

UNHCR’s Views on Gender-Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender

Using international law to support claims from women and girls seeking protection in the U.S.

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The United Nations High Commissioner for Refugees (UNHCR) has long recognized the special protection needs of women and girls in refugee and asylum procedures. Under international standards, “[i]t is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status. This approach has been endorsed by the General Assembly, as well as the Executive Committee of UNHCR’s Programme.”¹ The purpose of this note is to summarize UNHCR’s views on gender-based asylum claims, with a focus on membership in a particular social group, as relevant to pursuing asylum in the United States. It is generally applicable to claims with a gender component advanced by women and girls from all over the world.

Recognizing the unique protection concerns of women and girls, UNHCR takes the view that that the refugee definition, found in Article 1A(2) of the 1951 Convention Relating to the Status of Refugees and Article I of the 1967 Protocol Relating to the Status of Refugees,² encompasses claims from women and girls facing gender-based violence, and it has developed guidance accordingly. UNHCR works to understand and address escalating levels of violence faced by women and girls across the globe, including those fleeing Central America³ and other regions,⁴ and has produced country-specific asylum eligibility guidelines that discuss their unique risk profiles. Moreover, UNHCR is tracking how the COVID-19 pandemic has exacerbated vulnerabilities of women and girls in their countries of origin, which may be

¹ UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶ 2, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter Gender Guidelines].

² U.N. General Assembly, *Convention Relating to the Status of Refugees*, 19 U.S.T. 6259, 189 U.N.T.S. 137 (July 28, 1951) [hereinafter 1951 Convention]; U.N. General Assembly, *Protocol relating to the Status of Refugees*, GA Res. 2198 (XXI), UN GAOR, 21st Sess., U.N. Doc. A/RES/2198 (Dec. 6, 1966) [hereinafter 1967 Protocol].

³ UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* (2015), available at <http://www.unhcrwashington.org/womenontherun> [hereinafter Women on the Run]; see also, UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala*, U.N. Doc. HCR/EG/GTM/18/01, Jan. 2018, <https://www.refworld.org/docid/5a5e03e96.html> [hereinafter Guatemala Eligibility Guidelines]; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras*, U.N. Doc. HCR/EG/HND/16/03, July 27, 2016, <https://www.refworld.org/docid/579767434.html> [hereinafter Honduras Eligibility Guidelines]; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, U.N. Doc. HCR/EG/SLV/16/01, Mar. 15, 2016, <https://www.refworld.org/docid/56e706e94.html> [hereinafter El Salvador Eligibility Guidelines]. More current reports and articles underscore the continuing protection concerns of Central American women. See, e.g., U.S. Inst. of Diplomacy & Human Rights, *Tackling Violence Against Women in the Northern Triangle of Central America*, Nov. 14, 2021, <https://usidhr.org/tackling-violence-against-women-in-the-northern-triangle-of-central-america-ntca/>; UNHCR, *Death Threats and Gang Violence Forcing More Families to Flee Northern Central America*, Dec. 17, 2020, <https://www.unhcr.org/en-us/news/press/2020/12/5fdb14ff4/death-threats-gang-violence-forcing-families-flee-northern-central-america.html>.

⁴ See, e.g., UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, U.N. Doc. HCR/EG/AFG/18/02, Aug. 30, 2018, <https://www.refworld.org/docid/5b8900109.html>; UNHCR, *International Protection Considerations with Regard to People Fleeing the Republic of Iraq*, U.N. Doc. HCR/PC/IRQ/2019/05_Rev.2, May 2019, <https://www.refworld.org/docid/5cc9b20c4.html>; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, U.N. Doc. HCR/EG/LKA/12/04, Dec. 21, 2012, <https://www.refworld.org/docid/50d1a08e2.html>; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea*, U.N. Doc. HCR/EG/ERT/11/01_Rev.1, Apr. 20, 2011, <https://www.refworld.org/docid/4d4fe0ec2.html>.

relevant to evaluating their protection needs.⁵ The resources compiled at the end of this document expand upon the discussion.

I. Relevance of International Refugee Law in the United States

The 1951 Convention and its 1967 Protocol⁶ are the key international instruments governing the protection of refugees. The United States is a signatory and party to the 1967 Protocol, and therefore is bound to comply with the obligations deriving from the Protocol as well as, by incorporation, articles 2-34 of the 1951 Convention,⁷ and it has incorporated the substantive provisions of the Protocol into U.S. domestic law.⁸ U.S. law, based on the 1951 Convention and the 1967 Protocol, defines a refugee as someone who is outside of his or her country of nationality 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 future persecution “on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁹

U.S. courts have an obligation to construe U.S. statutes in a manner consistent with international obligations whenever possible.¹⁰ In their efforts to fulfill that duty, U.S. courts have relied on UNHCR guidance, especially the Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter Handbook),¹¹ in assessing refugee claims—including those based on gender¹²—and have

⁵ UNHCR, *Protecting Forcibly Displaced Women and Girls During the Covid-19 Pandemic*, at 2 (Mar. 2021), available at https://reporting.unhcr.org/sites/default/files/Protecting%20forcibly%20displaced%20women%20and%20girls%20during%20Covid-19%20March%202021.pdf#_ga=2.173366436.607318615.1640603726-384923944.1633458231; U.N. Women, *Covid-19 in Latin America and the Caribbean: How to Incorporate Women and Gender Equality in the Management of the Crisis Response*, at 1-2 (Mar. 2020), available at <https://www2.unwomen.org/-/media/field%20office%20americas/documentos/publicaciones/2020/03/enbriefing%20coronavirus1117032020.pdf?la=en&vs=4511>; UNHCR, *UNHCR Warns Second Wave of COVID Pandemic Driving Further Violence Against Refugee Women and Girls*, Nov. 25, 2020, <https://www.unhcr.org/news/press/2020/11/5f8e0f394/unhcr-warns-second-wave-covid-pandemic-driving-further-violence-against.html>; see also Friedrich Ebert Stiftung, *How Covid-19 Affects Women in Migration*, Sept. 7, 2020, <https://www.fes.de/en/iez/international-week-of-justice/article-in-gerechtigkeitswoche/how-covid-19-effects-women-in-migration-1-1>; Devon Cone, *Gender Matters: COVID-19’s Outsized Impact on Displaced Women and Girls*, REFUGEES INTERNATIONAL, May 7, 2020, <https://www.refugeesinternational.org/reports/2020/5/4/gender-matters-covid-19s-outsized-impact-on-displaced-women-and-girls>.

⁶ 1951 Convention; 1967 Protocol.

