REFUGEE LAW AND POLICY

A COMPARATIVE AND INTERNATIONAL APPROACH

FOURTH EDITION

2015 SUPPLEMENT

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Australia Update

The number of migrants arriving by sea remained high throughout 2011. By July 2012, the number of migrants who had arrived during the first seven months of the year exceeded the totals of 2010 and 2011. In response, Prime Minister Julia Gillard requested a three member expert panel to issue recommendations for Australia’s response. On August 13, 2012, the panel released the Houston Report which contained twenty-two recommendations. The Report recommended reinstating offshore refugee processing in both Nauru and Papua New Guinea and endorsed the “no advantage principle,” seeking to ensure that no migrants “circumventing” the regular migration process benefit from doing so.

The Report further encouraged the Australian government to continue building on previous efforts to transfer migrants to Malaysia for processing. The Australian High Court invalidated the Malaysia Arrangement in 2011 on the grounds that Australia cannot validly declare a country to process asylum seekers if it is not bound by international or domestic laws that ensure (1) access to effective asylum procedures; (2) protection during the pendency of their application; and (3) protection for those found to be refugees in the period leading up to resettlement. Malaysia is not a signatory to the 1951 Convention relating to the Status of Refugees or the 1967 Protocol and the Australian High Court held that its domestic framework did not meet the three requirements. Nevertheless, the Report encouraged a return to negotiations with the Malaysian government as a third location for offshore processing.

The Australian government signed an agreement with Nauru in August 2012 and Papua New Guinea in September 2012 to resume offshore processing. In May 2013, the Gillard government excised the Australian mainland from its migration zone. The migration zone designates areas where arriving asylum seekers are able to apply for protection in Australia. Offshore islands that commonly receive migrants arriving by sea have been excised from the migration zone since 2001. Excising mainland Australia from the migration zone allowed even those migrants who reach the Australian mainland to be removed to Nauru or Papua New Guinea.

In July 2013, Australia signed a regional resettlement agreement with Papua New Guinea stating that all arrivals would be processed for resettlement on Manus Island, one of Papua New Guinea’s northern islands, rather than Australia. A similar agreement was signed with Nauru in

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5 Press Release, Prime Minister for Immigration, Australia and Papua New Guinea Regional Settlement Arrangement (July 19, 2013),
August 2013 with the result that no asylum seeker arriving by sea after July 19, 2013 would have the opportunity to receive protection in Australia.\(^6\) Nauru and Papua New Guinea are party to both the Convention and the Protocol, Nauru being the most recent state party to join, in June 2011.\(^7\) However, UNHCR has expressed strong concern with the lack of domestic implementation of the Convention and the slow to non-existent rate of processing in both nations.\(^8\) Though 85% of the 1,169 persons detained on Nauru by June 2014 had applied for protection, final determinations had been issued on only 128 applications. Of the applicants who had received a final determination, 99 persons—nearly 80%—were found to be owed protection. During this same time period, no final determinations had been made on protection claims from the 1,173 detainees held on Manus Island although 57 initial assessments had been completed.\(^9\) In September 2014, the Australian government signed an agreement with the Cambodian government, designating Cambodia as a resettlement site for refugees from Nauru. Under the terms of the agreement, persons determined to be refugees on Nauru will be presented with the option of choosing resettlement in Cambodia instead of Nauru although reports indicate refugees are facing significant pressure to accept Cambodian resettlement.\(^10\) The first refugees were resettled in Cambodia in June 2015.\(^11\)

During the 2013 federal elections, Tony Abbott of the conservative Liberal Party was elected prime minister after campaigning on a “stop the boats” platform.\(^12\) Soon afterwards, the Abbott government instituted Operation Sovereign Borders, a military-enforced policy of intercepting and turning back migrant boats.\(^13\)

In mid-February 2014, rising tensions in the Manus Island facility over detention conditions and delayed processing sparked riots and the violent response from facility staff resulted in the murder of one detainee.\(^14\) In July 2014, the Abbott government began to send all new arrivals to

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Nauru instead of Manus Island, a first step to closing the facility after the current population is resettled into Papua New Guinea.\textsuperscript{15} Fearing resettlement in a community hostile to their presence, 500 Manus Island detainees went on a hunger strike in January 2015.\textsuperscript{16}

The Australian government’s practice of holding child migrants in mandatory closed detention in both on- and off-shore facilities for indefinite periods has drawn significant attention and criticism in recent months. The Australian Human Rights Commission condemned the practice in a report published in November 2014, noting that 800 children were held in detention facilities at that time with no viable prospects for protection.\textsuperscript{17}

In December 2014, the Australian parliament passed legislation replacing references to the 1951 Convention and 1967 Protocol in the Migration Act with the Australian government’s interpretations, stripping the Act of the non-refoulement obligations to consider asylum claims before deportation, and expanding the use of temporary protection visas in place of permanent protection.\textsuperscript{18}

The Abbott government has credited the implementation of off-shore processing and Operation Sovereign Borders with dramatic reductions in the number of migrants arriving by sea.\textsuperscript{19} As arrival numbers have decreased, the government has begun closing on-shore detention facilities. By May 2015, thirteen centers had ceased operations or been designated for closure by the end of the year, including long-running facilities on Christmas Island.\textsuperscript{20}

European Union Update

The Stockholm Programme of 2009 established an expectation that a Common European Asylum System would be up and running by 2012.\textsuperscript{1} The system was expected to include common guarantees, uniform standards, and a dual focus on high protection standards and procedural fairness and efficiency. The Common European Asylum system is authorized by various legislative texts, including the Qualifications Directive, the Reception Conditions Directive, and the Procedures Directive.

As part of this effort, the European Commission published an evaluation of the implementation of the 2005 Procedures Directive in September 2009. UNHCR, leading NGOs, and other stakeholders consulted in the evaluation process which generally concluded the 2005 Procedures Directive failed to provide clear guidance on procedural standards. Accordingly, the Commission proposed amendments in the 2005 Directive in October 2009.

The European Council discussed the proposed amendments in 2010 but were unable to come to an agreement. To avoid incorporating significant numbers of country-specific exemptions to the 2009 proposed amendments, the Commission issued recast proposed amendments in June 2011 after a series of technical consultation meetings.\textsuperscript{2} The European Council on Refugees and Exiles, UNHCR, and others offered commentary on the recast proposed amendments that voiced concerns about the way the recast proposal walked back the improvements of the 2009 proposed amendment with respect to the safe third countries and countries of origin concepts, among other comments.\textsuperscript{3} The recast proposed amendments were agreed to and its text was enacted on June 26, 2013 as the revised Procedures Directive.\textsuperscript{4} The Asylum Procedures Directive of 2005 is in effect until July 21, 2015, at which point the Procedures Directive of 2013 takes effect.\textsuperscript{5}

The effort to establish the Common European Asylum System also included amendments to the Qualification Directive. This process was much less contentious than the adoption of the Procedures Directive. A political compromise on the amended Qualification Directive was reached in one day and the amendment was enacted in 2011.\textsuperscript{6} The Asylum Qualification Directive of 2004 was in effect until December 21, 2013, at which point the Qualification

\textsuperscript{1} European Council, \textit{The Stockholm Programme: And Open and Secure Europe Serving and Protecting Citizens}, para 6.2 O.J. 2010 C 115/1.
\textsuperscript{5} Migration and Home Affairs, European Commission, \textit{Asylum Procedures}, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/common-procedures/index_en.htm
Directive of 2011 took effect. The Qualification Directive was not referenced in subsections 1–6.

1. Accelerated Procedures

Overview
The 2013 Directive generally echoes the 2005 Directive on the circumstances in which accelerated proceedings may be used though it clarifies that any accelerated procedure must maintain the basic principles and guarantees governing regular proceedings. Although the proposed recast Procedures Directive would have eliminated unlawful entry and failure to present/apply as soon as possible continues as grounds for accelerated proceedings, they were reinserted and included in the approved Directive. The introductory language makes clear that lacking documents on entry or using forged documents does not automatically trigger accelerated proceedings. More significantly, the 2013 Directive restricts states’ abilities to decide applications at the border only to those applications that would otherwise give rise to accelerated proceedings. States may also use border proceedings to rule on an application’s initial admissibility. As the 2005 Directive allowed states wide latitude to use an expedited proceeding to determine the merits of most applications filed at the border, the 2013 Directive is a welcome improvement.

Specifics
The introductory language of the 2013 Directive allows that in certain well-defined circumstances an accelerated procedure may be used. Well-defined circumstances encompass situations where an application is likely to be unfounded or national security or public order concerns are implicated. However, lacking documents on entry or the use of forged documents cannot automatically give rise to accelerated procedures. The implementation of accelerated procedures may include reasonable time limits but any procedure may not prejudice a full examination and access to the basic principles and guarantees of the Directive. Additionally, if an applicant needs special procedural guarantees, they are to be exempted from accelerated procedures. Member states are able to determine the specifics of the procedural guarantees provided for these applicants though the Directive requires such guarantees serve to ensure applicants are able to “benefit from the rights and comply with the obligations” of the Directive.

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12 Id. at ¶ (21).
13 Id. at ¶ (20).
14 Id. at ¶ (30), ¶ (29) (stating that “applicants in need of special protection” may be based on an applicant’s age, gender, sexual orientation, gender identity, disability, illness, or past traumas).
15 Id. at Art. 24(3). For example, Italy prioritizes applications, places greater responsibilities on interviewers to properly assess claims from trauma survivors, and makes some changes to evidentiary weighing in addition to some
Member states may implement an accelerated procedure or border/transit zone processing if the applicant:\(^{16}\)
(a) does not raise any issues relevant to a grant of protection;
(b) is from a safe country of origin;
(c) misleads authorities about his nationality or identification by falsifying or failing to present documentation;
(d) likely destroyed identifying documents (in bad faith);
(e) makes “clearly inconsistent, contradictory, false, or obviously improbable” statements that contradict verifiable country conditions;
(f) makes a subsequent application for protection that does not present new elements or claims, thus not warranting further examination;
(g) is applying solely to delay or frustrate an earlier removal decision;
(h) entered unlawfully or overstayed a visa and did not apply for protection as soon as possible in the circumstances and cannot provide good reason for the delay;
(i) refuses to have fingerprints taken; or
(j) is considered, for serious reasons, a danger to national security or public order or has been “forcibly expelled for serious reasons of public security or order under national law.”

Member states must set deadlines for the accelerated processing of an application, but they may be exceeded when necessary for an adequate and complete examination, provided the state does not violate the general time limits of 6 – 21 months established in ¶¶ 3-5.\(^{17}\)

2. Safe Country of Origin

Overview
The 2013 Directive continues the practice of designating states as “safe countries of origin” that would give rise to a presumption of ability to return. If an applicant can provide “serious grounds” for showing that the country is not safe in his or her circumstances, the presumption may be overcome. The 2013 Directive specifically notes that the complexity of gender-based claims must be considered in determining whether the country of origin is safe in that context. The 2013 Directive follows the lead of the proposed recast Procedures Directive in that it makes no mention of the Council’s ability to designate its own list of safe countries; rather, states may choose to make such designations provided they consider a number of risk factors listed in Annex I, consult a variety of sources, and make regular reports to the Commission on their application of the concept. Unlike the 2005 Directive, applications from safe countries of origin are not considered unfounded, though they may place the application in accelerated or border proceedings and member states are still allowed to enact national legislation characterizing them as manifestly unfounded.\(^{18}\)
Specifics
The preamble of the 2013 Procedures Directive discusses the concept of safe countries of origin, noting that the concept allows for the presumption that the applicant could safely return but cannot serve as an absolute guarantee of safety. With respect to gender-related claims, the preamble acknowledges the complexity of such claims must be taken into account when considering the country of origin to be safe. Though the 2013 Directive does not prohibit member states from making or using lists of countries designated to be “safe,” it does require such determinations to be based on a variety of sources, that such determinations be regularly reviewed, and that states periodically inform the Commission which states are considered in theory or practice to be safe.

The concept of safe country of origin may have a detrimental impact on the applications for protection of unaccompanied minors. Safe country of origin is one of the few routes by which unaccompanied children may remain in accelerated or border proceedings after identification as unaccompanied. Article 36 of the Directive lays out the concept of a safe country of origin and requires applicants to submit serious grounds for considering the country not to be safe in her particular circumstances in order to overcome the designation. Member states are required to enact national legislation and rules regarding the application of the concept and may create lists of safe countries provided such lists are regularly reviewed, based on a range of information sources, and notification is provided to the Commission. Annex I to the Directive provides a full definition of which states may qualify as “safe,” requiring there be no general or consistent persecution, torture, or indiscriminate violence arising from international or internal armed conflict.

3. Safe Third Country

Overview
The safe third country (STC) provisions of the 2013 Directive maintain the disparate treatment of those applicants who entered the EU from a safe third country. Applications by adults made after being in a STC are rendered inadmissible while unaccompanied children entering from a STC are put in border proceedings. Application of the STC concept requires a reasonable nexus between the applicant and the STC. An applicant may challenge both the nexus determination and the presumption that the STC would be appropriate for repatriation in the applicant’s individual circumstance. The 2013 Directive does not have specific language allowing the Council to maintain a list of STCs and requires member states making such a list to ensure that returnees would not be subject to torture, persecution, threats to life/liberty, or non-refoulement

unfounded. Unfounded applications are those that do not give rise to a protection claim. Directive 2013/32/EU Preamble Art. 32(1) (June 26, 2013). States may enact legislation designating applications presenting the factors triggering accelerated proceedings to be manifestly unfounded. Id. Art. 32(2).

19 Id. at Preamble ¶¶ (40)-(42).
20 Id. at ¶ (32).
21 Id. at ¶ (46).
22 Id. at ¶ (47).
23 Id. at ¶ (48).
24 Id. Art. 25(6)(a), (b).
25 Id. Art. 37.
and that they are able to request refugee protection in the STC. The 2013 Directive also provides that applicants who enter from a European country that has (1) ratified relevant UN instruments, (2) ratified the European Convention on Human Rights, and (3) has an asylum procedure are not due a full examination of their application. In all cases, member states must keep the Commission informed about their designation and application of the STC and safe European country concepts.

