an asylum seeker known as L.R. (discussed above) became public. Although the social group Ms. L.R. advanced before the immigration judge was similar to that in the 2004 DHS brief in *Matter of R-A-*, the local DHS attorney assigned to the case argued that the group did not meet the social visibility and particularity requirements. The immigration judge agreed. He ruled that the social group was not legally cognizable, and that in any event, Ms. L.R.'s partner did not abuse her because of her social group membership, and he denied the claim. While the case was on appeal to the BIA, President Obama took office and DHS Headquarters filed a brief setting forth the new position that Ms. L.R. and other victims of domestic violence may qualify for asylum based membership in a particular social group. Ms. L.R.'s case is now back before the immigration court.

The DHS brief in L.R. was instrumental to securing a grant asylum to Rody Alvarado and ending her fourteen year legal battle for protection.<sup>14</sup> However, the position taken by the

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<sup>12</sup> See *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), *aff'd Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006).

<sup>13</sup> *Id.*; see also *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).

<sup>14</sup> Ms. Alvarado was granted asylum by an immigration judge on December 10, 2009.

local DHS attorney assigned to the L.R. case and the decision of the immigration judge demonstrate the problematic state of the law regarding social group and nexus, and the need for clear national guidance.

### **The Social Visibility and Particularity Requirements Pose Additional Challenges in Gender-Based Cases**

BIA decisions on social visibility and particularity are inconsistent and difficult to follow. Some decisions treat visibility in the literal sense, insisting that individual members of the group must be identifiable as group members to complete strangers, while others require that the group be recognized or perceived as a group in society. In addition, BIA decisions often conflate social visibility and particularity with other elements of the refugee definition, such as whether the nexus (causal link) to a protected ground has been established, or whether an applicant has a well-founded fear of persecution.

Social visibility and particularity have served as an almost insurmountable barrier in cases of women seeking refuge from gender-based harm. Additional examples of women's cases denied under these requirements include:

- An immigration judge recently denied asylum to a Mongolian woman who suffered years of brutal domestic violence at the hands of her husband. The woman argued that she was persecuted based on membership in a social group that is identical to one of the groups advanced by DHS in the L.R. case. Nonetheless, the local DHS attorney argued that the group lacked social visibility. The immigration judge agreed and denied the case.
- An immigration judge denied protection to a Senegalese woman who fled an impending forced marriage to an abusive man many years her senior. The woman's religious and feminist beliefs clashed with the traditional religious beliefs and gender norms adhered to by her father and community. Her father mercilessly beat her whenever she expressed her beliefs in women's rights and her opposition to the marriage. The social group advanced in the case was very similar to the one approved by the BIA in *Matter of Kasinga*. Nonetheless, the immigration judge ruled that the group lacked social visibility because the woman failed to show "how Senegalese who do not know her personally will identify her" as a member of the group.

While some federal courts have adopted the social visibility and particularity requirements, the Seventh Circuit has rejected them as being illogical and contrary to BIA precedent. Writing for the court, Judge Posner criticized social visibility as simply making "no sense" because members of a group targeted for persecution "take pains to avoid being socially visible." He illustrated the absurdity of the requirement by pointing to social groups the BIA had previously approved whose members would not be individually identifiable, such as homosexuals who would "pass as heterosexual" to avoid

persecution in a “homophobic society” and women who have not yet undergone female genital cutting, who “do not look different from anyone else.”<sup>15</sup>

Furthermore, the BIA's own justification for the social visibility requirement – that it is consistent with UNHCR's guidelines on social group claims - is erroneous. While UNHCR's guidelines advise that groups perceived as groups by society may be social groups, this approach is an alternative to the immutable or fundamental characteristics test, not in addition to it,<sup>16</sup> and regardless, neither approach requires social visibility. The UNHCR has repeatedly clarified its position and has explicitly rejected the requirements of social visibility and particularity as inconsistent with the purpose and intent of the 1951 Refugee Convention and its 1967 Protocol,<sup>17</sup> but the BIA has continued to apply them.