⁷ The 1967 Protocol binds parties to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention with respect to “refugees” as defined in Article 1A(2) of the 1951 Convention. 1967 Protocol, Art. I, ¶¶ 1–2. The 1967 Protocol universalizes the refugee definition in Article 1 of the 1951 Convention, removing the geographical and temporal limitations. *Id.*, ¶¶ 2–3. The United States acceded to the 1967 Protocol in 1968, thereby binding itself to the international refugee protection regime and the refugee definition in the 1951 Convention. H.R. Conf. Rep. No. 96–781, at 19 (1980), reprinted in 1980 U.S.C.C.A.N. 160; H.R. Rep. No. 96-608, at 9 (1979); S. Exec. Rep. No. 14, 90th Cong., 2d Sess., 4 (1968).

⁸ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

⁹ 8 USC § 1101(a)(42).

¹⁰ *Murray v. The Charming Betsy*, 6 U.S. 64, 80 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (finding “abundant evidence” that Congress intended to conform the definition of refugee and the asylum law of the U.S. “to the United Nation’s [sic] Protocol to which the United States has been bound since 1968.”).

¹¹ The UNHCR Handbook was prepared at the request of the Member States of the Executive Committee of the High Commissioner’s Programme, including the United States, to provide guidance to governments in applying the terms of the Convention and Protocol. See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, at 9, U.N. Doc. HCR/1P/4/ENG/REV.4 (2019) [hereinafter Handbook].

¹² *Kaur v. Wilkinson*, 986 F.3d 1216, 1225 (9th Cir. 2021) (citing the UNHCR Guidelines on the Protection of Refugee Women and the UNHCR Handbook for the Protection of Women and Girls to explain the psychological effects of sexual assault); *Clemente-Giron v. Holder*, 556 F.3d 658, 664-65 (8th Cir. 2009) (J. Wollman, dissenting) (citing to UNHCR Guidelines on the Protection of Refugee Women to emphasize the impact of sexual assault on a survivor’s ability to disclose her abuse and her credibility).

recognized that UNHCR’s analysis provides significant direction in understanding issues in refugee law.¹³ The U.S. Supreme Court, for instance, has “consistently turned [to UNHCR] for assistance in interpreting [U.S.] obligations under the Refugee Convention.”¹⁴ Thus, UNHCR guidance can serve as a critical tool in evaluating and resolving the diverse, evolving interpretative questions related to the refugee definition that continue to arise, including in the United States.

While international law can be used to support and advance an individual’s claim to asylum in the United States, UNHCR recognizes that an asylum seeker may need to affirmatively highlight relevant international legal standards to receive individualized consideration by U.S. courts and authorities in a particular case. Therefore, advocates and asylum seekers may wish to submit relevant materials, such as UNHCR’s *Guidelines on International Protection* or *Eligibility Guidelines*¹⁵ to be included in the record when applicable. These sources are cited throughout the document and compiled thematically in the last section.

II. Gender-Related Forms of Persecution

The asylum claims of women and girls may present questions regarding the persecution component of the refugee definition. The Handbook provides that a threat to life or freedom or other serious human rights violations on account of race, religion, nationality, political opinion or membership of a particular social group constitutes persecution.¹⁶ Certain physical, sexual, and psychological harms—including but not limited to domestic or family violence, rape, psychological abuse, harmful traditional practices, and punishment for transgression of social mores¹⁷—committed against women and girls may constitute persecution.¹⁸ A non-exhaustive list of gender-related harms are detailed further, below:

- **Sexual violence** may constitute persecution.¹⁹ It is particularly but not exclusively common in countries experiencing armed conflict²⁰ and may encompass rape, forced sterilization, and forced pregnancy, among other harms.²¹ Trafficking for the purposes of forced prostitution or sexual

¹³ *INS v. Cardoza-Fonseca*, 480 U.S. 421, n.22 (1987) (“The Handbook provides significant guidance in construing the Protocol . . . [and] has been widely considered useful in giving content to the obligations that the Protocol establishes.”).

¹⁴ *N-A-M v. Holder*, 587 F.3d 1052, 1061-62 (10th Cir. 2009) (Henry, C.J. concurring) (citing Supreme Court cases where the Court turned to UNHCR guidance materials for assistance in interpreting U.S. obligations under the Refugee Convention); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987) (“In interpreting the Protocol . . . we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status.”); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007) (stating that the Court views the UNHCR Handbook as “persuasive authority in interpreting the scope of refugee status under domestic asylum law.”) (Internal quotation marks omitted).

¹⁵ See e.g., Gender Guidelines, El Salvador Eligibility Guidelines.

¹⁶ Handbook, ¶ 51.

¹⁷ Gender Guidelines, ¶ 3.

¹⁸ See UNHCR, *Note on Certain Aspects of Sexual Violence against Refugee Women*, ¶ 29, U.N. Doc. EC/1993/SCP/CRP.2 (1993).

¹⁹ The UNHCR Executive Committee “strongly condemns persecution through sexual violence” and “supports the recognition as refugees of persons whose claim to refugee status is based upon a well-founded fear of persecution, through sexual violence, for reasons of race, religion, nationality, membership of a particular social group or political opinion.” UNHCR Exec. Comm., *Conclusion on International Protection No. 73 on Refugee Protection and Sexual Violence* (1993), <https://www.refworld.org/docid/5a2ead6b4.html>; see also, UNHCR, *Sexual and Gender-Based Violence Against Refugees, Returnees, and Internally Displaced Persons: Guidelines for Prevention and Response*, at 109 (May 2003), <https://www.refworld.org/docid/3edcd0661.html> [hereinafter SGBV Guidelines].

²⁰ See, e.g., UN Secretary-General (UNSG), *Sexual Violence in Conflict*, U.N. Doc. A/67/792 - S/2013/149 (Mar. 14, 2013).