Specifics
As with safe country of origin, the 2013 Directive specifically notes that the complexity of gender-related claims must be considered when evaluating the availability of a safe third country (“STC”). Designations of STC are subject to the same guidance given to safe countries of origin, including regular reviews and notification to the Commission regarding designations. Unaccompanied children may be subjected to border proceedings if there is a STC that is not a member state for the child. An adult’s application for protection will be found inadmissible when there is a non-member state STC available.

Designating a country as a safe third country is possible when the following principles would be applied to a returnee:

(a) “life and liberty not threatened on account of” a protected ground
(b) “no risk of serious harm as defined in Directive 2011/95/EU”
(c) non-refoulement is respected
(d) prohibition on removal that may result in torture or cruel, inhuman, or degrading treatment
(e) possibility to request refugee status and receive protection according to the 1951 Convention and 1967 Protocol

National legislatures shall enact provisions respecting the application of the concept and must (a) require a connection between the applicant and the country making relocation reasonable; (b) establish a methodology for application to an individual on a case-by-case basis or by general designation; (c) allow challenges on the grounds there is not sufficient nexus or safety in light of particular circumstances. If the STC does not permit the person to enter, he is entitled to access a procedure for requesting protection in the member state. Member states have to inform the Commission of countries to which they periodically apply this concept.

If an applicant has entered from a European country that has ratified the UN instruments without geographic limitations; has an asylum procedure in place; and has ratified the European Convention on Human Rights and observes it, then there does not need to be a full (or any) examination of the application. Applicants have the right to challenge that a European country

26 Id. at Preamble, ¶ (32).
27 Id. at Preamble, ¶¶ (47), (48).
28 Id. at Art. 25(6)(b)(iv).
29 Id. at Art. 33(2)(c).
30 Id. at Art. 38(1).
31 Id. at Art. 38(2)(a)-(c).
32 Id. at Art. 38(4).
33 Id. at Art. 38(5).
34 Id. at Art. 39(1), (2).
would not be safe for their particular circumstances.\textsuperscript{35} Member states must enact domestic legislation for implementing this provision, ensure they do not violate obligations of \textit{non-refoulement}, provide exceptions on the basis of humanitarian and political reasons, and inform the Commission about the application of this concept.\textsuperscript{36} Should the European country refuse admission, the member state must ensure access to a protection procedure.\textsuperscript{37}

4. **Right of Appeal & Suspensive Effect**

\textit{Overview}

The 2013 Directive incorporates many of the provisions of the proposed recast Procedures Directive, including strong language providing for an automatic stay of removal pending appeal in most cases in regular proceedings. Unfortunately, the 2013 Directive also incorporates the exemptions to automatic stays found in the proposed recast Procedures Directive, including exemptions for those in accelerated proceedings and those found to have access to a safe European country, who must make a separate application for a stay of removal should they wish to appeal. There are some protections in place to preserve the automatic suspension of removal for persons in border proceedings whose applications for a stay of removal are subject to very short turnaround or not given full consideration. The 2013 Directive takes a positive step in providing free access to counsel for persons appealing a decision who have limited financial means.

\textit{Specifics}

Applicants have the right to appeal the determination on their application as well as determinations that an application is unfounded, inadmissible, made at the border/transit zone, or not reviewed due to entry from a safe European country.\textsuperscript{38} In making such a review, the state must examine both facts and law\textsuperscript{39} and those applicants falling below a certain financial threshold are due free and competent legal assistance on appeal.\textsuperscript{40} States may implement reasonable appeal filing deadlines and appellants are entitled to remain in the territory until the expiration of their opportunity to file for appeal, or until the outcome of their appeal.\textsuperscript{41}

This stay of removal upon appeal does not automatically apply to appeals of determinations that an application:\textsuperscript{42}

\begin{enumerate}
\item is manifestly unfounded;
\item is unfounded in accelerated proceedings unless the proceedings were based on failure to file as soon as possible after unauthorized arrival;
\item is inadmissible;
\item is implicitly withdrawn or abandoned; or
\item is rejected due to safe third European country.
\end{enumerate}

\textsuperscript{35} \textit{Id.} at Art. 39(3).
\textsuperscript{36} \textit{Id.} at Art. 39(4), (7).
\textsuperscript{37} \textit{Id.} at Art. 39(6).
\textsuperscript{38} \textit{Id.} at Art. 46(1).
\textsuperscript{39} \textit{Id.} at Art. 46(3).
\textsuperscript{40} \textit{Id.} at Art. 20, 21.
\textsuperscript{41} \textit{Id.} at Art. 46(4)-(5).
\textsuperscript{42} \textit{Id.} at Art. 46(6).
In such cases, the applicant may apply to remain and is entitled to a stay of their removal during the pendency of his or her application for a stay of removal.\textsuperscript{43} For persons in border proceedings, an application for a stay of removal after a determination on one of these five grounds is valid only if (1) the applicant had sufficient time and resources to prepare the request and (2) the court sufficiently considered fact and law in review the stay request.\textsuperscript{44} If either condition is not met, the applicant is due an automatic stay of removal. If a determination is made that a person requires special procedural guarantees to the point they are not placed in accelerated proceedings, they should also be given automatic stays of removal.\textsuperscript{45}

5. Visa Requirements

Visas to enter EU territory: Updates

Since the publication of the casebook, the list of countries whose nationals require a short-term Schengen visa to enter the EU in Regulation 539/2001 has been amended several times, most recently in 2014.\textsuperscript{46} As the list currently stands, nationals of 106 states are required to obtain a visa prior to entry while nationals of 62 states are exempted from such a requirement.\textsuperscript{47}

While the number of countries requiring a visa has decreased, new language allows member states to request emergency visa measures in certain situations, including a significant increase in the number of persons seeking asylum from a country that is listed as visa-exempt. Member states may apply to the Council to temporarily require visas for a country which has seen increasing members of its nationals applying for asylum when the numbers result in “specific pressures” on the member state’s asylum system. Such a requirement is only available where the asylum applications are resulting in low grant rates—defined as 3% to 4%—and has an initial duration of 6 months.\textsuperscript{48} The EU cites an influx of persons from Western Balkan countries “abusing” the asylum system as the impetus for the change.\textsuperscript{49}

Additionally, Council Regulation 509/2014 added language specifically noting that determinations of visa requirements are made considering the possibility of illegal immigration, public policy and security concerns, economic benefits, and external relations with a specific eye towards human rights and fundamental freedoms.\textsuperscript{50}
Airport transit visas to transit through the EU: Updates

The list of countries whose nationals must obtain an airport transit visa when passing through the international transit area of member state airports continues to have twelve countries: Afghanistan, Bangladesh, Democratic Republic of the Congo, Eritrea, Ethiopia, Ghana, Iran, Iraq, Nigeria, Pakistan, Somalia, Sri Lanka.51 It does not appear this list has been amended since the enactment of 810/2009. Article 3 of the original regulation also includes a provision allowing member states to temporarily require airport transit visas from nationals of countries not on the list in the case of a “mass influx of illegal immigrants.”

6. Carrier Sanctions

There do not appear to be any substantive changes to the carrier sanctions regime within the European Union system. Amendments made to Directive 2001/51/EC have not been substantive or related to the focus of the casebook.

South Africa Update

Legislative and Regulatory Amendments

Changes to the Refugees Act, 1998

Implementation of Amending Acts
The Refugees Act of 1998 was most recently amended in 2011.\(^{52}\) The amending act was signed into law on August 21, 2011 but its provisions and those of the 2008 amending act have yet to take force. Both amending acts will be implemented on a date yet to be determined. Analogizing from the structure and implementation of the Immigration Act, my sense is that the implementation of the 2008 and 2011 acts is delayed until an accompanying amendment to the regulations is enacted. The current regulations have been in effect since 2000—the only regulatory change since has been the establishment of Refugee Appeal Board Rules.\(^{53}\)

Draft First Amendment of Refugees Regulation, 2014
On November 7, 2014 the government invited public comment on draft regulatory amendments.\(^{54}\) The publically-available draft regulations consist of a revised asylum application form. Advocates have expressed concern that the form inquiries into whether a person has applied for asylum in a third country, reasons why they did not decide to request protection in the third country for those who did not apply, and the financial situation of applicants, among other items.\(^{55}\) The proposed draft regulations do not yet designate an effective date though the comment period has closed. It is unclear if the 2014 regulatory amendment will also have the function of implementing the amending acts of 2008 and 2011.

Refugee Appeal Board Rules, 2013
In December 2013, the government implemented new regulations specifically on the appellate process.\(^{56}\) The appellate regulations were issued under the provisions of the Refugees Act, 1998 Section 14(2) which allowed the Appeal Board to set its own rules. The rules establish the framework for an appeal, noting that appellants are entitled to representation at no cost to the government\(^{57}\) and requiring an appeal to be lodged in-person at the same Refugee Reception Office that issued the initial decision.\(^{58}\)

\(^{57}\) Refugee Appeal Board Rules, 2013 § 9.
\(^{58}\) Refugee Appeal Board Rules, 2013 § 4.
Refugee Amendment Act, 2011

Once implemented, the Refugees Amendment Act, 2011 will make several changes to the refugee process. The Act introduces the concept of a Status Determination Committee, which appears to combine the functions of both the refugee status officers and refugee reception officers into a single committee.\(^{59}\) Each Refugee Reception Office is to have a Status Determination Committee and the Committee may work in subcommittees of at least two members.\(^{60}\)

The 2011 Act maintains the language of the 1998 Act that provides the Status Determination Committee need only have “reason”—rather than “serious reason”—to believe that an applicant may be ineligible for asylum on the basis of a non-political crime outside South Africa. However, the 2011 Act clarifies that such a crime may only bar the applicant if the crime would be punished by “imprisonment without the option of a fine” in South Africa, an improvement from the language of the 1998 Act which only requires the crime be punishable by “imprisonment.”

The Act introduces single-member review by the Appeals Board but does not clarify the circumstances when a single-member review would be appropriate.\(^{61}\) The Act also removes the right of appeal for determinations where an application is found to be manifestly unfounded, abusive, or fraudulent.\(^{62}\) In such a situation, the Director-General must review the determination but upon affirmance the decision becomes final and it is not clear what, if any, procedure is due the applicant during the Director-General’s review.\(^{63}\)

Changes to the Immigration Act, 2002

Implementation of Amending Acts & Regulations

The Immigration Amendment Act, 2011 was signed into law on the same date as the Refugee Amendment Act, 2011.\(^{64}\) Though the 2011 Act was dormant for a period of years, the enactment of revised immigration regulations on May 22, 2014 triggered the implementation of the 2011 and 2007 amending acts.\(^{65}\)

Immigration Amendment Act, 2011

The Immigration Act relates to asylum policy as the legislative basis for the issuance of asylum transit visas. These visas allow a person arriving at a port of entry and identifying as an asylum seeker to enter the country and apply for protection at a Refugee Reception Office.\(^{66}\) While the visas had previously been valid for a period of fourteen days, the 2011 Act shortened the

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\(^{59}\) 2011 Refugee Act § 2(a).

\(^{60}\) 2011 Refugee Act § 3.


\(^{63}\) 2011 Refugee Act § 8.


\(^{66}\) 2011 Immigration Act § 23(1).
timeframe to five days. The changes to the duration of the asylum transit visa are particularly concerning in light of the fact that only three Refugee Reception Offices are operational (as of October 2014) and they are already overburdened by the number of applicants.

The language of the 2011 Act also clarifies that the immigration official encountering the person at the border shall make an initial decision whether the asylum transit visa should be granted. Advocates have raised concerns that this unduly restricts access to asylum and contravenes the Refugees Act which should provide the sole basis for asylum determinations. The Home Minister has indicated that this provision is intended to screen for those persons entering from a safe country of asylum. The Act also introduces advanced passenger processing, though specifics of its implementation are not clear. The combined effect of the advanced passenger screening and the border screening for asylum transit visas has led advocates to argue that South Africa has effectively barred applications from all those who do not enter the country directly from their country of origin.

Should a person fail to make their application within five days, they become an “illegal foreigner,” subject to arrest, detention, and deportation. The Act increases the penalties for those in violation of immigration laws, changing the maximum jail term for failure to depart from three months to four years.

Immigration Regulations, 2014
On May 26, 2014 amended immigration regulations came into effect. The 2014 regulations relate to asylum seekers primarily through documentary and detention provisions. The 2014 regulations places a significant documentary burden on persons arriving at ports of entry, requiring among other things that parents produce an unabridged birth certificate for their children. Persons using false or fraudulent documents are categorically barred from entry and there is no exception for persons intending to seek asylum.

Advocates have criticized the 2014 regulations for requiring automatic detention or prosecution of all persons in possession of falsified documents inside the country, noting that this violates

67 2011 Immigration Act § 23.
69 2011 Immigration Act § 23.
71 Government of South Africa, Comments by Minister of Home Affairs N Dlamini Zuma (Feb. 8, 2011), http://www.gov.za/transcript-copy-interaction-media-home-affairs-minister-dr-nkosazana-dlamini-zuma-regarding ("[I]f it is clear that South Africa is the first safe country then you cannot ask [screening questions at the border].").
72 2011 Immigration Act § 1.
74 2011 Immigration Act § 23, 32(2), 34.
75 2011 Immigration Act § 49(1)(b).
77 2014 Immigration Regulations § 6(12)(a).
78 2014 Immigration Regulations § 6(13).
international refugee obligations.\textsuperscript{79} Similarly, advocates expressed concern that the regulations fail to provide any guidance regarding factors that should be considered in making individualized detention assessments, per the government’s obligations, instead endorsing what appears to be a blanket detention policy.\textsuperscript{80} The 2014 regulations clarify that a person applying for an asylum transit visa must apply in-person at a port of entry, cannot already have refugee status in another country, cannot be a fugitive from justice, and must complete the designated form.\textsuperscript{81}

\textbf{Court Cases}

\textit{South African Human Rights Commission and 40 Others v. Minister of Home Affairs}, Case No. 41571/12 (Aug. 28, 2014). The South Guateng High Court found the detention of 39 individuals held at Lindela Detention Centre to be unlawful and ordered the Department of Home Affairs to abide by the law requiring no person to be detained more than 30 days without a warrant; no person ever be detained more than 120 days; and that persons in detention have fair process to appeal an extension of their detention.