The Refugee Protection Act addresses the problems created by social visibility and particularity, as well as the absence of binding guidance in claims based on membership in a particular social group. It does so by making statutory the BIA's definition of a “particular social group,” which was articulated in *Matter of Acosta* and followed by the BIA for over twenty years, and was widely accepted by federal courts, the UNHCR, and foreign jurisdictions.

### **3) Providing Clear Guidance on how to Establish Nexus to an Enumerated Ground**

#### **Background**

In 1991, the Supreme Court ruled that in order to establish nexus to one of the five statutory grounds for asylum, an applicant must present direct or circumstantial evidence of the persecutor's motive. (*INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1991)). The BIA's decision in *Matter of Kasinga* looked to circumstantial evidence of social norms regarding FGC and gender roles to determine that Ms. Kassindja had a well-founded fear of FGC on account of her social group membership. However, the BIA's 1999 *Matter of R-A-* decision, in which it ruled that even if Ms. Alvarado was a member of a social group she was not harmed on account of such membership, failed to consider the societal context in which the abuse took place in determining nexus.

The DOJ in its Proposed Regulations of 2000 and the DHS in its 2004 brief to A.G. Ashcroft pointed out that decisions such as the BIA's in *Matter of R-A-* ignore the circumstantial evidence of patterns of violence against individuals similarly situated to

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<sup>15</sup> See *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009); see also *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) (rejecting the particularity requirement).

<sup>16</sup> UNHCR Guidelines on International Protection, “Membership in a particular social group,” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), at paras 10-13.

<sup>17</sup> See e.g. Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of the Petitioner, *Valdiviezo-Galdamez v. Holder*, No. 08-4564 (A97-447-286), in the United States Court of Appeals for the Third Circuit, at 3-4, 8-10, available at:

<http://www.unhcr.org/refworld/category.LEGAL.UNHCR.AMICUS.,49ef25102.0.html>.

the applicant and the failure of the legal system to protect them. As the Proposed Regulations and the DHS briefs in both *Matter of R-A-* and *L.R.* recognize, an abuser may be motivated to target his victim because violence against women is pervasive and he knows he can abuse her with impunity.<sup>18</sup>

Courts have long understood the challenge asylum applicants face in demonstrating nexus because persecutors rarely articulate the reasons for their actions.<sup>19</sup> Despite this recognition, countless claims have been denied because adjudicators have rejected circumstantial evidence as insufficient to prove nexus. Nexus has been particularly problematic in women's cases - especially when the persecutor is a non-state actor - where judges are quick to dismiss gender-based harm as either a criminal or private act not motivated by a protected ground. CGRS has numerous examples of refugee claims based on rape, domestic violence, honor killing, forced marriage, and trafficking that were denied for failure to establish nexus to a protected ground, despite evidence presented of widespread discrimination and violence against women, as well as impunity for such violence.

Consistent with the Supreme Court's nexus analysis in *INS v. Elias-Zacarias*, the DOJ's Proposed Regulations of 2000, and the DHS briefs in *Matter of R-A-* and *L.R.*, the Refugee Protection Act clarifies that either direct or circumstantial evidence - including evidence that the state or society tolerates persecution against individuals similarly situated to the applicant - fulfills the nexus requirement. This amendment would help protect women and girls who have endured or fear rape, domestic violence, or other gender-based harm by non-state actors who do not announce their motive.