²¹ SGBV Guidelines, at 16-17.

exploitation is considered a form of torture and cruel, inhumane or degrading treatment, and it may also constitute persecution.²²

- **Psychological violence** may constitute persecution.²³ This might include serious forms of humiliation, intimidation, harassment, threats, verbal abuse, isolation from family and friends, and other practices that cause or result in mental or emotional harm.²⁴
- **Harmful traditional practices** may constitute persecution. Examples include female genital mutilation (FGM),²⁵ early or forced marriage, honor killings or maiming, and female infanticide or neglect.²⁶ Regarding FGM, both UNHCR and the U.S. government have issued specific guidance that recognize FGM as a form of persecution and highlight that asylum seekers who suffered this harm may be eligible for protection.²⁷
- **Severe or cumulative instances of discrimination** may constitute persecution.²⁸ This may be so, for instance, when the combined effect of discriminatory measures lead to consequences of a “substantially prejudicial nature, . . . e.g., serious restrictions on [the] right to earn [a] livelihood, [the] right to practice [] religion, or [on one’s] access to normally available educational facilities.”²⁹ Other examples of measures that would be “substantially prejudicial” to women might include severe restrictions on dress, travel, property rights, inheritance rights or the right to marry.
- **Penalties or punishment for non-compliance of a law or policy** that are disproportionately severe relative to the alleged transgression and have a gender dimension, may constitute persecution.³⁰

III. Gender-Based Asylum Claims Based on Membership in a Particular Social Group

“Membership in a particular social group” is one of the five protected grounds, though it is not defined in the 1951 Convention. It has been increasingly invoked in asylum applications in recent years, especially in cases that have a gender component. At the same time, in the United States, this ground has been subject to increased litigation and has seen attempts to narrow its scope. The Handbook provides generally that a particular social group (PSG) is normally comprised of persons of similar background, habits or social

²² Gender Guidelines, ¶ 18.

²³ UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, ¶ 33, U.N. Doc. HCR/GIP/09/08 (Dec. 2009) [hereinafter *Child Guidelines*].

²⁴ *Child Guidelines*, ¶ 33.

²⁵ FGM amounts to persecution as a form of gender-based violence that “inflicts severe harm, both mental and physical.” UNHCR, *Guidance Note of Refugee Claims Relating to Female Genital Mutilation* (2009). Claims may not only involve asylum seekers who faced an imminent threat of being subjected to FGM, but also those who have already suffered from it. *Id.*

²⁶ SGBV Guidelines, at 75-76.

²⁷ UNHCR, *Guidance Note of Refugee Claims Relating to Female Genital Mutilation*, ¶ 7 (2009); RAI0 Directorate, Officer Training Nexus-Particular Social Group, at 4.4.1, July 20, 2021, https://www.uscis.gov/sites/default/files/document/foia/Nexus_-_Particular_Social_Group_PSG_LP_RAIO.pdf; RAI0 Directorate, Officer Training Well-Founded Fear, at 43-46, Dec. 20, 2019, https://www.uscis.gov/sites/default/files/document/foia/Well_Founded_Fear_LP_RAIO.pdf.

²⁸ Handbook, ¶ 54.

²⁹ Handbook, ¶ 54.

³⁰ Handbook, ¶ 12.

status,³¹ and other UNHCR guidelines elaborate on the proper interpretation and substantive analysis of membership in a PSG.³²

While a PSG cannot be “exclusively defined by the fact that it is targeted for persecution,” there is no “closed list” of groups that constitute a PSG.³³ Social groups should also be viewed in an evolutionary manner, “open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”³⁴ The following subsections offer an overview of relevant international legal standards on cognizable groups and nexus and articulate how they apply in the specific context of gender-based claims presented in the United States.

a. Legal Cognizability of Particular Social Groups

International law recognizes alternative approaches to defining a “particular social group,” and gender-based asylum claims may be established under either. Under these alternative approaches, an asylum seeker may demonstrate that her PSG is comprised of a group of persons that *either* shares a common characteristic, such as sex, caste, color, family background or a shared past experience, **(the protected characteristics approach)** or is perceived as a distinct group by society **(the social perception approach)**.³⁵ In cases of gender-based violence, for example, “sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics,” thereby fulfilling the protected characteristics approach.³⁶ Alternatively, because some societies identify females as a group and subject them to different treatment and standards, asylum seekers may satisfy the social perception approach.³⁷

Claims based on membership in a PSG have come under increased scrutiny in U.S. courts and administrative bodies in recent years. While U.S. law initially followed the protected characteristics approach,³⁸ it has evolved to require essentially that *both* alternative approaches be satisfied, as a PSG must include members who share a common, immutable characteristic; be defined with particularity; and be socially distinct³⁹—thus establishing a threshold for cognizable PSGs that far exceeds international standards. Notably, in 2018, the decision in *Matter of A-B-* restated these heightened requirements⁴⁰ and significantly affected asylum seekers who had fled domestic and gang violence.⁴¹ UNHCR subsequently filed several amicus briefs addressing the U.S. interpretation of “particular social group,” underscoring

³¹ Handbook, ¶ 77.

³² UNHCR, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter Social Group Guidelines].

³³ Social Group Guidelines, ¶ 2.

³⁴ Social Group Guidelines, ¶ 3.

³⁵ Social Group Guidelines, ¶ 11. The characteristic “will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.” Social Group Guidelines, ¶ 11. It might also be based on shared past experiences (such as former military or political leadership), or shared values, attitudes or behaviors, such as sexuality.

³⁶ Social Group Guidelines, ¶ 12; Gender Guidelines, ¶ 30.

³⁷ Gender Guidelines, ¶ 30.

³⁸ *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (interpreting “particular social group” to mean a group of persons who share a common, immutable characteristic.).

³⁹ *Matter of S-E-G-*, 24 I&N Dec. 579, 582, 589 (BIA 2008).

⁴⁰ *Matter of A-B- I*, 27 I&N Dec. 316, 317 (A.G. 2018) (“the applicant must demonstrate membership in a group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question.”).

⁴¹ *Matter of A-B- I*, 27 I&N Dec. 316, 320 (A.G. 2018) (suggesting, in dicta, that “claims by [noncitizens] pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”).

how it is at variance with international legal standards and emphasizing that those with gender-based claims can qualify for protection.⁴²

Although *Matter of A-B-* was vacated in 2021,⁴³ establishing legally cognizable PSGs in U.S. asylum adjudication remains challenging and out of step with international law in a number of ways. The size of a PSG, for instance, sometimes becomes an issue. Under prevailing international standards, the size, cohesion, and diffusiveness of a proposed group are not at all relevant to determining whether a PSG exists within the meaning of Article 1A(2) of the 1951 Convention.⁴⁴ Nevertheless, while there are no explicit limitations on the size of a PSG under U.S. law and PSGs “may contain only a few individuals or a large number of people,”⁴⁵ the Board of Immigration Appeals (BIA) has cautioned that “major segments of the population will rarely constitute distinct social groups.”⁴⁶ The BIA’s warning, especially should it be used to deny recognition of an otherwise cognizable PSG, is contrary to international law.