\textit{Ersumo v. Minister of Home Affairs}, Case No. 69/2012 (March 28, 2012). Supreme Court of Appeal of South Africa held a detained man who wished to apply for asylum from Lindela was entitled to receive an asylum transit visa, be released from detention, and allowed to make his application at the Refugee Reception Office in accordance with the Refugees Act.

\textit{Bula and Others v. Minister of Home Affairs and Others}, No. 589/2011 (Nov. 29, 2011). Supreme Court of Appeal of South Africa held that asylum seekers cannot be prevented from applying for asylum after being arrested.

\textit{Abdi and Another v. Minister of Home Affairs and Other}, no. 734/2010 (Feb. 15, 2011). Supreme Court of Appeal of South Africa held that asylum seekers cannot be prevented from applying for asylum from within a facility holding inadmissible persons at the airport.

Many of the detention cases clarify that the need to ensure access to asylum procedures stems from an obligation to not return persons to situations of persecution. Additionally, the North Gauteng High Court upheld the rights of asylum seekers and refugees to apply for business licenses and operate small businesses in \textit{Somali Association of South Africa v. Limpopo Department of Economic Development, Environment and Tourism}, No. 48/2014 (Sept. 26, 2014).

\textbf{Re-evaluate successful refugees’ status every two years}

Despite the court ruling making it unlawful to re-evaluate successful refugee status every two years, the Department of Home Affairs continues to list that successful asylum applicants will


\textsuperscript{81} 2014 Immigration Regulations § 22.
have to undergo a status review in front of a Refugee Status Determination Officer after two years.\footnote{Department of Home Affairs, \emph{Refugee Status Determination}, \url{http://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum}.}

**Safe Third Country Policy**

While the government of South Africa has not codified a safe third country policy in either the Refugee or Immigration Acts or their accompanying rules, the concept is implied in various places and directly supported by statements of the Minister for Home Affairs. In discussing the 2011 amendments to the Immigration Act, then-Minister N Dlamini Zuma stated that “international law refers to the first safe country an asylum seeker enters” in explaining the motivation behind the border screening for asylum transit visas to be identifying persons coming from safe countries.\footnote{Government of South Africa, \emph{Comments by Minister of Home Affairs N Dlamini Zuma} (Feb. 8, 2011), \url{http://www.gov.za/transcript-copy-interaction-media-home-affairs-minister-dr-nkosazana-dlamini-zuma-regarding}} The imposition of the advance passenger screening directive has been read as an attempt to restrict the travel of persons coming from a “safe” country to apply for asylum.\footnote{Refugee Studies Centre, \emph{Responses to Secondary Movements of Refugees: A Comparative Preliminary Study of State Practice in South Africa, Spain, and the USA} 6 (August 2011), \url{http://www.unhcr.org/4ef3321b9.pdf} (“Accordingly it appears that the safe third country and country of first asylum concepts hidden in the newly introduced advance passenger processing act as automatic bars for asylum applicants who do not enter South Africa directly from the country of origin.”).}

In 2012, a policy paper from the African National Congress noted that UN Conventions provide for a first country rule, requiring asylum seekers to apply for protection in the first safe country they reach. The paper states “South Africa should exercise its right to refuse granting refugee status to asylum seekers who have travelled through safe countries.”\footnote{African National Congress, \emph{Peace and Stability: Policy Discussion Document} 6 (March 2012), \url{http://www.anc.org.za/docs/discus/2012/peacev.pdf}}

Similarly, the regulations proposed to the Refugee Act in 2014 that propose a new asylum application form place a heavy emphasis on the applicant’s travel history and require justification for failure to apply for protection in previous countries.\footnote{Department of Home Affairs, \emph{Publication of the Draft First Amendment of the Refugees Regulation (Forms and Procedure), 2000} (Nov. 7, 2014), \url{http://www.gov.za/sites/www.gov.za/files/38186_rg10310_gon878.pdf}.} The use of the safe third country policy without clear implementing policy documents has been criticized by advocates, who note that its usage thus far has been “based on a simplified 1st safe country logic, meaning the exclusion of asylum seekers assumed to have been able to seek asylum in another country before reaching South Africa, without any further assessment of their protection needs or experiences.”\footnote{Lawyers for Human Rights, \emph{Policy Shifts in the South African Asylum System: Evidence and Implications} 24 (2013), \url{http://www.lhr.org.za/publications/policy-shifts-south-african-asylum-system-evidence-and-implications}.}
Detention Policy

The current detention framework is contained in the Immigration Act. People who are “illegal foreigners” may be arrested without a warrant and detained. If the person is confirmed to be an “illegal foreigner,” they are then detained pending deportation. Persons may be detained up to 30 days without a warrant, though a detainee may make a request for a warrant confirming that his or her detention is for the purposes of deportation. After a person’s immigration status is verified, they are sent to the Lindela detention facility, 40 kilometers outside of Johannesburg, which has a capacity of up to 4,000 persons. Detainees have the right to be notified of their deportation decision, their right to appeal, and the right to request a court to review their detention. No person is to be detained longer than 120 days pending deportation. In the absence of a few designated situations giving rise to detention—including violation of visa conditions, failure to renew a visa, or a decision that the application is manifestly unfounded or abusive—asylum seekers are not to be detained pending a final decision on their application. However, both the South African Human Rights Commission and the African Center for Migration & Society have documented numerous instances of the detention of asylum seekers at Lindela. In general, the practices of the South African government routinely flout laws and obligations regarding immigration detention, particularly the need to verify immigration status, the 120 day maximum detention, and the detention of asylum seekers and refugees.

Xenophobic Attacks

A wave of xenophobic attacks targeting foreign workers in the KwaZulu-Natal province began in late March 2015. The attacks and violence that spanned three weeks resulted in the deaths of seven people and saw more than 5,000 foreigners uprooted. Targets of the attacks have primarily been African foreign nationals, with the Ethiopian community suffering significant...
harm. In mid-April, Malawi began voluntary repatriation of its citizens and urged those planning to move to South Africa to postpone their plans until the violence passes. More than 800 members of the national police force were deployed to the region in an effort to restore peace. While political leaders called for calm, some public figures, including the president’s son and the Zulu king, have made inflammatory remarks about foreigners present in South Africa. UNHCR reports that similar attacks took place in January 2015 in Soweto. The violence is cited as the worst outbreak of xenophobic violence since 2008, when a period of violence resulted in the deaths of 60 people and the displacement of 50,000.

Evolution of PSG Standards

Circuit Court Decisions after S-E-G- and E-A-G-

Every circuit court eventually considered the validity of particularity and social visibility to some extent. The First, Fifth, Sixth, and Tenth Circuits upheld the requirements set forth in S-E-G-. The Eighth Circuit applied the S-E-G- requirements but signaled openness to a future challenge. The Second and Eleventh Circuits published decisions continuing to follow the earlier C-A-standard. After initially accepting the S-E-G- standard, the Ninth Circuit later issued a decision that criticized the requirements but ultimately resolved the case on other grounds. The Fourth Circuit found particularity to be reasonable but explicitly declined to rule on social visibility. When combined with the Seventh and Third Circuits’ rejection, the legal landscape was a confused patchwork of those circuits that accepted the standards, those that reserved judgment, those that continued to apply the older C-A- framework, and those that rejected all or part of the S-E-G- standard.

The circuit court decisions often turned on whether S-E-G- was an arbitrary and unexplained change to the BIA’s precedent and thus impermissible under administrative law principles. Courts that found the S-E-G- standard could be interpreted in a manner consistent with precedent generally endorsed the requirements while those holding the S-E-G- standard was irreconcilable with the precedent declined to give the requirements deference. The critical point of difference between circuit analyses of this question was whether the BIA intended to require “on-sight” or literal visibility in S-E-G-’s social visibility requirement. Other areas of disagreement between circuit interpretations included (1) whether a group had to have social visibility only to their persecutors or to the society at large; and (2) whether the particularity requirement would reject groups with significant internal diversity.

Cases from the Third and Ninth Circuits illustrate how the courts either accepted or rejected the argument that the BIA’s additional requirements are consistent with precedent. In Henriquez Rivas v. Holder, the Ninth Circuit notes:

We agree that a requirement of ‘on-sight’ visibility would be inconsistent with previous BIA decisions and likely impermissible under the statute. However, we

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1 See e.g., Mendez Barrera v. Holder, 602 F.3d 21, 26 (1st Cir. 2010); Orellana-Monson v. Holder, 685 F.3d 511, 521 (5th Cir. 2012); Al-Ghorbani v. Holder, 585 F.3d 980, 994 (6th Cir. 2009); Rivera Barrientos v. Holder, 666 F.3d 641, 652 (10th Cir. 2012).
2 See e.g., Gathungu v. Holder, 725 F.3d 900, 908 n.4 (8th Cir. 2013).
3 See e.g., Ucelo Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007); Castillo-Arias v. U.S. Atty. Gen., 446 F.3d 1190 (11th Cir. 2006).
4 Compare Ramos Lopez v. Holder, 563 F.3d 855 (9th Cir. 2009) with Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013).
5 Martinez v. Holder, 740 F.3d 902, 910 (4th Cir. 2014).
7 Compare Orellana-Monson v. Holder, 685 F.3d 511, 519 (5th Cir. 2012) (implying on-sight visibility) with Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009) (rejecting on-sight visibility).
8 Compare Gashi v. Holder, 702 F.3d 130 (2d Cir. 2012) (implying it is the persecutor’s perception that matters) with Al-Ghorbani v. Holder, 585 F.3d 980, 994 (6th Cir.) (stating visibility speaks to the society’s perception).
9 Compare Mendez Barrera v. Holder, 602 F.3d 21, 26 (1st Cir. 2010) (requiring “cohesive” groups) with Henriquez Rivas v. Holder, 707 F.3d 1081, 1094-95 (9th Cir. 2013) (allowing for diversity in groups).
do not read C-A- and subsequent cases to require ‘on-sight’ visibility…. So long as the ‘social visibility’ and ‘particularity’ criteria are applied in a way that did not directly conflict with prior agency precedent, we would be hard-pressed to reject the new criteria as unreasonable under Chevron.10

In Valdiviezo-Galdamez v. Attorney General of the U.S., the Third Circuit came to a different conclusion:

[W]e are hard-pressed to understand how the ‘social visibility’ requirement was satisfied in prior cases using the Acosta standard….If a member of any of these groups applied for asylum today, the BIA’s ‘social visibility’ requirement would pose an unsurmountable obstacle to refugee status…[B]ecause the BIA’s requirements that a ‘particular social group’ possess the elements of ‘social visibility’ and ‘particularity’ are inconsistent with prior BIA decisions, those requirements are not entitled to Chevron deference.11

The BIA Responds: M-E-V-G- & W-G-R-

In February 2014, the BIA issued its response to the circuit courts in the companion cases Matter of M-E-V-G- and Matter of W-G-R-.12 Interestingly, the government took the position in M-E-V-G- that the requirements should be combined into a single “‘social distinction’ requirement because of the close relationship between the two concepts.”13 The Board rejected this argument and similar critiques from the circuit courts, instead reiterating its commitment to both particularity and social visibility and noting their consistency with previous BIA decisions. The Board also rejected arguments that the two requirements were inconsistent with international law, noting that UNHCR’s interpretive guidance does not bind the BIA and citing to the EU Qualifications Directive discussed in Chapter 2 as evidence that the EU uses an analogous test for particular social groups. The BIA overlooks the fact that the Qualifications Directive outlines the minimal level of protection for the EU and that many states have chosen not to adopt its standard.14

In the decisions the Board acknowledged the confusion over the meaning of ‘social visibility.’ The decisions rename ‘social visibility’ as ‘social distinction’ to clarify that on-sight visibility is not required. The BIA also noted that social distinction is established by societal perception, rather than by the perception of the persecutors.15 The BIA did not directly address the differing views of the circuit courts on whether internal diversity defeats a particularity claim. However, it rejected the proposed particular social group in W-G-R-, “former members of Mara 18 in El

10 707 F.3d 1081, 1087-89 (9th Cir. 2013).
11 Valdiviezo-Galdamez, 663 F.3d 582, 604, 608 (3d Cir. 2011)
13 M-E-V-G-, 26 I. & N. Dec. at 236 n.11.
15 However, in M-E-V-G- the Board does leave some space for the persecutor’s perspective, noting that a group “may not be considered a group by themselves or by society unless and until the government begins persecuting them.” 26 I. & N. at 242-43.
Salvador who have renounced their gang membership,” in part because of internal diversity of age, sex, and background.\(^\text{16}\)

**BIA and Circuit Court Decisions After *M-E-V-G* and *W-G-R*-**

The BIA’s recommitment to particularity and social distinction in *M-E-V-G* and *W-G-R* has drawn significant criticism from advocates who argue the requirements are illogical, unnecessary, and difficult to satisfy, making it significantly more difficult to obtain asylum based on a particular social group than other protected grounds.\(^\text{17}\) This argument was bolstered by the fact that the BIA had not approved a particular social group in a published decision since 2006 when it first implemented the requirements in *C-A*-.