### **Restore Asylum Eligibility for Cases in Which the Persecutor has Mixed Motives**

Beginning in 1996, the BIA and federal courts recognized that asylum may be granted in cases where the persecutor has "mixed motives," as long as an enumerated ground is one of the reasons for persecution.<sup>20</sup> However, the REAL ID Act of 2005 raised the bar in mixed motive cases, requiring that a protected ground be "one central reason" for persecution. While the BIA has clarified that the mixed motive doctrine survived the REAL ID Act,<sup>21</sup> the interpretation and application of the "one central reason" language by the BIA and federal courts has virtually eliminated eligibility for asylum in mixed motive cases.<sup>22</sup> The "one central reason" language has been exceptionally problematic in gender cases, where, as discussed above, adjudicators are quick to dismiss gender-based persecution as a criminal act. The result has been that adjudicators regularly look to all

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<sup>18</sup> UNICEF (and other leading authorities on violence against women) has long recognized that lack of legal protection is one of the causes of domestic violence and has urged states to end impunity for violence against women. See e.g. *Domestic violence against women and girls*, UNICEF, Innocenti Digest No. 6, June 2000 at 8.

<sup>19</sup> See e.g. *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1075 (9th Cir. 2004).

<sup>20</sup> See e.g. *Matter of S-P-*, 21 I&N Dec. 486, 494 (BIA 1996).

<sup>21</sup> See *In re J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007).

<sup>22</sup> See e.g., *Parussimova v. Mukasey*, 555 F.3d 734, 740-41 (9th Cir. 2009) (holding that "one central reason" places a "more onerous burden" on an asylum applicant than the "at least in part" standard).

the possible non-statutorily protected reasons for gender-based persecution to discount the statutory ground as not being "one central reason" for the persecution.

### **Examples of Women Denied Protection Because of Application of "One Central Reason" Language**

- The immigration judge in the L.R. case acknowledged that Ms. L.R.'s abuser viewed her as property, but found that he beat her simply because he was a violent man, not because of her gender or status in the relationship. As a result, the judge ruled that Ms. L.R. failed to establish that her social group membership was a "central reason" for her persecution.
- An ethnic Russian woman who is a native and citizen of Kazakhstan, and who worked for an American company, was targeted by two Kazakhstani men while walking one day. The men harassed and insulted her, and told her she had no right to work for an American company. They kicked her, spat on her, called her a "Russian pig[]," and told her to get out of their country. Then they tore off her clothes and attempted to rape her. The woman sought asylum, arguing that she was persecuted on account of her Russian ethnicity. Her claim was denied by an immigration judge who ruled that she did not prove ethnicity was one central reason for her persecution. The BIA upheld the decision. On appeal before the Ninth Circuit, the court ruled that although the assailants were clearly aware of the woman's ethnicity and had hurled ethnic slurs at her during their attack, this evidence was insufficient to show that ethnicity was "a central motivating reason" for her attack.<sup>23</sup>

The Refugee Protection Act addresses the restrictive application of nexus demonstrated in the above examples, which denies protection to women like Ms. L.R., by clarifying that one of the five protected grounds must be a "factor" in the applicant's persecution or fear of persecution, rather than "one central reason" for it. It also reaffirms that an applicant who has suffered or fears persecution for both statutorily protected and non-protected reasons should qualify for asylum.

### **Conclusion**

Despite the DHS brief in L.R. and the grant of asylum to Rody Alvarado, victims of gender-based persecution continue to face significant impediments to protection, such as the one-year bar, the problematic social visibility and particularity requirements, the restrictive application of a nexus analysis imposed by the "one central reason" requirement, and the lack of guidance regarding social group and nexus. The L.R. brief and decision in Ms. Alvarado's case are positive developments. However, they do not constitute legal precedent, but simply demonstrate DHS's recommended analysis. As a

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<sup>23</sup> *Id.* at 742.

result, there continue to be inconsistent decisions, with some judges granting asylum based on the framework set out in the L.R. brief, and others denying due to the lack of binding authority. Additionally, CGRS has been informed of a number of cases in which attorneys for DHS have either refused to acknowledge the existence of the April 2009 DHS brief in L.R, or have taken a position contrary to it. CGRS calls on the Senate Judiciary Committee to pass the Refugee Protection Act in order to ensure that the U.S. upholds its commitment to protect refugees like Ms. Alvarado and Ms. L.R.