Despite these challenges, U.S. federal courts and immigration judges have found that gender can form the basis of a PSG,⁴⁷ and U.S. administrative authorities (whose training materials play a normative role in the development of U.S. asylum law) have highlighted that “women hold a significantly different position in many societies than men” and that “[w]omen may suffer harm solely because of their gender.”⁴⁸ One court found, for example, that as a result of pervasive, targeted violence, “Guatemalan women” could generally constitute a PSG.⁴⁹ The below list (and corresponding footnotes) includes examples of gender-related PSGs that courts have recognized:

⁴² See, e.g., UNHCR Amicus Brief, *Grace v. Barr*, No. 19-5013 (D.C. Cir. July 31, 2019), <https://www.refworld.org/docid/5d7a0e544.html>; UNHCR Amicus Brief, *Matter of O.L.B.D.*, No. 18-1816 (A206-252-605) (1st Cir. Mar. 11, 2019), <https://www.refworld.org/docid/5c8924454.html>; UNHCR Amicus Brief, *Marroquin-Perez v. Barr*, No. 18-73146 (BIA Feb. 28, 2020), <https://www.refworld.org/docid/5f647e574.html>.

⁴³ *Matter of A-B- III*, 28 I&N Dec. 307 (A.G. 2021).

⁴⁴ This means that an asylum seeker does not have to establish that all members of the group are at risk of being persecuted or that all members of the proposed group know or associate with each other for the PSG to be considered legally cognizable. Social Group Guidelines, ¶¶ 15, 17-18; UNHCR Amicus Brief, *Matter of O.L.B.D.*, at 23 (citing Social Group Guidelines, ¶¶ 15, 18).

⁴⁵ *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (explaining that “the size and breadth of a group alone does not preclude a group from qualify as such a social group.”).

⁴⁶ *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014) (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)).

⁴⁷ See, e.g., *De Pena-Paniagua v. Barr*, 957 F.3d 88, 96 (1st Cir. 2020) (explaining that “it is not clear why a larger group defined as ‘women,’ or ‘women in country X’ – without reference to additional limiting terms – fails either the ‘particularity’ or ‘social distinction’ requirement”); *Martinez-Mejia v. Barr*, 825 Fed. Appx. 421, 423 (9th Cir. 2020) (rejecting IJ’s finding that PSG of “Salvadoran women” was impermissibly broad and amorphous, as “size and breadth of group alone does not preclude a group from qualifying as a social group”) (internal citations omitted); *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) (finding that gender is a “prototypical immutable characteristic”); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (recognizing PSG defined by gender and tribal membership); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (noting that gender could be the defining characteristic of a PSG). In addition, some immigration judges have found PSGs defined by gender plus nationality cognizable. See, e.g., *Matter of –*, immigration judge decision (Paul M. Gagnon), Boston, MA (June 18, 2019), available at <https://immigrationcourtside.com/wp-content/uploads/2019/08/Boston-Judge-Gagnon-Decision.pdf> (finding “Guatemalan women” a cognizable PSG); *Matter of –*, immigration judge decision (Deepali Nadkarni), Arlington, VA (2018) at 6, available at perma.cc/2BMS-P88F (finding “women in Honduras” a cognizable PSG); *Matter of –*, immigration judge decision (Miriam Hayward), San Francisco, CA (Sep. 13, 2018) at 8–10, 12–14, 18–20, available at perma.cc/M3RC-Y6G9 (finding “Mexican females” a cognizable PSG); *Matter of –*, immigration judge decision (Eileen Trujillo), Denver, CO (Mar. 07, 2019) at 10–11, 20, available at perma.cc/6ZYW-3Q6B (finding “Mexican women” a cognizable PSG); *Matter of –*, immigration judge decision (Steven Morley), Philadelphia, PA (May 15, 2019) at 13–16, 19, available at perma.cc/5DG6-UE2W (finding “Guatemalan women” a cognizable PSG).

⁴⁸ Asylum Officer Basic Training Course, Female Asylum Applications and Gender-Related Claims, at 5-6 (Mar. 12, 2009) available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBT%20Lesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf>.

⁴⁹ *Perdomo v. Holder*, 611 F. 3d 662, 667 (9th Cir. 2010) (reasoning that “women in a particular country, regardless of ethnicity or clan membership, could form a particular social group.”). The BIA similarly recognized “married women in Guatemala who are unable to leave their relationship” as a cognizable particular social group in *Matter of A-R-C-G-*, 26 I&N Dec. 388, 388 (BIA 2014), a case in which UNHCR submitted an amicus brief. UNHCR Amicus Brief, *Matter of A-R-C-G-* (BIA Nov. 21, 2012), <https://www.refworld.org/docid/50b5c2a22.html>. While *Matter of A-B-* overturned *Matter of A-R-C-G-* for several years, *Matter of A-B-* was later vacated, and *Matter of A-R-C-G-* is applicable law again. *Matter of A-B- III*, 28 I&N Dec. 307 (A.G. 2021).

- Social groups based on gender and nationality⁵⁰
- Social groups based on gender, age, and nationality⁵¹
- Social groups based on family, kinship, or tribal membership⁵²
- Social groups based on relationships and status within them⁵³
- Social groups based on opposition to harmful traditional practices⁵⁴
- Social groups based on opposition to forced marriage, involuntary servitude, or slavery⁵⁵

UNHCR notes that individuals may be eligible for asylum based upon multiple PSGs, as well as various protected grounds since the Convention grounds are not mutually exclusive (see Section IV, below).⁵⁶

b. Nexus

Under the 1951 Convention, nexus is established when the persecutor harms an individual for reasons of a Convention ground.⁵⁷ The protected ground only has to be a “relevant contributing factor, [and] it need not be . . . the sole, or dominant, cause” of the persecution.⁵⁸ Where a woman has suffered domestic abuse, for example, “nexus would be satisfied if the persecutor harmed the applicant for reasons related to her relationship with the persecutor or status in the relationship, in addition to any other reasons or

⁵⁰ *Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010) (reasoning that “women in a particular country, regardless of ethnicity or clan membership, could form a particular social group.”); *Bah v. Mukasey*, 529 F.3d 99 (2d Cir. 2008) (recognizing PSG based on gender combined with ethnicity, nationality, or tribal membership); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (recognizing “Somali females”); *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) (noting that “the recognition that girls or women of a particular clan or nationality . . . may constitute a social group is simply a logical application of our law”). *But see, Fuentes v. Barr*, 969 F.3d 865, 873 (8th Cir. 2020) (rejecting “female heads of households” and “vulnerable Salvadoran females”); *De Guevara v. Barr*, 919 F.3d 538, 541 (8th Cir. 2019) (rejecting “Salvadoran female heads of households” and “vulnerable Salvadoran females”).