That changed in August 2014 the BIA applied the *W-G-R* and *M-E-V-G* to uphold the particular social group “married women in Guatemala who are unable to leave their relationship” in *Matter of A-R-C-G*.\(^\text{18}\) The particularity of the group was established after the BIA concluded that “married,” “women,” and “unable to leave the relationship” had commonly-accepted definitions in Guatemala and that the combination of the terms resulted in a discrete group. Social distinction was established when the BIA held that Guatemalan society “makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave,” evidenced in *A-R-C-G* by the existence of special laws designated to protect domestic violence victims.

Only the Tenth Circuit has issued a published decision directly addressing the validity of particularity and social distinction after *W-G-R* and *M-E-V-G*, finding the requirements to be consistent with the circuit’s past interpretation of the particular social group requirements.\(^\text{19}\) The Eighth and Second Circuits have referenced particularity and social distinction without commenting on the requirements themselves.\(^\text{20}\) The Ninth Circuit has accepted the BIA’s determination that it is the perception of society that matters in determining social distinction, but reserved decision on the requirements themselves.\(^\text{21}\)

**Trends in Gang Cases**

Much of the evolution in the particular social group standard has occurred in the context of gang-related asylum cases. Many of these claims come from Central America and while they take a variety of forms the common perpetrators are powerful, transnational gangs, such as MS-13 or Mara 18. Some common formulations of particular social groups in gang cases are:

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\(^{16}\) The petitioner in *W-G-R* has since appealed his case to the Ninth Circuit. *M-E-V-G* was remanded to the Immigration Court for further proceedings.

\(^{17}\) See e.g., Brief for the National Immigrant Justice Center as *Amicus Curiae* Supporting Petitioner, *Santos v. Holder* (3d Cir. 2014) (No. 14-1050) (“The particularity requirement…irrationality imposes size and breadth limitations on particular social groups in violation of the canon of *ejusdem generis*.”).


\(^{19}\) *Rodas-Orellana v. Holder*, 780 F.3d 982 (10th Cir. 2015).

\(^{20}\) *Paloka v. Holder*, 762 F.3d 191 (2d Cir. 2014); *Juarez Chiel v. Holder*, 779 F.3d 850 (8th Cir. 2015); *Kanagu v. Holder*, 781 F.3d 912 (8th Cir. 2015).

\(^{21}\) *Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014).
- **Former gang members.**\(^ {22}\) Claims brought by former members of gangs are increasingly accepted by the circuit courts. Though some circuits raise issue with this grouping for policy reasons—stating that Congress didn’t intend to protect criminals under the asylum statute—many circuits have held such reasoning only applies to current gang members and that protecting former gang members is consistent with the policy goals of asylum.

- **Informants/witnesses to crimes committed by a gang.**\(^ {23}\) Though C-A- was denied after the BIA found informants against the Cali cartel to lack social visibility, informant and witness claims have seen more acceptance by the circuit courts in recent years, especially those that clearly establish social distinction by means of testimony in open court or other public forums.

- **Family members of an individual targeted by a gang.**\(^ {24}\) Family-based particular social groups are one of the strongest formulations for gang claims. Though specificity in the group formulation remains important, the circuit courts have generally upheld groups based on relationships to a person targeted for recruitment or other reasons.

- **Persons resisting gang recruitment.**\(^ {25}\) This social group has generally been denied by courts. After the S-E-G- decision rejected the group of young Salvadorans resistant to gang recruitment many courts began categorically rejecting similar claims without providing an individualized assessment. It remains difficult to win or receive meaningful review of these groups.

- **Gender claims.**\(^ {26}\) Claims arising from the gang’s mistreatment of women—manifesting in various forms of violence against women—have also been difficult to win. The courts often overlook societal attitudes resulting in the subordination of women, a critical aspect of social distinction. The A-R-C-G- decision may prompt courts to analyze these claims in a different manner.

Additionally, gang-related asylum cases can be argued as political opinion or religious claims. Political opinion often runs into the same challenge as gender-based particular social groups in that the sociopolitical context is not appropriately considered in the courts’ assessment of whether resistance to gangs constitutes a political opinion.\(^ {27}\) Religious claims are also difficult to win, often rejected for failure to establish nexus.\(^ {28}\)

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\(^ {22}\) Martinez v. Holder, 740 F.3d 902 (4th Cir. 2014); Urbina-Mejia v. Holder, 597 F.3d 360 (6th Cir. 2010); Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009); Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007).

\(^ {23}\) Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013); Gashi v. Holder, 702 F.3d 130 (2d Cir. 2012).

\(^ {24}\) See e.g., Aldana-Ramos v. Holder, 757 F.3d 9 (1st Cir. 2014); Zelaya v. Holder, 668 F.3d 159 (4th Cir. 2012); Crespin-Valladares v. Holder, 632 F.3d 117 (4th Cir. 2011); but see de Abarca v. Holder, 757 F.3d 334 (1st Cir. 2014) (finding “mothers of individuals who resisted gang activity” to lack particularity).

\(^ {25}\) See e.g., Juarez Chitel v. Holder, 779 F.3d 850 (8th Cir. 2015); Rivera-Barrientos v. Holder, 666 F.3d 641 (10th Cir. 2012); Ortiz-Puentes v. Holder, 662 F.3d 481 (8th Cir. 2011).

\(^ {26}\) See e.g., Rivera Barrientos v. Holder, 666 F.3d 641 (10th Cir. 2012); Mendez Barrera v. Holder, 602 F.3d 21 (1st Cir. 2010); Caal-Tial v. Holder, 582 F.3d 92 (1st Cir. 2009).

\(^ {27}\) See, e.g., Mayorga-Vidal v. Holder, 675 F.3d 9 (1st Cir. 2012); Marroquin-Ochoma v. Holder, 574 F.3d 574 (8th Cir. 2009).

\(^ {28}\) See, e.g., Bueso-Avila v. Holder, 663 F.3d 934 (7th Cir. 2011); Quinteros-Mendoza, 556 F.3d 159 (4th Cir. 2009).
MATTER OF M-E-V-G-
26 I. & N. Dec. 227 (BIA), Interim Decision 3795 (BIA 2014)

BEFORE: Board Panel: ADKINS-BLANCH, Vice Chairman; GUENDELSBERGER and GREER, Board Members.
GUENDELSBERGER, Board Member:

This case is before us on remand from the United States Court of Appeals for the Third Circuit for further consideration of the respondent’s applications for asylum and withholding of removal. The court declined to afford deference to our conclusion that a grant of asylum or withholding of removal under the “particular social group” ground of persecution requires the applicant to establish the elements of “particularity” and “social visibility.” Upon further consideration of the record and the arguments presented by the parties and amici curiae, we will clarify our interpretation of the phrase “particular social group.”6 We adhere to our prior interpretations of the phrase but emphasize that literal or “ocular” visibility is not required, and we rename the “social visibility” element as “social distinction.” The record will be remanded to the Immigration Judge for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

Prior decisions of the Board and Third Circuit have set forth the underlying facts of this case in detail. In short, the respondent claims that he suffered past persecution and has a well-founded fear of future persecution in his native Honduras because members of the Mara Salvatrucha gang beat him, kidnapped and assaulted him and his family while they were traveling in Guatemala, and threatened to kill him if he did not join the gang. In addition, the respondent testified that the gang members would shoot at him and throw rocks and spears at him about two to three times per week. The respondent asserts that he was persecuted “on account of his membership in a particular social group, namely Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs.”


On remand, we issued a decision on October 22, 2008, which again denied the respondent’s applications for asylum and withholding of removal. We held that the respondent did not establish past persecution “on account of a protected ground” and applied our intervening
decisions in *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008), and *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008), in concluding that the respondent did not show that his proposed particular social group possessed the required elements of “particularity” and “social visibility.”

The case is now before us following a second remand from the Third Circuit. *Valdiviezo-Galdamez v. Att’y Gen. of U.S.* (“*Valdiviezo-Galdamez II*”), 663 F.3d 582 (3d Cir. 2011). The court found that our requirement that a particular social group must possess the elements of “particularity” and “social visibility” is inconsistent with prior Board decisions, that we have not announced a “principled reason” for our adoption of that inconsistent requirement, and that our interpretation is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Valdiviezo-Galdamez II*, 663 F.3d at 608. Nevertheless, the court advised that “an agency can change or adopt its policies” and recognized that the Board may add new requirements to, or even change, its definition of a “particular social group.” *Id.* (quoting *Johnson v. Ashcroft*, 286 F.3d 696, 700 (3d Cir. 2002)) (internal quotation marks omitted).

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III. PARTICULAR SOCIAL GROUP

A. Origins

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The phrase “membership in a particular social group,” which is not defined in the Act, the Convention, or the Protocol, is ambiguous and difficult to define...

Congress has assigned the Attorney General the primary responsibility of construing ambiguous provisions in the immigration laws, and this responsibility has been delegated to the Board. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999); see also section 103(a)(1) of the Act, 8 U.S.C. § 1103(a)(1) (2012) (providing that the “determination and ruling by the Attorney General with respect to all questions of law shall be controlling”). The Board’s reasonable construction of an ambiguous term in the Act, such as “membership in a particular social group,” is entitled to deference. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. at 844.

We first interpreted the phrase “membership in a particular social group” in *Matter of Acosta*. We found the doctrine of “ejusdem generis” helpful in defining the phrase, which we held should be interpreted on the same order as the other grounds of persecution in the Act. *Matter of Acosta*, 19 I&N Dec. at 233-34. *See generally CSX Transp., Inc. v. Alabama Dep’t of Revenue*, 131 S. Ct. 1101, 1113 (2011) (stating that the canon “ejusdem generis” literally means “of the same kind”). The phrase “persecution on account of membership in a particular social group” was interpreted to mean “persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.” *Matter of Acosta*, 19 I&N Dec. at 233. The common characteristic that defines the group must be one “that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.” *Id.*
B. Evolution of the Board’s Analysis of Social Group Claims

*Matter of Acosta* was decided based on whether a common immutable characteristic existed. *Matter of Acosta*, 19 I&N Dec. at 233. We rejected the applicant’s claim that a Salvadoran cooperative organization of taxi drivers was a particular social group, because members could change jobs and working in their job of choice was not a “fundamental” characteristic. *Id.* at 234 (“[T]he internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice.”). Because there was no common immutable characteristic in *Matter of Acosta*, we did not reach the question whether there should be additional requirements on group composition.

At the time we issued *Matter of Acosta*, only 5 years after enactment of the Refugee Act of 1980, relatively few particular social group claims had been presented to the Board. Given the ambiguity and the potential breadth of the phrase “particular social group,” we favored a case-by-case determination of the particular kind of group characteristics that would qualify under the Act. *Id.* at 233. This flexible approach enabled courts to apply the particular social group definition within a wide array of fact-specific asylum claims.

Now, close to three decades after *Acosta*, claims based on social group membership are numerous and varied. The generality permitted by the *Acosta* standard provided flexibility in the adjudication of asylum claims. However, it also led to confusion and a lack of consistency as adjudicators struggled with various possible social groups, some of which appeared to be created exclusively for asylum purposes. See, e.g., *Sepulveda v. Gonzales*, 464 F.3d 770, 772 (7th Cir. 2006) (“A social group has to have sufficient homogeneity to be a plausible target for persecution. But under *Acosta* this is not a demanding requirement . . . .”). In *Matter of R-A-*, 22 I&N Dec. 906, 919 (BIA 1999; A.G. 2001), we cautioned that “the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown.”

Over the years there were calls for the Board to state with more clarity its framework for analyzing social group claims. . . . To provide clarification and address the evolving nature of the claims presented by asylum applicants, we refined the particular social group interpretation first discussed in *Matter of Acosta* to provide the additional analysis required once an applicant demonstrated membership based on a common immutable characteristic.

In a series of cases, we applied the concepts of “social visibility” and “particularity” as important considerations in the particular social group analysis, and we ultimately deemed them to be requirements. See *Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012) (“[C]ase by case adjudication is permissible and . . . such adjudication does not necessarily follow a straight path. The BIA may make adjustments to its definition of “particular social group’ and often does so in response to the changing claims of applicants.”). Although we expanded the particular social group analysis beyond the *Acosta* test, the common immutable characteristic requirement set forth there has been, and continues to be, an essential component of the analysis.

In *Matter of C-A-*, we recognized “particularity” as a requirement in the particular social group analysis and held that the “social visibility” of the members of a claimed social group is “an
important element in identifying the existence of a particular social group.” Matter of C-A-, 23 I&N Dec. 951, 957, 959-61 (BIA 2006) (holding that “noncriminal informants working against the Cali drug cartel” in Colombia were not a particular social group), aff’d sub nom. Castillo-Arias v. U.S. Att’y Gen., 446 F.3d 1190 (11th Cir. 2006), cert. denied, 549 U.S. 1115 (2007). We subsequently determined that a “particular social group” cannot be defined exclusively by the claimed persecution, that it must be “recognizable” as a discrete group by others in the society, and that it must have well-defined boundaries. Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69, 74-76 (BIA 2007) (holding that “wealthy” Guatemalans were not shown to be a particular social group within the meaning of the “refugee” description), aff’d sub nom. Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007).

Finally, in 2008, we issued Matter of S-E-G- and Matter of E-A-G-, in which we held that—in addition to the common immutable characteristic requirement set forth in Acosta—the previously introduced concepts of “particularity” and “social visibility” were distinct requirements for the “membership in a particular social group” ground of persecution. In *233 Matter of S-E-G-, 24 I&N Dec. at 582, we stated that we were seeking to provide “greater specificity to the definition of a social group” outlined in Acosta by requiring an applicant to establish “particularity” and “social visibility,” consistent with our prior decisions. In Matter of E-A-G-, we noted that “we have issued a line of cases reaffirming the particular social group formula set forth in Matter of Acosta . . . and providing further clarification regarding its proper application.” Matter of E-A-G-, 24 I&N Dec. at 594 (reaffirming the requirements of Acosta and the additional requirements of “particularity” and “social visibility”).