⁵¹ *Paloka v. Holder*, 762 F.3d 191, 198 (2d Cir. 2014) (recognizing “Young Albanian women” or “Young Albanian women between the ages of 15 and 25”); *Cece v. Holder*, 733 F.3d 662, 672 (7th Cir. 2013) (recognizing “Young, Albanian women living alone”).

⁵² *Diaz de Gomez v. Wilkinson*, 987 F.3d 359, 363 (4th Cir. 2021) (“a person’s nuclear family qualifies as a particular social group.”); *Hernandez-Cartagena v. Barr*, 977 F.3d 316, 320 (4th Cir. 2020) (recognizing “The Hernandez-Cartagena family”), *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (recognizing “female member of the Tukulor Fulani tribe”).

⁵³ *Juan Antonio v. Barr*, 959 F.3d 778, 791 (6th Cir. 2020) (recognizing “married indigenous women in Guatemala who are unable to leave their relationship”); *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1088 (9th Cir. 2020) (remanding to BIA to determine whether “indigenous women in Guatemala who are unable to leave their relationship” constitutes social group); *Alvarez Lagos v. Barr*, 927 F.3d 236, 252-54 (4th Cir. 2019) (recognizing “unmarried mothers living under the control of gangs in Honduras”); *Gomez-Zuluaga v. U.S. Att’y Gen.*, 527 F.3d 330, 351 (3d Cir. 2008) (recognizing “Colombian women who have the shared past experience of relationships with military and police men”); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (recognizing “Cameroonian widows”).

⁵⁴ *Kamar v. Sessions*, 875 F.3d 811, 818 (6th Cir. 2017) (recognizing “persons opposing Yemen’s traditional, paternalistic, Islamic marriage traditions”); *Sarhan v. Holder*, 658 F.3d 649, 656 (7th Cir. 2011) (recognizing “[w]omen who, in accordance with social and religious norms in Jordan, are accused of being immoral criminals and, as a consequence, face the prospect of being killed or persecuted without any protection from the Jordanian government”).

⁵⁵ *Akosung v. Barr*, 970 F.3d 1095, 1103-04 (9th Cir. 2020) (recognizing “women resistant to forced marriage proposals”); *Gomez-Zuluaga v. U.S. Att’y Gen.*, 527 F.3d 330, 345-49 (3d Cir. 2008) (recognizing “women who have escaped involuntary servitude after being abducted and confined by FARC”); *Gao v. Gonzales*, 440 F.3d 62, 60 (2d Cir. 2006), *vacated on procedural grounds by Kreisler v. Gao*, 128 S.Ct. 345 (2007) (recognizing “women who have been sold into marriage and who live in a part of China where forced marriages are considered valid and enforceable”); *Fiadjo v. U.S. Att’y Gen.*, 411 F.3d 135, 163 (3d Cir. 2005) (recognizing “Trokosi sex slaves”).

⁵⁶ Claims involving FGM, for example, may also be brought under the political opinion or religion convention ground where a woman or girl opposes FGM and the persecutor views this opposition as a political statement or as non-conformist religious behavior. UNHCR, *Guidance Note of Refugee Claims Relating to Female Genital Mutilation*, ¶¶ 22-27; *see also, Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2013) (finding that a mother’s fear that her minor child would undergo FGM amounted to well-founded fear of future persecution based on political opinion or Pentecostal Christian religious practice); *Jalloh v. Barr*, 794 Fed. App’x 418, 420 (5th Cir. 2019) (recognizing as political opinion male journalist’s anti-FGM activism where he investigated and wrote article calling for abolishment of FGM) (unpublished decision).

⁵⁷ Social Group Guidelines, ¶ 21.

⁵⁸ Gender Guidelines, ¶ 20, Social Group Guidelines, ¶¶ 15, 18.

motives that may exist.”⁵⁹ Even if an asylum seeker is unable to show that the persecutor acted based on a protected ground, nexus may nonetheless be established if the State is unable or unwilling to protect the asylum seeker *based on* a Convention ground.⁶⁰ This could be the case, for instance, when a State is biased against or discriminates against women, perhaps demonstrating this stance when it declines to investigate violence they have suffered or prosecute the perpetrators of that harm.⁶¹

U.S. law governing nexus exceeds international standards. Under U.S. law, an asylum seeker must demonstrate that a protected ground “was or will be at least one central reason” for the applicant’s persecution.⁶² UNHCR notes that, as a Convention ground need not be the sole or dominant cause for the persecution (rather, it only needs to be a relevant contributing factor), the existence of personal or interpersonal animus does not necessarily lead to a claim failing for lack of nexus, an issue that has come up in U.S. asylum adjudication.⁶³ Persecution could, for example, be perpetrated due to personal or interpersonal animus in combination with one or more Convention grounds, and this would satisfy the causal link under international standards so long as the Convention ground(s) were a relevant, contributing factor. Accordingly, personal or interpersonal animus should not automatically preclude a grant of refugee status.

IV. Gender-Based Asylum Claims Based on Other Convention Grounds

Any of the Convention grounds may be applicable to gender-based claims, and while the focus of this note is on social group claims, those “may frequently overlap with a claim on other grounds,” such as political opinion or religion.⁶⁴ In other words, the Convention grounds are not mutually exclusive, and an applicant “may be eligible for refugee status under more than one of the grounds identified in Article 1A(2).”⁶⁵ For example, women who transgress social mores of the society in which they live may be considered part of a “particular social group”⁶⁶ and / or as having made a political statement or holding certain religious

⁵⁹ UNHCR, *Comments of the United Nations High Commissioner for Refugees on the Proposed Rules from the U.S. Department of Justice (Executive Office for Immigration Review) and U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services) “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review”*, at 44 (July 15, 2020), <https://www.refworld.org/docid/60f846504.html> [hereinafter UNHCR Comments on Global Asylum Rule] (citing UNHCR Amicus Brief, *In the Matter of Thomas*, at 17, A75-597-033/-034/-035/-036 (BIA Jan. 25, 2007)).

⁶⁰ Social Group Guidelines, ¶ 22.

⁶¹ UNHCR Amicus Brief, *In the Matter of Thomas*, at 17.

⁶² INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i). As with the definition of PSG, federal courts have interpreted the “one central reason” requirement in various ways, and some administrations have attempted to heighten the requirement for proving nexus. For example, while the Third Circuit held that “one central reason” must be “an essential or principal reason for the persecution,” *Gonzalez-Posadas v. U.S. Att’y Gen.*, 781 F.3d 677, 685 (3d Cir. 2015), the Ninth Circuit has held that the persecutor may be motivated by more than one central reason, and an applicant must not prove which reason was dominant. *Singh v. Holder*, 764 F.3d 1153, 1162 (9th Cir. 2014). In addition, in *Matter of A-B- II*, then-Acting Attorney General Rosen attempted to heighten the nexus requirement, by requiring that asylum seekers show that the protected status was the “but-for” cause and “neither incidental nor tangential to another reason for the harm.” *Matter of A-B- II*, 28 I&N Dec. 199, 210-11 (A.G. 2021).

⁶³ See, e.g., *Matter of Pierre*, 15 I&N Dec. 461, 462-63 (BIA 1975) (finding no nexus because “[t]he motivation behind [the persecutor’s] alleged actions appears to be strictly personal”); *Marquez v. INS*, 105 F.3d 374, 380 (7th Cir. 1997) (“A personal dispute, no matter how nasty, cannot support [a noncitizen’s] claim of asylum.”); Final Rule, *Procedures for Asylum and Withholding of Removal; Credible and Reasonable Fear Review*, 85 Fed. Reg. 80,274, 80,281 (Dec. 11, 2020) (providing that “[i]nterpersonal animus or retribution” is a circumstance that “would not generally support a favorable adjudication of an application for asylum or statutory withholding of removal due to the applicant’s inability to demonstrate persecution on account of a protected ground”) (currently enjoined by *Pangea Legal Services v. DHS* (3:20-cv-09253) and *Immigration Equality v. DHS* (3:20-cv-09258), Order Re Preliminary Injunction (N.D. Cal. Jan. 8, 2021)).

⁶⁴ Handbook, ¶ 77.

⁶⁵ Social Group Guidelines, ¶ 4.

⁶⁶ See, e.g., UNHCR ExCom Conclusion No. 39, *Conclusion on Refugee Women and International Protection* (1985).

beliefs.⁶⁷ Thus, persecution in such circumstances might effectively be linked to religion or political opinion, actual or imputed, as well as membership in a PSG.

UNHCR's *Gender Guidelines* elaborate on how each of the Convention grounds may apply in gender-based claims.⁶⁸ Political opinion, for instance, "should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged," which may include fundamental beliefs concerning gender roles.⁶⁹ In addition, behavior at odds with a society's religious tenets may be perceived as an unacceptable political opinion,⁷⁰ or non-conformist behavior could lead a persecutor to impute a political opinion to an asylum seeker.⁷¹ U.S. courts have recognized gender-related asylum claims based on political opinion, even while rejecting similarly-defined social groups.⁷²

Religious claims may also have a gender component.⁷³ Women may face harm for their specific religious beliefs or practices or those attributed to them, "including their refusal to hold particular beliefs, to practice a prescribed religion or to conform [their] behaviour in accordance with the teachings of a prescribed religion."⁷⁴ Harmful traditional practices in the name of religion may target women, such as forced underage marriages, honor crimes, FGM, allegations of witchcraft, and pledging girls to perform traditional slave duties or sexual services to the clergy or other men.⁷⁵ Punishment due to transgressions of social mores may similarly have both a religion and gender component, since failing to fulfil societal roles or abiding by moral codes may be perceived as a woman holding unacceptable religious beliefs.⁷⁶ U.S. courts and administrative bodies have recognized gender-related asylum claims based on religious persecution.⁷⁷

V. Agents of Persecution and a State's Ability and Willingness to Protect

International legal standards do not require the persecutor to be a State actor, and gender-related violence may constitute persecution "whether perpetrated by State or private actors."⁷⁸ In UNHCR's view, "the source of feared harm is of little, if any, relevance to the finding of whether persecution has occurred,

⁶⁷ When an applicant is at risk of persecution because she refuses to wear traditional clothing, for example, "[d]epending on the particular circumstances of the society, she may be able to establish a claim based on political opinion (if her conduct is viewed by the State as a political statement that it seeks to suppress), religion (if her conduct is based on a religious conviction opposed by the State) or membership in a particular social group." *Social Group Guidelines*, ¶ 4.

⁶⁸ *Gender Guidelines*, ¶¶ 24-32.

⁶⁹ *Gender Guidelines*, ¶ 32.

⁷⁰ *Gender Guidelines*, ¶ 26.

⁷¹ *Gender Guidelines*, ¶ 32.

⁷² See, e.g., *Hernandez-Chacon v. Barr*, 948 F.3d 94, 99, 103-105 (2d. Cir. 2020) (recognizing "resistance to male domination in Salvadoran society" as a political opinion on which an asylum claim may be based, while rejecting "Salvadoran women who have rejected the sexual advances of a gang member"). Feminism has also been explicitly recognized as a political opinion. *Rodriguez Tornes v. Garland*, 993 F.3d 743, 752 (9th Cir. 2021) ("We have little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes.") (Internal quotation marks omitted); *Fatin v. I.N.S.*, 12 F.3d 1233, 1242 (3d Cir. 1993) (stating the same).

⁷³ UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶ 24, U.N. Doc HCR/GIP/04/06 (Apr. 28, 2004).

⁷⁴ *Gender Guidelines*, ¶ 26.

⁷⁵ UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶ 24, U.N. Doc HCR/GIP/04/06 (Apr. 28, 2004).

⁷⁶ *Gender Guidelines*, ¶ 25.

⁷⁷ See, e.g. *In re S-A-*, 22 I&N Dec. 1328, 1336 (BIA Jun. 27, 2000) (Granting asylum to a woman based on past persecution on account of her religious beliefs, "as [her views] differed from those of her father concerning the proper role of women in Moroccan society.").

⁷⁸ *Gender Guidelines*, ¶ 9.

or is likely to occur.”⁷⁹ The Handbook, while acknowledging that persecution is “normally related to action by the authorities of a country,” explicitly states that it “may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned.”⁸⁰ In gender-based claims, for example, persecutory non-state actors commonly include “neighbors, family members and other individuals.”⁸¹ Such claims may warrant a more nuanced analysis, but that does not render these claims “less relevant or less deserving of international protection.”⁸²

Persecution by non-state actors may give rise to an asylum claim if such persecution is “knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”⁸³ *Effective protection* is not fulfilled by “merely enacting a law prohibiting persecutory practices,”⁸⁴ as the State “may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively.”⁸⁵ Instead, effective protection depends on the de jure as well as de facto capabilities of the authorities.⁸⁶ In other words, protection is *ineffective* where “the police fail to respond to requests for protection or the authorities refuse to investigate, prosecute or punish (non-State) perpetrators of violence . . . with due diligence.”⁸⁷ In some societies, for example, domestic violence victims do not receive effective protection from the state because of high impunity rates, which can undermine women’s confidence in protection and judicial systems and discourage them from even reporting incidents to authorities.⁸⁸

Under U.S. law, persecution by non-state actors may give rise to asylum eligibility when the government is unwilling or unable to either control the ‘private’ actor or to protect the asylum seeker.⁸⁹ Most courts, administrative bodies, and training materials apply the framing focused on the ‘private’ actor,⁹⁰ which slightly diverges from the international standard as it focuses on a State’s ability to *control the persecutor*, rather than on its ability to effectively *protect an individual* from persecution. In one decision, the U.S. government attempted to heighten the standard by requiring asylum seekers to show that the State

⁷⁹ UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 19 (Apr. 2001), <https://www.refworld.org/docid/3b20a3914.html>.