Our articulation of these requirements has been met with approval in the clear majority of the Federal courts of appeals . . . .

C. Positions of the Parties

**7 On appeal, the respondent and amici curiae argue that the Board should disavow the requirements of “social visibility” and “particularity” and should restore Matter of Acosta as the sole standard for determining a particular social group. The Department of Homeland Security (“DHS”) argues that “social visibility” and “particularity” are valid refinements to the particular social group interpretation but that the two concepts should be clarified and streamlined into a single requirement.

IV. ANALYSIS

We take this opportunity to clarify our interpretation of the phrase “membership in a particular social group.” In doing so, we adhere to the social group requirements announced in Matter of S-E-G- and Matter of E-A-G-, as further explained here and in Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014), a decision published as a companion to this case.9 We believe that these requirements provide guidance to courts and those seeking asylum based on “membership in a particular social group,” are necessary to address the evolving nature of claims asserted on this ground of persecution, and are essential to ensuring the consistent nationwide adjudication of asylum claims . . . . In this regard, we clarify that the “social visibility” test was never intended to, and does not require, literal or “ocular” visibility.
A. Protection Within the Refugee Context

The interpretation of the phrase “membership in a particular social group” does not occur in a contextual vacuum. See Medtronic, Inc. v. Lohr, 518 U.S. 470, 484-85 (1996) (stating that although analysis of a statute begins with its text, interpretation of the statutory language does not occur in a contextual vacuum). Consistent with the interpretive canon “ejusdem generis,” the proper interpretation of the phrase can only be achieved when it is compared with the other enumerated grounds of persecution (race, religion, nationality, and political opinion), and when it is considered within the overall framework of refugee protection.10

The Act and the Protocol do not extend protection to all individuals who are victims of persecution. They identify “refugees” as only those who face persecution on account of “race, religion, nationality, membership in a *235 particular social group, or political opinion.” Section 101(a)(42) of the Act; Protocol, supra, art. 1.

The limited nature of the protection offered by refugee law is highlighted by the fact that it does not cover those fleeing from natural or economic disaster, civil strife, or war. See Matter of Sosa Ventura, 25 I&N Dec. 391, 394 (BIA 2010) (explaining that Congress created the alternative relief of Temporary Protected Status because individuals fleeing from life-threatening natural disasters or a generalized state of violence within a country are not entitled to asylum). Similarly, asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions. See Konan v. Att’y Gen. of U.S., 432 F.3d 497, 506 (3d Cir. 2005); Abdille v. Ashcroft, 242 F.3d 477, 494 (3d Cir. 2001) (“[O]rdinary criminal activity does not rise to the level of persecution necessary to establish eligibility for asylum.”); Singh v. INS, 134 F.3d 962, 967 (3d Cir. 1998) (“Mere generalized lawlessness and violence between diverse populations, of the sort which abounds in numerous countries and inflicts misery upon millions of innocent people daily around the world, generally is not sufficient to permit the Attorney General to grant asylum . . . .”).

Unless an applicant has been targeted on a protected basis, he or she cannot establish a claim for asylum. . . .

The “membership in a particular social group” ground of persecution was not initially included in the refugee definition proposed by the committee that drafted the U.N. Convention; it was added later without discussion. Matter of Acosta, 19 I&N Dec. at 232. The guidelines to the Protocol issued by the United Nations High Commissioner for Refugees (“UNHCR”) clearly state that the particular social group category was not meant to be “a ‘catch all’ that applies to all persons fearing persecution.” UNHCR, Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, at 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), available at http://www.unhcr.org/3d58de2da.html (“UNHCR Guidelines”).

Societies use a variety of means to distinguish individuals based on race, religion, nationality, and political opinion. The distinctions may be based on characteristics that are overt and visible to the naked eye or on those that are subtle and only discernible by people familiar with the particular culture. The characteristics are sometimes not literally visible. Some distinctions are
based on beliefs and characteristics that are largely internal, such as religious or political beliefs. Individuals with certain religious or political beliefs may only be treated differently within society if their beliefs were made known or acted upon by the individual. The members of these factions generally understand their own affiliation with the grouping, and other people in the particular society understand that such a distinct group exists.

Therefore these enumerated grounds of persecution have more in common than simply describing persecution aimed at an immutable characteristic. They have an external perception component within a given society, which need not involve literal or “ocular” visibility. Considering the refugee context in which they arise, we find that the enumerated grounds all describe persecution aimed at an immutable characteristic that separates various factions within a particular society.

B. Particular Social Group

Given the suggestions that further explanation of our interpretation of the phrase “particular social group” is warranted, we now provide such clarification based on the analysis set forth above.

The primary source of disagreement with, or confusion about, our prior interpretation of the term “particular social group” relates to the social visibility requirement. See Umana-Ramos v. Holder, 724 F.3d at 672-73; Henriquez-Rivas v. Holder, 707 F.3d at 1087; Valdiviezo-Galdamez II, 663 F.3d at 603-09. Contrary to our intent, the term “social visibility” has led some to believe that literal, that is, “ocular” or “on-sight,” visibility is required to make a particular social group cognizable under the Act. See Valdiviezo-Galdamez II, 663 F.3d at 606-07. Because of that misconception, we now rename the “social visibility” requirement as “social distinction.” This new name more accurately describes the function of the requirement.

Thus, we clarify that an applicant for asylum or withholding of removal seeking relief based on “membership in a particular social group” must establish that the group is (1) composed of members who share a common immutable characteristic,

(2) defined with particularity, and

(3) socially distinct within the society in question.

1. Overview of Criteria

The criteria of particularity and social distinction are consistent with both the language of the Act and our earlier precedents. By defining these concepts in Matter of C-A- and the cases that followed it, we did not depart from or abrogate the definition of a particular social group that was set forth in Matter of Acosta; nor did we adopt a new approach to defining particular social groups under the Act. See Henriquez-Rivas v. Holder, 707 F.3d at 1084 (describing our refinement of the definition of a particular social group). Instead, we clarified the definition of the term to give it more “concrete meaning through a process of case-by-case adjudication.”
Our interpretation of the phrase “membership in a particular social group” incorporates the common immutable characteristic standard set forth in Matter of Acosta, 19 I&N Dec. at 233, because members of a particular social group would suffer significant harm if asked to give up their group affiliation, either because it would be virtually impossible to do so or because the basis of affiliation is fundamental to the members’ identities or consciences. Our interpretation also encompasses the underlying rationale of both the “particularity” and “social distinction” tests.

The “particularity” requirement relates to the group’s boundaries or, as earlier court decisions described it, the need to put “outer limits” on the definition of a “particular social group.” See Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003); Sanchez-Trujillo v. INS, 801 F.2d at 1576. The particular social group analysis does not occur in isolation, but rather in the context of the society out of which the claim for asylum arises. Thus, the “social distinction” requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it. A viable particular social group should be perceived within the given society as a sufficiently distinct group. The members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society.12

Literal or “ocular” visibility is not, and never has been, a prerequisite for a viable particular social group. . . . An immutable characteristic may be visible to the naked eye, and it is possible that a particular social group could be set apart within a given society based on such visible characteristics. However, our use of the term “social visibility” was not intended to limit relief solely to those with outwardly observable characteristics. Such a literal interpretation would be inconsistent with the principles of refugee protection underlying the Act and the Protocol.

In fact, we have recognized particular social groups that are clearly not ocularly visible. See, e.g., Matter of Kasinga, 21 I&N Dec. 357, 365-66 (BIA 1996) (determining that young tribal women who are opposed to female genital mutilation (“FGM”) constitute a particular social group); Matter of Toboso-Alfonso, 20 I&N Dec. 819, 822-23 (BIA 1990) (holding that homosexuals in Cuba were shown to be a particular social group); Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988) (holding that former national police members could be a particular social group in certain circumstances). Our precedents have collectively focused on the extent to which the group is understood to exist as a recognized component of the society in question. See Matter of E-A-G-, 24 I&N Dec. at 594 (describing social visibility as “the extent to which members of a society perceive those with the characteristic in question as members of a social group”).

2. “Particularity”

While we addressed the immutability requirement in Acosta, the term “particularity” is included in the plain language of the Act and is consistent with the specificity by which race, religion, nationality, and political opinion are commonly defined.13 The Tenth Circuit recently noted that “the particularity requirement flows quite naturally from the language of the statute, which, of course, specifically refers to membership in a ‘particular social group.’”D’ Rivera-Barrientos v.
A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 76 (holding that wealthy Guatemalans lack the requisite particularity to be a particular social group). It is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part. *Id.* (observing that the concept of wealth is too subjective to provide an adequate benchmark for defining a particular social group).

The group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective. *See Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005) (stating that a particular social group must be narrowly defined and that major segments of the population will rarely, if ever, constitute a distinct social group). The particularity requirement clarifies the point, at least implicit in earlier case law, that not every ““immutable characteristic” is sufficiently precise to define a particular social group. *See, e.g., Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005) (finding the characteristics of poverty, homelessness, and youth to be “too vague and all encompassing” to set perimeters for a protected group within the scope of the Act).

3. “Social Distinction”

Our definition of “social visibility” has emphasized the importance of ““perception” or “recognition” in the concept of “particular social group.” *See Matter of H-*, 21 I&N Dec. 337, 342 (BIA 1996) (stating that in Somali society, clan membership is a “highly recognizable” characteristic that is ““inextricably linked to family ties”). The term was never meant to be read literally. The renamed requirement “social distinction” clarifies that social visibility does not mean “ocular” visibility—either of the group as a whole or of individuals within the group—any more than a person holding a protected religious or political belief must be “ocularly” visible to others in society. *See, e.g., Henriquez-Rivas v. Holder*, 707 F.3d at 1087-89. Social distinction refers to social recognition, taking as its basis the plain language of the Act—in this case, the word “social.” To be socially distinct, a group need not be seen by society; rather, it must be perceived as a group by society. *Matter of C-A-*, 23 I&N Dec. at 956-57 (citing UNHCR Guidelines, *supra*). Society can consider persons to comprise a group without being able to identify the group’s members on sight.

The examples in *Matter of Kasinga*, *Matter of Toboso-Alfonso*, and *Matter of Fuentes*, illustrate this point. It may not be easy or possible to identify who is opposed to FGM, who is homosexual, or who is a former member of the national police. These immutable characteristics are certainly not ocularly visible. Nonetheless, a society could still perceive young women who oppose the practice of FGM, homosexuals, or former members of the national police to comprise a particular social group for a host of reasons, such as sociopolitical or cultural conditions in the country. For this reason, the fact that members of a particular social group may make efforts to hide their membership in the group to avoid persecution does not deprive the group of its protected status as a particular social group. *See Rivera-Barrientos v. Holder*, 666 F.3d at 652 (stating that the social distinction requirement “does not exclude groups whose members might have some measure of success in hiding their status in an attempt to escape persecution”).
The Third Circuit has indicated that it was “hard-pressed to discern any difference between the requirement of ‘particularity’ and the discredited requirement of ‘social visibility.’” Valdiviezo-Galdamez II, 663 F.3d at 608. We respectfully disagree. As recognized by other courts, there is considerable overlap between the “social distinction” and “particularity” requirements, which has resulted in confusion. See, e.g., Henriquez-Rivas v. Holder, 707 F.3d at 1090 (“Admittedly, both BIA and our own precedent have blended the ‘social visibility’ and ‘particularity’ analysis . . .”). “‘Particularity’ remains essential in the interpretation of the phrase ‘particular social group,’” especially in the analysis of broadly defined social groups.

The “social distinction” and “particularity” requirements each emphasize a different aspect of a particular social group. They overlap because the overall definition is applied in the fact-specific context of an applicant’s claim for relief. While “particularity” chiefly addresses the “outer limits” of a group’s boundaries and is definitional in nature, see Castellano-Chacon v. INS, 341 F.3d at 549, this question necessarily occurs in the context of the society in which the claim for asylum arises, see Matter of S-E-G-, 24 I&N Dec. at 584 (inquiring whether the group can be described in sufficiently distinct terms that it “would be recognized, in the society in question, as a discrete class of persons”). Societal considerations have a significant impact on whether a proposed group describes a collection of people with appropriately defined boundaries and is sufficiently “particular.” Similarly, societal considerations influence whether the people of a given society would perceive a proposed group as sufficiently separate or distinct to meet the “social distinction” test.

For example, in an underdeveloped, oligarchical society, “landowners” may be a sufficiently discrete class to meet the criterion of particularity, and the society may view landowners as a discrete group, sufficient to meet the social distinction test. However, such a group would likely be far too amorphous to meet the particularity requirement in Canada, and Canadian society may not view landowners as sufficiently distinct from the rest of society to satisfy the social distinction test. In analyzing whether either of these hypothetical claims would establish a particular social group under the Act, an Immigration Judge should make findings whether “landowners” share a common immutable characteristic, whether the group is discrete or amorphous, and whether the society in question considers “landowners” as a significantly distinct group within the society. Thus, the concepts may overlap in application, but each serves a separate purpose.

4. Society’s Perception

The Ninth Circuit has recently observed that neither it nor the Board “has clearly specified whose perspectives are most indicative of society’s perception of a particular social group.” Henriquez-Rivas v. Holder, 707 F.3d at 1089 (suggesting that “the perception of the persecutors may matter the most” in determining a society’s perception of a particular social group); see also Rivera-Barrientos v. Holder, 666 F.3d at 650-51 (referencing the relevant society as both “citizens of the applicant’s country” and “the applicant’s community”). Interpreting “membership in a particular social group” consistently with the other statutory grounds within the context of refugee protection, we clarify that a group’s recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor.
Defining a social group based on the perception of the persecutor is problematic for two significant reasons. First, it is important to distinguish between the inquiry into whether a group is a “particular social group” and the question whether a person is persecuted “on account of” membership in a particular social group. In other words, we must separate the assessment whether the applicant has established the existence of one of the enumerated grounds (religion, political opinion, race, ethnicity, and particular social group) from the issue of nexus. The structure of the Act supports preserving this distinction, which should not be blurred by defining a social group based solely on the perception of the persecutor.