⁸⁰ Handbook, ¶ 65.

⁸¹ UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence Under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions*, ¶ 28, U.N. Doc HCR/GIP/16/12 (Dec. 2, 2016).

⁸² UNHCR Comments on Global Asylum Rule, at 44.

⁸³ Handbook, ¶ 65.

⁸⁴ UNHCR Amicus Brief, *Mijangos v. Barr*, No.19-70489, 27 (9th Cir. 2020).

⁸⁵ In such cases, the practice would still constitute persecution. Gender Guidelines, ¶ 11 (emphasis omitted).

⁸⁶ UNHCR Amicus Brief, *Mijangos v. Barr*, at 27.

⁸⁷ Sexual Orientation Guidelines, ¶¶ 34-37.

⁸⁸ See *Women on the Run*, at 17; Honduras Eligibility Guidelines, at 25; Guatemala Eligibility Guidelines, at 34; El Salvador Eligibility Guidelines, at 25.

⁸⁹ *Matter of A-R-C-G-*, 26 I&N Dec. 388, 395 (BIA 2014); see also *Rosales Justo v. Sessions*, 895 F.3d 154, 159, 163 (1st Cir. 2018) (holding that asylum seeker had met the “unable or unwilling” standard where government had displayed a “willingness to investigate” the murder of the applicant’s family member by non-state actors but could nonetheless not protect the applicant).

⁹⁰ *Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2015) (holding that a non-state actor’s conduct may constitute persecution where the government is “unable or unwilling to control it”); *Matter of A-R-C-G-*, 26 I&N Dec. 388, 395 (B.I.A. 2014) (“[I]n order for the respondent to prevail on an asylum claim based on past persecution, she must demonstrate that the Guatemalan Government was unwilling or unable to control the ‘private’ actor.”); see also, RAO Directorate, Officer Training Definition of Persecution and Eligibility based on Past Persecution, at 4.2, Dec. 20, 2019, https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAIO.pdf (“An applicant may establish that he or she has suffered or will suffer persecution by a non-government actor if the applicant demonstrates that the government of the country from which the applicant fled is unable or unwilling to control the entity doing the harm.”); Ellison & Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 COLUM. HUMN. RTS. L. REV. 441, 455-91 (Winter 2021) (analyzing the standard applied at the BIA, in each federal Circuit Court, and at the Supreme Court.).

“condoned the private actions or at least demonstrated a complete helplessness to protect the victims.”⁹¹ This development was heavily litigated in federal courts⁹² until the decision was vacated and adjudicators received instructions to revert to the previous “unwilling or unable to control” standard.⁹³

VI. Gender-Sensitive Considerations in Asylum Adjudication

UNHCR has advised that “special efforts may be needed to resolve problems faced specifically by refugee women”⁹⁴ and proposed substantive and procedural measures to address these needs, including providing adjudicators with training on the claims of women asylum seekers and ensuring the availability of women as interviewers and interpreters during asylum procedures.⁹⁵ Following the issuance of this guidance and to support its implementation in the U.S. context, UNHCR worked directly with the former Immigration and Naturalization Service (INS), which subsequently issued its own guidelines and instituted trainings on gender-related claims.⁹⁶

Several measures may help women convey sensitive information critical to adjudicating their asylum claims while minimizing re-traumatization. These include:

- Interviewing women separately from their family, since survivors of gender-based violence may otherwise not feel comfortable to disclose their experiences.⁹⁷
- Allowing asylum seekers to express a preference for the sex of their interpreter and interviewer.⁹⁸
- Respecting the confidentiality of the information disclosed by the asylum seeker.⁹⁹
- Providing breaks to asylum seekers during their interviews, if needed, as well as sufficient time “to enable the applicant to build a relationship of trust, allowing her to disclose the full circumstances of her claim.”¹⁰⁰

⁹¹ *Matter of A-B- I*, I&N Dec. 316, 337 (A.G. 2018), *Matter of A-B- II*, 28 I&N Dec. 199 (A.G. 2021) vacated by *Matter of A-B- III*, 28 I&N Dec. 307 (A.G. 2021).

⁹² See *Grace v. Barr*, 965 F.3d 883, 903 (D.C. Cir. 2020) (finding that implementation of the heightened standard was arbitrary and capricious as the government failed to acknowledge or explain the change); *Jimenez Galloso v. Barr*, 954 F.3d 1189, 1192 (8th Cir. 2020) (holding that the unwilling-or-unable test, rather than the completely helpless test, controls since the two tests conflict and the unwilling-or-unable standard came first). For a detailed discussion on the “unwilling or unable” standard and interpretations in the different federal circuit courts before the vacatur of *Matter of A-B-*, see Ellison & Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 COLUM. HUMN. RTS. L. REV. 441, (Winter 2021).

⁹³ *Matter of A-B- III*, 28 I&N Dec. 307, 309 (A.G. 2021) (vacating *Matter of A-B- I* and *II*, pointing out confusion over the applicable “unable or unwilling standard,” and instructing courts to follow pre-*A-B- I* precedent until further rulemaking clarifies the standard).

⁹⁴ UNHCR, *Guidelines on the Protection of Refugee Women*, ¶ 4 (1991), available at <http://www.unhcr.org/3d4f915e4.html> [hereinafter *Guidelines on the Protection of Refugee Women*].

⁹⁵ *Guidelines on the Protection of Refugee Women*, ¶ 75.

⁹⁶ INS Office of International Affairs, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, Memorandum to all INS Asylum Officers, HQASM Coordinators (May 26, 1995), available at <http://www.unhcr.org/refworld/docid/3ae6b31e7.html>. USCIS heavily cited UNHCR materials in its asylum officer training manual on female asylum applicants and gender-related claims. USCIS, *RAIO Combined Training Program, Gender-Related Claims Training Module*, Dec. 20, 2019, https://www.uscis.gov/sites/default/files/document/foia/Gender_Related_Claims_LP_RAIO.pdf.

⁹⁷ *Gender Guidelines*, ¶ 36; Council of Europe, *Gender-Based Asylum Claims and Non-Refoulement: Articles 60 and 61 of the Istanbul Convention*, at 38 (December 2019) [hereinafter *Gender-Based Asylum Claims and Non-Refoulement*].

⁹⁸ *Gender Guidelines*, ¶ 36; *Gender-Based Asylum Claims and Non-Refoulement*, at 38.

⁹⁹ *Gender-Based Asylum Claims and Non-Refoulement*, at 38.

¹⁰⁰ *Gender-Based Asylum Claims and Non-Refoulement*, at 38; *Gender Guidelines*, ¶ 36. Note, also, that accelerated procedures are often a barrier to disclosure. *Gender-Based Asylum Claims and Non-Refoulement*, at 38.

- Ensuring that interviews are otherwise gender- and culturally sensitive.¹⁰¹

In addition, UNHCR recommends that asylum adjudicators, prior to deciding a gender-related claim, become familiar with the status and experiences of women in the country from which an asylum seeker has fled.¹⁰² Among the issues of which officials should be aware are:

- The position of women before the law, including their standing in court, the right to file a complaint and provide evidence, the right to own property, the right to have or refuse an abortion, and divorce and custody laws;
- The political rights of women, including the right to vote, to hold office, and to belong to a political party;
- The social and economic rights of women, including the right to marry the person of her choice, the right to an education, a career, and a job or other remunerated activities, the status of a widow or divorcee, and the freedom of dress;
- The incidence of reported violence against women and the forms it takes (such as sexual assaults, honor killings, and bride burnings);
- Protection available to women and the sanctions or penalties on those who perpetrate the violence; and
- The consequences that a woman may face were she forced to return to her country of origin in light of the circumstances described in her claim.¹⁰³

Further, UNHCR has underscored that “the duty to ascertain and evaluate all the relevant facts is *shared* between the applicant and the examiner.”¹⁰⁴ In cases involving especially vulnerable asylum seekers, such as those who have suffered gender-based violence or trauma, “it may be for the examiner to use all the means at his [or her] disposal to produce the necessary evidence in support of the application.”¹⁰⁵ Women and girls may be reluctant initially to reveal the true nature and / or extent of harm they have experienced.¹⁰⁶ Several reasons may explain this hesitancy, including:

- The intimate nature of many types of gender-based violence against women;
- Fear of the consequences of such a disclosure (e.g., their husband may disown them, it might affect a sister’s marriage chances, etc.);
- Internalized feelings of shame and stigma;
- Fear of, or treatment by, the interviewing officer, particularly where the officer is a member of the security force or police;
- The effect of post-traumatic stress disorder or other mental health difficulties;

¹⁰¹ Gender-Based Asylum Claims and Non-Refoulement, at 38.

¹⁰² UNHCR advises asylum adjudicators to evaluate thoroughly the situation in the country from which a refugee claimant has fled. See Handbook, ¶ 42 (“The applicant’s statements cannot, however, be viewed in the abstract, and must be viewed in the context of the relevant background situation. . . . In general, the applicant’s fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.”).

¹⁰³ Guidelines on the Protection of Refugee Women, ¶ 73.

¹⁰⁴ Handbook, ¶ 196 (emphasis added).

¹⁰⁵ Handbook, ¶ 196.

¹⁰⁶ Gender Guidelines, ¶ 35; Gender-Based Asylum Claims and Non-Refoulement, at 38.

- Being tired or traumatized as a result of the journey, process, or difficult and unsafe accommodation and reception conditions.¹⁰⁷

Late disclosure of facts, therefore, should not be viewed as evidence of a lack of credibility. Similarly, “the type and level of emotion displayed during the recounting of her experiences should not affect a woman’s credibility,” since trauma and cultural differences may play a role in determining behavior.¹⁰⁸

VII. Overview of UNHCR Resources to Support Gender-Based Asylum Claims

For a discussion of substantive and procedural considerations relevant to gender-based claims, see:

- [Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A\(2\) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees](#) (May 2002)
- [Guidelines on the Protection of Refugee Women](#) (July 1991)

For a discussion of UNHCR’s views on the legal analysis of gender-based asylum claims in the U.S. context, see:

- [Comments on the Proposed Rules from the U.S. Dept. of Justice and Dept. of Homeland Sec., “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review”](#) (July 2020)
- [Amicus Brief, *Marroquin-Perez v. Barr*](#) (Feb. 2020)
- [Amicus Brief, *Grace v. Barr*](#) (July 2019)
- [Amicus Brief, *Matter of O.L.B.D.*](#) (Mar. 2019)
- [Amicus Brief, *Matter of A-R-C-G- et al.*](#) (Nov. 2012)
- [Amicus Brief, *Matter of Thomas et al.*](#) (Jan. 25, 2007)
- [Advisory Opinion on International Norms: Gender-Related Persecution and Relevance to “Membership of a Particular Social Group” and “Political Opinion,” in *Matter of Rodi Alvarado Peña*](#) (Jan. 2004)

For a discussion of the specific protection issues, problems, and risks facing refugee and asylum-seeking women, see:

- [Guidelines on the Protection of Refugee Women](#) (July 1991)
- [UNHCR Policy on the Prevention of, Risk Mitigation, and Response to Gender-Based Violence](#) (Oct. 2020)
- [UNHCR, *Protecting Forcibly Displaced Women and Girls During the Covid-19 Pandemic*](#) (Mar. 2021)

For a discussion of the reasons why women and girls who flee Central America and Mexico may need international protection, see:

- [Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection](#) (Mar. 2014)

¹⁰⁷ Gender-Based Asylum Claims and Non-Refoulement, at 38-39.

¹⁰⁸ Gender Guidelines, ¶ 36.

- [Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico](#) (Oct. 2015)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala](#) (Jan. 2018)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras](#) (July 2016)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador](#) (Mar. 2016)
- [Guidance Note on Refugee Claims Relating to Victims of Organized Gangs](#) (Mar. 2010)

For other country-specific guidelines that discuss the situation and common protection needs of women and girls, see:

- [International Protection Considerations with Regard to People Fleeing the Republic of Iraq](#) (May 2019)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan](#) (Aug. 2018)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka](#) (Dec. 2012)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea](#) (Apr. 2011)