Second, defining a particular social group from the perspective of the persecutor is in conflict with our prior holding that “a social group cannot be defined exclusively by the fact that its members have been subjected to harm.” Matter of A-M-E- & J-G-U-, 24 I&N Dec. at 74. The perception of the applicant’s persecutors may be relevant, because it can be indicative of whether society views the group as distinct. However, the persecutors’ perception is not itself enough to make a group socially distinct, and persecutory conduct alone cannot define the group. Id.; see also, e.g., Henriquez-Rivas v. Holder, 707 F.3d at 1102 (Kozinski, C.J., dissenting) (“Defining a social group in terms of the perception of the persecutor risks finding that a group exists consisting of a persecutor’s enemies list.”); Mendez-Barrera v. Holder, 602 F.3d at 27 (“The relevant inquiry is whether the social group is visible in the society, not whether the alien herself is visible to the alleged persecutors.”).

For example, a proposed social group composed of former employees of a country’s attorney general may not be valid for asylum purposes. Although such a shared past experience is immutable and the group is sufficiently discrete, the employees may not consider themselves a separate group within the society, and the society may not consider these employees to be meaningfully distinct within society in general. Nevertheless, such a social group determination must be made on a case-by-case basis, because it is possible that under certain circumstances, the society would make such a distinction and consider the shared past experience to be a basis for distinction within that society.

The former employees of the attorney general may not be considered a group by themselves or by society unless and until the government begins persecuting them. Upon their maltreatment, it is possible that these people would experience a sense of “group,” and society would discern that this group of individuals, who share a common immutable characteristic, is distinct in some significant way. See, e.g., Sepulveda v. Gonzales, 464 F.3d 770 (regarding a social group consisting of former employees of the Colombia Attorney General’s Office); see also Cece v. Holder, 733 F.3d at 671 (recognizing that “[a] social group ‘cannot be defined merely by the fact of persecution’ or ‘solely by the shared characteristic of facing dangers in retaliation for actions they took against alleged persecutors,’” but that the shared trait of persecution does not disqualify an otherwise valid social group (quoting Jonaitiene v. Holder, 660 F.3d 267, 271-72 (7th Cir. 2011))). The act of persecution by the government may be the catalyst that causes the society to distinguish the former employees in a meaningful way and consider them a distinct group, but the immutable characteristic of their shared past experience exists independent of the persecution.
The persecutor’s actions or perceptions may also be relevant in cases involving persecution on account of “imputed” grounds, such as where one is erroneously thought to hold particular political opinions or mistakenly believed to be a member of a particular social group. See, e.g., Matter of S-P-, 21 I&N Dec. 486, 489 (BIA 1996); Matter of A-G-, 19 I&N Dec. 502, 507 (BIA 1987). For example, an individual may present a valid asylum claim if he is incorrectly identified as a homosexual by a government that registers and maintains files on homosexuals—in a society that considers homosexuals a distinct group unified by a common immutable characteristic. In such a case, the social group exists independent of the persecution, and the perception of the persecutor is relevant to the issue of nexus (whether the persecution was or would be on account of the applicant’s imputed homosexuality).

Persecution limited to a remote region of a country may invite an inquiry into a more limited subset of the country’s society, such as in Matter of Kasinga, 21 I&N Dec. at 366, where we considered a particular social group within a tribe. Cf. Henriquez-Rivas v. Holder, 707 F.3d at 1089 (“Society in general may also not be aware of a particular religious sect in a remote region.”). However, the refugee analysis must still consider whether government protection is available, internal relocation is possible, and persecution extends countrywide. Section 101(a)(42) of the Act; Gambashidze v. Ashcroft, 381 F.3d 187, 192-94 (3d Cir. 2004); Abdille v. Ashcroft, 242 F.3d at 496; Matter of C-A-L-, 21 I&N Dec. 754, 757-58 (BIA 1997). Only when the inquiry involves the perception of the society in question will the “membership in a particular social group” ground of persecution be equivalent to the other enumerated grounds of persecution.

C. Evidentiary Burdens

The respondent argues that a particular social group interpretation that requires more than the analysis set forth in Matter of Acosta imposes significant burdens on the applicant and introduces subjectivity to the analysis. Such concerns are based on an overbroad reading of the particular social group ground of persecution. In all asylum and withholding of removal cases, including those involving the other grounds of persecution, an applicant is required to establish the existence of the underlying basis for the alleged persecution. . . .

For example, when an applicant makes a claim of persecution based on political opinion or religion, he or she is required to provide evidence that the claimed political or religious group exists and is recognized as such in the relevant society. . . .

Likewise, the applicant has the burden to establish a claim based on membership in a particular social group and will be required to present evidence that the proposed group exists in the society in question. The evidence available in any given case will certainly vary. However, a successful case will require evidence that members of the proposed particular social group share a common immutable characteristic, that the group is sufficiently particular, and that it is set apart within the society in some significant way. Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as “distinct” or “other” in a particular society. Thus, when the requirements for “membership in a particular social group” are
consistent with the other grounds of persecution, the overall burdens are equivalent to those placed on applicants asserting claims based on the other grounds.

D. Consistency with Prior Board Precedent

In its decision, the Third Circuit declined to afford *Chevron* deference to our prior interpretation of the requirements for a particular social group because it perceived them to be inconsistent with our past decisions, in particular *Matter of Kasinga*, *Matter of Toboso-Alfonso*, and *Matter of Fuentes*. *Valdiviezo-Galdamez II*, 663 F.3d at 604, 607. In clarifying that “ocular” visibility is not required, we consider our interpretation of the phrase “membership in a particular social group” to be consistent with our prior case law.

In *Kasinga* and *Toboso-Alfonso*, we found that each applicant established an immutable characteristic in keeping with the *Acosta* standard, and we held that they established viable particular social groups. *Matter of Kasinga*, 21 I&N Dec. at 365-66 (young women of the Tchamba-Kunsuntu Tribe who had not been subjected to FGM, as practiced by that tribe, and who opposed the practice); *Matter of Toboso-Alfonso*, 20 I&N Dec. at 822-23 (persons identified as homosexuals by the Cuban Government).

The Third Circuit recognized that the members of each of these groups “have characteristics which are completely internal to the individual and cannot be observed or known by other members of the society in question (or even other members of the group) unless and until the individual member chooses to make that characteristic known.” *Valdiviezo-Galdamez II*, 663 F.3d at 604. However, the unobservable nature of the immutable characteristics involved in *Kasinga* and *Toboso-Alfonso* did not preclude the societies in question from considering certain women of the tribe or homosexuals, respectively, as distinct groups that were set apart within the society.

In *Matter of Toboso-Alfonso*, the Government did not challenge the Immigration Judge’s finding that homosexuality was an immutable characteristic. The proposed group in that case, homosexuals in Cuba, was sufficiently particular because it was a discrete group with well-defined boundaries. The group was based on an immutable characteristic that provided an adequate benchmark for defining the members of the group, and it did not rely on a vague or subjective characteristic. The record established the existence of a Cuban governmental office that registered and maintained files on homosexuals. *Matter of Toboso-Alfonso*, 20 I&N Dec. at 820, 822. The applicant testified that residents threw eggs and tomatoes at him when he was being forced to leave the country because of his status as a homosexual, and he submitted evidence that suspected homosexuals were subjected to physical examinations, interrogations, and beatings. *Id.* at 820-21. On those facts, it was clear that people in Cuban society considered homosexuals to be a discrete and distinct group within the society and that a homosexual in Cuba would have generally understood his or her affiliation with the grouping. The group was therefore particular and socially distinct within the society in question.

In *Matter of Kasinga*, 21 I&N Dec. at 365-66, we found that the social group met the immutable characteristic test set forth in *Acosta*. The proposed group of young women of a certain tribe who had not been subjected to FGM and opposed the practice was sufficiently particular because it...
presented a group that had clear and definable boundaries. The record contained objective evidence regarding the prevalence of FGM in the society in question and the expectation that women of the tribe would undergo FGM. *Id.* at 361, 367. Based on these facts, we found that people in the Tchamba-Kunsuntu Tribe would generally consider women who had not undergone FGM and opposed the practice to be a discrete and distinct group that was set apart in a significant way from the rest of the society. Such women would clearly understand their affiliation with this grouping. Thus, the proposed group was particular and was perceived as socially distinct within the society in question.

In *Matter of Fuentes*, the fundamental characteristic at issue was also not visible. However, we did not hold that “former member[s] of the national police of El Salvador” necessarily constituted a viable particular social group. *Matter of Fuentes*, 19 I&N Dec. at 662. Rather, we merely recognized that the applicant’s status as a former policeman was an immutable characteristic because it was beyond his capacity to change, and we noted that it is “possible that mistreatment occurring because of such a status in appropriate circumstances could be found to be persecution on account of political opinion or membership in a particular social group.” *Id.* (emphasis added). The applicant in *Fuentes* presented some evidence of social distinction, because the national police played a high-profile role in combating guerrilla violence, and a witness testified that “guerrillas had the names of the people who had been in the service” and targeted and killed former service members. *Id.* at 659, 661. However, because we held that the applicant did not show that the harm he feared bore a nexus to his status as a former member of the national police, we did not fully assess the factors that underlie particularity and social distinction. *Id.* at 661-63.

In *Matter of C-A-*, we found that “noncriminal drug informants working against the Cali drug cartel” in Colombia were not a particular social group, and we emphasized that “[s]ocial groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.” *Matter of C-A-*, 23 I&N Dec. at 957, 959-60 (finding that members of the applicant’s society would not “recognize a social group based on informants who act out of a sense of civic duty rather than for compensation”). However, we also included language highlighting the relative ocular invisibility of confidential informants. *Id.* at 959-60. To the extent that *Matter of C-A-* has been interpreted as requiring literal or “ocular” visibility, we now clarify that it does not.

Since *Matter of Acosta*, we have also recognized “particular social groups” in cases involving immutable characteristics within discrete segments of the population. *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997) (Filipinos of mixed Filipino-Chinese ancestry); *Matter of H-*, 21 I&N Dec. at 342-43 (members of the Marehan subclan of Somalia who share ties of kinship and linguistic commonalities). The particular social groups in these cases satisfied the social distinction test because the record in each case contained objective evidence establishing the existence of the groups as distinct within the society in question. *Matter of V-T-S-*, 21 I&N Dec. at 798 (citing the State Department Profile on the Philippines as stating that approximately 1.5% of the Philippine population has an identifiable Chinese background); *Matter of H-*, 21 I&N Dec. at 342-43 (citing country reports discussing various clans).
Our interpretation of the phrase “membership in a particular social group” originated with the immutable characteristics test in *Matter of Acosta*. In response to the evolution of social group claims presented, we announced the addition of the “particularity” and “social visibility” requirements in *Matter of S-E-G-* and *Matter of E-A-G-* and *Matter of S-Y-G-* and *Matter of E-A-G-* if we were to apply the term “social distinction” rather than “social visibility.” Therefore, we need not revisit cases where we used the term “social visibility.” See *INS v. Abudu*, 485 U.S. 94, 107 (1998); *Matter of S-Y-G-* and *Matter of E-A-G-* (BIA 2007) (explaining that an incremental or incidental change does not meet the requirements for untimely motions to reopen and that even a change in law is insufficient absent evidence that the prior version was meaningfully different); *Matter of G-D-* (BIA 1999) (stating that an incremental development in case law does not warrant sua sponte reopening).

E. International Interpretations

Although the statutory terms “refugee” and “particular social group” occur against the backdrop of the Protocol and the Convention, international interpretations of those terms are not controlling here. *INS v. Aguirre-Aguirre*, 526 U.S. at 427-28.

We recognize that our interpretation of the ambiguous phrase “particular social group” differs from the approach set forth in the UNHCR’s social group guidelines, which sought to reconcile two international interpretations that had developed over the years. UNHCR Guidelines, *supra*, at 2-3; see also *Valdiviezo-Galdamez II*, 663 F.3d at 615 n.4 (Hardiman, J., concurring). The UNHCR advocates an alternative approach, which permits an individual to establish a particular social group based on “protected characteristics” or “social perception” but does not require both. UNHCR Guidelines, *supra*, at 2-3. However, the European Union adopted a “particular social group” definition that departs from the UNHCR Guidelines by requiring a social group to have both an immutable/fundamental characteristic and social perception.

While the views of the UNHCR are a useful interpretative aid, they are “not binding on the Attorney General, the BIA, or United States courts.” *INS v. Aguirre-Aguirre*, 526 U.S. at 427. Indeed, the UNHCR has disclaimed that its views have such force and has taken the position that the determination of “refugee” status is left to each contracting State. *Id.* at 428 (citing Office of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* para. II, at 1 (Geneva, 1979)); see also *INS v. Cardoza-Fonseca*, 480 U.S. at 439 n.22.

We believe that our interpretation in *Matter of S-E-G-* and *Matter of E-A-G-* as clarified, more accurately captures the concepts underlying the United States’ obligations under the Protocol and will ensure greater consistency in the adjudication of asylum claims under the Act. Unlike the UNHCR’s alternative approach, we conclude that a particular social group must satisfy both the “protected characteristic” and “social perception” approaches, in addition to the particularity requirement, as described above.
V. APPLICATION TO THE RESPONDENT

In our prior decision in this case, we rejected the respondent’s gang-related claim based on the reasoning set forth in Matter of S-E-G- and Matter of E-A-G-. In Matter of S-E-G-, 24 I&N Dec. at 582, we denied a gang-related asylum claim asserting a proposed social group of “Salvadoran youths who have resisted gang recruitment, or family members of such Salvadoran youth.” The applicant’s membership in a particular social group was not established because he did not show that the proposed group was sufficiently particular or socially distinct, that is, recognized in the society in question as a discrete class of persons. Id. at 584-87. His fear was based on his individual response to the gang’s efforts to increase its ranks, not on persecution aimed at his membership in a group. See INS v. Elias-Zacarias, 502 U.S. at 483 (rejecting a guerrilla recruitment claim where the applicant failed to establish that the persecutor had a motive other than increasing the size of its forces). Similarly, the applicant in Matter of E-A-G- did not establish that the proposed group, “persons resistant to gang membership,” was a particular social group. Matter of E-A-G-, 24 I&N Dec. at 594-95 (“The focus is not with statistical or actuarial groups, or with artificial group definitions. Rather, the focus is on the existence and visibility of the group in the society in question and on the importance of the pertinent group characteristic to the members of the group.”).16

While there is no universal definition of a “gang,” it is generally understood to be “a criminal enterprise having an organizational structure, acting as a continuing criminal conspiracy, which employs violence and any other criminal activity to sustain the enterprise.” UNHCR, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs 1 n.3 (Mar. 31, 2010), available at http://www.unhcr.org/refworld/docid/4bb21fa02.html (quoting the Federal Bureau of Investigation’s definition of a gang).

The UNHCR has recognized that “[g]ang-related violence may be widespread and affect large segments of society, in particular where the rule of law is weak. Ordinary people may be exposed to gang-violence simply because of being residents of areas controlled by gangs.” Id. para. 10, at 4. Although the UNHCR indicates that certain marginalized social groups may be specifically targeted by gangs, it also noted that “a key function of gangs is criminal activity. Extortion, robbery, murder, prostitution, kidnapping, smuggling and trafficking in people, drugs and arms are common practices employed by gangs to raise funds and to maintain control over their respective territories.” Id. para. 8, at 3.

In Matter of S-E-G-, 24 I&N Dec. at 588, we also noted that the evidence of record indicated that El Salvador suffered from widespread gang violence, stating that “victims of gang violence come from all segments of society, and it is difficult to conclude that any ‘group,’ as actually perceived by the criminal gangs, is much narrower than the general population of El Salvador.” Although this evidence of indiscriminate gang violence and civil strife was largely dispositive of the applicant’s ability to establish the proposed group’s existence in the society in question, it also undermined his attempt to establish a nexus between any past or feared harm and a protected ground under the Act.

Against the backdrop of widespread gang violence affecting vast segments of the country’s population, the applicant in Matter of S-E-G- could not establish that he had been targeted on a
protected basis. See Al-Fara v. Gonzales, 404 F.3d at 740; Abdille v. Ashcroft, 242 F.3d at 494-95; Matter of N-M-A-, 22 I&N Dec. at 323, 326. Although he was subjected to one of the many different criminal activities that the gang used to sustain its criminal enterprise, he did not demonstrate that he was more likely to be persecuted by the gang on account of a protected ground than was any other member of the society. Matter of S-E-G-, 24 I&N Dec. at 587 ("[G]angs have directed harm against anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises and territorial power.").

The prevalence of gang violence in many countries is a large societal problem. The gangs may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping, trafficking in drugs and people, and other crimes. Although certain segments of a population may be more susceptible to one type of criminal activity than another, the residents all generally suffer from the gang’s criminal efforts to sustain its enterprise in the area. A national community may struggle with significant societal problems resulting from gangs, but not all societal problems are bases for asylum. See Konan v. Att’y Gen. of U.S., 432 F.3d at 506; Al Fara v. Gonzales, 404 F.3d at 740; Abdille v. Ashcroft, 242 F.3d at 494-95; see also Matter of Sosa Ventura, 25 I&N Dec. at 394 (discussing the history of Temporary Protected Status and the fact that individuals fleeing life-threatening natural disasters or a generalized state of violence were not entitled to either asylum or withholding of removal). Congress may choose to provide relief to those suffering from difficult situations not covered by asylum and withholding of removal. See, e.g., section 244(a)(1) of the Act, 8 U.S.C. § 1254a(a)(1) (2012); Ruth Ellen Wasem & Karma Ester, Cong. Research Serv., RS 20844, Temporary Protected Status: Current Immigration Policy and Issues 2 (2010), available at http://fpc.state.gov/documents/organization/137267.pdf.

Nevertheless, we emphasize that our holdings in Matter of S-E-G- and Matter of E-A-G- should not be read as a blanket rejection of all factual scenarios involving gangs. Matter of S-E-G-, 24 I&N Dec. at 587 (recognizing that the evidence of record did not “indicate that Salvadoran youth who are recruited by gangs but refuse to join (or their family members) would be ‘perceived as a group’ by society, or that these individuals suffer from a higher incidence of crime than the rest of the population”). Social group determinations are made on a case-by-case basis. Matter of Acosta, 19 I&N Dec. at 233. For example, a factual scenario in which gangs are targeting homosexuals may support a particular social group claim. While persecution on account of a protected ground cannot be inferred merely from acts of random violence and the existence of civil strife, it is clear that persecution on account of a protected ground may occur during periods of civil strife if the victim is targeted on account of a protected ground. See Konan v. Att’y Gen. of U.S., 432 F.3d at 506; Matter of Villalta, 20 I&N Dec. 142, 147 (BIA 1990); see also, e.g., Ochave v. INS, 254 F.3d 859, 865 (9th Cir. 2001) (“Asylum generally is not available to victims of civil strife, unless they are singled out on account of a protected ground.”).

VI. CONCLUSION

We interpret the “particular social group” ground of persecution in a manner consistent with the other enumerated grounds of persecution in the Act and clarify that our interpretation of the phrase “membership in a particular social group” requires an applicant for asylum or withholding of removal to establish that the group is (1) composed of members who share a common
immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. Not every “immutable characteristic” is sufficiently precise to define a particular social group. The additional requirements of “particularity” and “social distinction” are necessary to ensure that the proposed social group is perceived as a distinct and discrete group by society. We further clarify that a particular social group does not require literal or “ocular” visibility.

The respondent has requested a remand and the DHS has expressed that it has no opposition. Because the respondent’s proposed particular social group has evolved during the pendency of his appeal, our guidance on particular social group claims has been clarified since this case was last before the Immigration Judge, and the Third Circuit has indicated that a remand may be appropriate, we will remand this case. A remand will enable the Immigration Judge to engage in any fact-finding that may be necessary to resolve the issues in this case, consistent with standard Immigration Court practice and procedure.

Further, a remand is appropriate to allow the Immigration Judge to revisit the issues of the respondent’s possible relocation and the Honduran Government’s inability or unwillingness to control the gangs. Although the Immigration Judge initially denied the respondent’s asylum claim on these grounds, they were the basis on which the Third Circuit granted his first petition for review and they have not yet been resolved. See, e.g., Valdiviezo-Galdamez II, 663 F.3d at 588-89 & n.4; Valdiviezo-Galdamez I, 502 F.3d at 292-93.

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MATTER OF A-R-C-G- ET AL., RESPONDENTS

26 I. & N. Dec. 388 (BIA), Interim Decision 3811 (BIA 2014)

BEFORE: Board Panel: ADKINS-BLANCH, Vice-Chairman; MILLER and GREER, Board Members.

ADKINS-BLANCH, Vice Chairman:

In a decision dated October 14, 2009, an Immigration Judge found the respondents removable and denied their applications for asylum and withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act. The respondents have appealed from that decision, contesting only the denial of their applications for relief from removal. We find that the lead respondent, a victim of domestic violence in her native country, is a member of a particular social group composed of “married women in Guatemala who are unable to leave their relationship.” The record will be remanded to the Immigration Judge for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

The lead respondent is the mother of the three minor respondents. The respondents are natives and citizens of Guatemala who entered the United States without inspection on December 25, 2005. The respondent filed a timely application for asylum and withholding of removal under the Act.

The Immigration Judge found the respondent to be a credible witness, which is not contested on appeal. It is undisputed that the respondent, who married at age 17, suffered repugnant abuse by her husband. This abuse included weekly beatings after the respondent had their first child. On one occasion, the respondent’s husband broke her nose. Another time, he threw paint thinner on her, which burned her breast. He raped her.

The respondent contacted the police several times but was told that they would not interfere in a marital relationship. On one occasion, the police came to her home after her husband hit her on the head, but he was not arrested. Subsequently, he threatened the respondent with death if she called the police again. The respondent repeatedly tried to leave the relationship by staying with her father, but her husband found her and threatened to kill her if she did not return to him. Once she went to Guatemala City for about 3 months, but he followed her and convinced her to come home with promises that he would discontinue the abuse. The abuse continued when she returned. The respondent left Guatemala in December 2005, and she believes her husband will harm her if she returns.

The Immigration Judge found that the respondent did not demonstrate that she had suffered past persecution or has a well-founded fear of future persecution on account of a particular social group comprised of “married women in Guatemala who are unable to leave their relationship.” The Immigration Judge determined that there was inadequate evidence that the respondent’s spouse abused her “in order to overcome” the fact that she was a “married woman in Guatemala who was unable to leave the relationship.” He found that the respondent’s abuse was the result of “criminal acts, not persecution,” which were perpetrated “arbitrarily” and “without reason.” He
accordingly found that the respondent did not meet her burden of demonstrating eligibility for asylum or withholding of removal under the Act.

On appeal, the respondent asserts that she has established eligibility for asylum as a victim of domestic violence. The Department of Homeland Security (“DHS”) initially responded that the Immigration Judge’s decision should be upheld. We subsequently requested supplemental briefing from both parties and amici curiae to address the issue whether domestic violence can, in some instances, form the basis for a claim of asylum or withholding of removal under sections 208(a) and 241(b)(3) of the Act. 10 See 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 and stay lifted, 24 I&N Dec. 629 (A.G. 2008).

In response to our request for supplemental briefing, the DHS now concedes the respondent established that she suffered past harm rising to the level of persecution and that the persecution was on account of a particular social group comprised of “married women in Guatemala who are unable to leave their relationship.” However, the DHS seeks remand, arguing that “further factual development of the record and related findings by the Immigration Judge are necessary on several issues” before the asylum claim can be properly resolved. The respondent opposes remand and maintains that she has met her burden of proof regarding all aspects of her asylum claim. We accept the parties’ position on the existence of harm rising to the level of past persecution, the existence of a valid particular social group, and the issue of nexus under the particular facts of this case. We will remand the record for further proceedings.

II. ANALYSIS

A. Particular Social Group

**3 The question whether a group is a “particular social group” within the meaning of the Act is a question of law that we review de novo…. The question whether a person is a member of a particular social group is a finding of fact that we review for clear error….

We initially considered whether victims of domestic violence can establish membership in a particular social group in Matter of R-A-, 22 I&N Dec. at 907. We reversed an Immigration Judge’s finding that the respondent in that case was eligible for asylum on account of her membership in a particular social group consisting of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.” Id. at 911. The majority opinion reasoned that the proffered social group was “defined principally, if not exclusively, for purposes of the asylum case and that it was unclear whether “anyone in Guatemala perceives this group to exist in any form whatsoever,” including spousal abuse victims themselves or their male oppressors. Id. at 918. We further reasoned that even if the proffered social group was cognizable, the respondent did not establish that her husband harmed her on account of her membership in the group. Id. at 920-23.

The Acting Commissioner of the former Immigration and Naturalization Service (“INS”) referred the decision to the Attorney General for review. 11 In 2001, Attorney General Janet Reno
vacated our decision in *Matter of R-A*, 22 I&N Dec. 906. She remanded the case for the Board’s reconsideration following final publication of proposed regulations that addressed the meaning of various terms in asylum law, including “persecution,” “membership in a particular social group,” and “on account of a protected characteristic. See Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,597-98 (proposed Dec. 7, 2000).


**B. Respondent’s Claim**

The DHS has conceded that the respondent established harm rising to the level of past persecution on account of a particular social group comprised of “‘married women in Guatemala who are unable to leave their relationship.’” The DHS’s position regarding the existence of such a particular social group in Guatemala under the facts presented in this case comports with our recent precedents clarifying the meaning of the term “particular social group.” *Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R*, 26 I&N Dec. 208 (BIA 2014). In this regard, we point out that any claim regarding the existence of a particular social group in a country must be evaluated in the context of the evidence presented regarding the particular circumstances in the country in question.

In *Matter of W-G-R* and *Matter of M-E-V-G*, we held that an applicant seeking asylum based on his or her membership in a “particular social group” must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.13 The “common immutable characteristic” requirement incorporates the standard set forth in *Matter of Acosta*, 19 I&N Dec. 211, 233-34 (BIA 1985). The “particularity” requirement addresses “the question of delineation.” *Matter of W-G-R*, 26 I&N Dec. at 214. That is, it clarifies the point that “not every ‘immutable characteristic’ is sufficiently precise to define a particular social group.” *Matter of M-E-V-G*, 26 I&N Dec. at 239. The “social distinction” requirement renames the former concept of “social visibility” and clarifies “the importance of ‘perception’ or ‘recognition’ to the concept of the particular social group.” *Matter of W-G-R*, 26 I&N Dec. at 216.

In this case, the group is composed of members who share the common immutable characteristic of gender. See *Matter of Acosta*, 19 I&N Dec. at 233 (finding that sex is an immutable characteristic); see also *Matter of W-G-R*, 26 I&N Dec. at 213 (“The critical requirement is that the defining characteristic of the group must be something that either cannot be changed or that the group members should not be required to change in order to avoid persecution.”). Moreover, marital status can be an immutable characteristic where the individual is unable to leave the relationship. A determination of this issue will be dependent upon the particular facts and evidence in a case. A range of factors could be relevant, including whether dissolution of a
marriage could be contrary to religious or other deeply held moral beliefs or if dissolution is possible when viewed in light of religious, cultural, or legal constraints. In evaluating such a claim, adjudicators must consider a respondent’s own experiences, as well as more objective evidence, such as background country information.

The DHS concedes that the group in this case is defined with particularity. The terms used to describe the group—“married,” “women,” and “unable to leave the relationship”—have commonly accepted definitions within Guatemalan society based on the facts in this case, including the respondent’s experience with the police. See Matter of M-E-V-G-, 26 I&N Dec. at 239; Matter of W-G-R-, 26 I&N Dec. at 214. In some circumstances, the terms can combine to create a group with discrete and definable boundaries. We point out that a married woman’s inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation. See Matter of W-G-R-, 26 I&N Dec. at 214 (observing that in evaluating a group’s particularity, it may be necessary to take into account the social and cultural context of the alien’s country of citizenship or nationality); Committees on Foreign Relations and Foreign Affairs, 111th Cong., 2d Sess., Country Reports on Human Rights Practices for 2008 2598 (Joint Comm. Print 2010), available at http://www.gpo.gov/fdsys/pkg/CPRT-111JPRT62931/pdf/CPRT-111JPRT62931.pdf (“Country Reports”) (discussing sexual offenses against women as a serious societal problem in Guatemala); Bureau of Human Rights, Democracy, and Labor, U.S. Dep’t of State, Guatemala Country Reports on Human Rights Practices-2008 (Feb. 25, 2009), http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119161.htm. In this case, it is significant that the respondent sought protection from her spouse’s abuse and that the police refused to assist her because they would not interfere in a marital relationship.

The group is also socially distinct within the society in question. Matter of M-E-V-G-, 26 I&N Dec. at 240 (“To be socially distinct, a group need not be seen by society; rather it must be perceived as a group by society.”). To have “social distinction,” there must be “evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.” Matter of W-G-R-, 26 I&N Dec. at 217. The group’s recognition is “determined by the perception of the society in question, rather than by the perception of the persecutor.” Matter of M-E-V-G-, 26 I&N Dec. at 242; see also Matter of W-G-R-, 26 I&N Dec. at 214 (noting that there is some degree of overlap between the particularity and social distinction requirements because both take societal context into account).

When evaluating the issue of social distinction, we look to the evidence to determine whether a society, such as Guatemalan society in this case, makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave. Such evidence would include whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors. Cf. Davila-Mejia v. Mukasey, 531 F.3d 624, 629 (8th Cir. 2008) (finding that competing family business owners are not a particular social group because they are not perceived as a group by society).

Supporting the existence of social distinction, and in accord with the DHS’s concession that a
particular social group exists, the record in this case includes unrebutted evidence that Guatemala has a culture of “machismo and family violence.” See Guatemala Failing Its Murdered Women: Report, Canadian Broad. Corp. (July 18, 2006), http://www.cbc.ca/news/world/guatemala-failing-its-murdered-women-report-1.627240. Sexual offenses, including spousal rape, remain a serious problem. See Country Reports, supra, at 2608. Further, although the record reflects that Guatemala has laws in place to prosecute domestic violence crimes, enforcement can be problematic because the National Civilian Police “often failed to respond to requests for assistance related to domestic violence.” Id. at 2609.

We point out that cases arising in the context of domestic violence generally involve unique and discrete issues not present in other particular social group determinations, which extends to the matter of social distinction. However, even within the domestic violence context, the issue of social distinction will depend on the facts and evidence in each individual case, including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent’s past experiences; and other reliable and credible sources of information.16

C. Remaining Issues

The DHS stipulates that the respondent suffered mistreatment rising to the level of past persecution. The DHS also concedes in this case that the mistreatment was, for at least one central reason, on account of her membership in a cognizable particular social group. We note that in cases where concessions are not made and accepted as binding, these issues will be decided based on the particular facts and evidence on a case-by-case basis as addressed by the Immigration Judge in the first instance. ....In particular, the issue of nexus will depend on the facts and circumstances of an individual claim.

We will remand the record for the Immigration Judge to address the respondent’s statutory eligibility for asylum in light of this decision. Under controlling circuit law, in 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… If the respondent succeeds in establishing that the Government was unwilling or unable to control her husband, the burden shifts to the DHS to demonstrate that there has been a fundamental change in circumstances such that the respondent no longer has a well-founded fear of persecution….Alternatively, the DHS would bear the burden of showing that internal relocation is possible and is not unreasonable….The Immigration Judge may also consider, if appropriate, whether the respondent is eligible for humanitarian asylum….

III. CONCLUSION

For the foregoing reasons, we will remand the record to the Immigration Judge for further proceedings and for the entry of a new decision. On remand, the Immigration Judge should afford the parties the opportunity to update the evidentiary record.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.
Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law

In August 2014, the US Board of Immigration Appeals (BIA), the highest immigration tribunal in the country, conceded that women fleeing domestic violence could meet the refugee definition and qualify for protection.

The case in question, Matter of A-R-C-G- et al., involved Aminta Cifuentes, a Guatemalan woman who had suffered egregious brutalization over a 10-year period at the hands of her spouse. Her husband beat and kicked her, including incidents where he broke her nose and punched her in the stomach when she was eight months pregnant with such force that the baby was born prematurely and with bruises. Ms. Cifuentes told her husband she would call the police, but he said it would be pointless since “even the police and the judges beat their wives.” Unfortunately, her husband’s claim bore true; she called the police on at least three occasions and they dismissed her complaints as marital problems and told her to go home to her husband.

The decision in Matter of A-R-C-G-et al. is notable for many reasons, not the least because it put an end to a controversy that had been raging in US law since 1999 when the same body denied protection to another Guatemalan woman, Rody Alvarado, whose case presented very similar facts. Ms. Alvarado, like Ms. Cifuentes, had suffered more than a decade of violent abuse, and her appeals to both the police and the judicial system had been met with scorn, indifference, and inaction.

In the interim—between 1999 when the BIA denied Ms. Alvarado’s claim, and 2014 when it ruled in favor of Ms. Cifuentes—there existed a remarkable level of disagreement at the highest levels of the US government on the central issue of whether women fleeing domestic violence are entitled to asylum protection. No fewer than three Attorneys General of the United States (Janet Reno, John Ashcroft, and Michael Mukasey) became personally involved in the discretion of asylum cases.

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involved in the issue, and various federal agencies adopted diametrically opposed positions. These entrenched differences in policy positions led to a virtual deadlock that lasted for 15 years.

Why has the issue of protection for women who are brutalized by their intimate partners been such a lightning rod for controversy and evoked such strong disension and resultant gridlock? In order to answer, it is necessary to situate the question of asylum protection for victims of domestic violence within the broader context of “gender asylum” (claims for protection arising from gender-motivated rights violations), and to examine both the origins of our modern refugee protection regime and the historical resistance to recognizing women’s rights as human rights.

**Historical Context**

The birth of our international refugee protection regime can be traced back to the aftermath of World War II and the recognition of the failure to protect Jews and other victims of the Holocaust. Many who fled and attempted to seek haven were turned back. One of the most shameful and iconic examples of this refoulement occurred when the US refused safe harbor to a ship, the *St. Louis*, carrying Jews from Europe after they were denied promised landing in Cuba. The *St. Louis* with its more than 400 passengers was forced to return to Europe, where many of the people on board perished in concentration camps.

When representatives of state governments came together to draft an international treaty to address refugees, the World War II experience stood foremost in their consciousness. The 1951 Convention Relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol defined a refugee as an individual with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,” grounds which reflected the historical period and the drafters’ understanding of reasons for persecution. The drafting of these treaties preceded the recognition of women’s rights as human rights.

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Growing Recognition of Women’s Rights

Historically, the violation of women’s rights was not seen as an issue of concern within the international human rights framework. Violations of women’s rights were often considered expressions of cultural norms or were justified as being mandated by religion. In addition, there persisted a perceived delineation between violations by governments committed against its citizens in the public sphere and violations by non-state actors of women in the so-called “private sphere.” It was only through the efforts of women’s rights activists that this distinction has been largely eroded, and within the human rights arena there has been growing acceptance that violations of women’s rights, even if they take place in “private,” are a matter of public concern and state responsibility.

Such progress came much more slowly in the area of refugee protection, where two principal conceptual barriers were in play. First, there was the reluctance to recognize traditional practices, such as female genital cutting (FGC), as acts of “persecution.” Second, and equally important, was the definition of “refugee” in the UN Refugee Convention—which has been adopted by most countries that are parties to it—does not include gender as one of the five protected grounds. In 1985, the United Nations High Commissioner for Refugees (UNHCR), whose role it is to provide guidance to governments on their application of the 1951 Convention and its 1967 Protocol, began to address the potential exclusion of women from refugee protection. The UNHCR encouraged a broader recognition of gender-related harms as persecution, as well as the use of the “particular social group” protected ground to include claims based on gender. In 1993, the UNHCR, in Executive Committee Conclusion 73, recommended that state parties to the Refugee Convention or Protocol develop “appropriate guidelines on women asylum-seekers in recognition of the fact that women refugees often experience persecution differently from refugee men.”

In 1995, in an apparent response to the UNHCR’s recommendation, the United States issued gender guidelines, which were generally positive in their approach towards recognizing violations of women’s rights as deserving of asylum protection. Their impact, however, was limited by the fact that they were directed only to the first tier of decision-makers in the US system, asylum officers. Even at that level, the guidelines had no binding effect, leaving it up to the discretion of each asylum officer whether to follow them or not.

An immigration judge’s denial of asylum to Fauziya Kassindja, a young woman from Togo fleeing FGC, provided clear demonstration of the guidelines’ circumscribed effect. Ms. Kassindja appealed the judge’s ruling to the BIA, and there, the principle of protection for women fleeing gendered harms prevailed. In a 1996 decision known as Matter of Kasinga, the BIA ruled that the physical and psychological harm inflicted by FGC met the legal definition of “persecution,” and that it would be imposed on Ms. Kasinga because of her “membership in a particular social group,” defined in significant part by gender. The BIA’s holding was a landmark in US law as the first to accept that women fleeing harms inflicted because of gender could qualify for refugee status. However, it had a strong basis in existing law; the definition of persecution had long included acts of physical and psychological harm analogous to FGC, and a 1985 precedent decision, Matter of Acosta, had specifically ruled that social groups could be defined by “sex.”
The 15-Year Controversy in the United States

Shortly after the BIA’s positive decision in Fauziya Kassindja’s case, Rody Alvarado—a Guatemalan woman fleeing brutal domestic violence, whose case is referred to above—was granted asylum by an immigration judge in San Francisco. The judge applied the same rationale as the BIA had in Ms. Kassindja’s case—that egregious harms inflicted because of a woman’s gender in combination with other characteristics can be the basis for a successful claim to asylum. Implicit in the decision was that the judge saw no reason to treat the harm of domestic violence any differently than the harm of FGC. Although they took different forms, both rose to the required level of severity, and both were imposed or motivated by the gender-defined social group of the victim. Given the rationality of this approach, it was a surprise to many when the attorney representing the US government decided to appeal the grant of asylum to Ms. Alvarado, and even more of a surprise three years later when the BIA, which had granted asylum to Ms. Kassindja, reversed the grant of asylum to Ms. Alvarado in a decision known as Matter of R-A-.

The Board’s decision in Matter of R-A- set off a series of Executive Branch actions which often conflicted with each other, and laid bare the deep divides between governmental actors on the issue. In December 2000, then-Attorney General Janet Reno issued proposed regulations specifically intended to sweep away the legal barriers to asylum for domestic violence survivors imposed by the decision in Matter of R-A-. She next took the unusual step of personally intervening in the R-A- case (in a process called “certification”), and wiped out the negative ruling. She directed the board to decide the case anew once the proposed regulations were issued as final.

In the subsequent years, Attorneys General Ashcroft and Mukasey would also undertake the somewhat rare measure of directly intervening in Rody Alvarado’s case. In 2003, Ashcroft certified the case to himself and asked both parties—Ms. Alvarado and the government, represented by the Department of Homeland Security (DHS)—to submit briefs on the issue of whether Ms. Alvarado met the refugee definition.

Information leaked from government sources indicated that Ashcroft took the case with the intention of reinstating the earlier board denial. However, in an unexpected change of position, the government—the party that had disagreed with the asylum grant to Ms. Alvarado in 1996 and lodged the appeal that resulted in the reversal—filed a brief in 2004 stating that Ms. Alvarado met the legal definition of a refugee and should be granted protection. This made it quite impossible for Ashcroft to reinstate the denial, when the government itself (albeit the DHS, a different agency from Ashcroft’s Department of Justice) was arguing that she should be granted asylum. Ashcroft decided to dodge the issue by declining to decide it and sending the case back to the BIA with the same directive as had his predecessor Janet Reno—to decide the matter once the proposed regulations were issued as final.

The depth of controversy around this issue affected the ability of the relevant government agencies to agree on issuing regulations; by 2008 the regulations proposed in 2000 had still not been finalized, and to this date have not been finalized. At that point Michael Mukasey, the third Attorney General to involve himself, decided to intervene. He certified the case to himself, and ordered the BIA to decide Ms. Alvarado’s case on the basis of the existing law, and not await finalized regulations.

In compliance with his order, Ms. Alvarado’s case went back to the BIA, which agreed to send it back to an immigration judge. During the trial, the DHS repeated its statement from 2004 when the case was in front of John Ashcroft: that Rody Alvarado qualified for relief and should be granted protection. She was thus granted asylum once more, 13 years after she had originally been granted asylum—but this time the decision was not appealed, and her odyssey for protection came to a positive conclusion. Nonetheless, this did not by any means resolve the issue on a national level. Decisions by immigration judges do not bind other immigration judges, and it would be five more years until there would be binding precedent assuring protection for women fleeing gender-based harms such as domestic violence. That binding precedent was Matter of A-R-C-G-.

Why all the Controversy?

Why has there been such resistance? There is prob-
ably no single answer, but rather a long list of factors. The comments of some who oppose protection often reveal a resistance to accepting that women's rights are indeed human rights, and therefore of legitimate concern within a human rights and refugee rights framework. Their remarks frequently demonstrate an adherence to the old public/private sphere approach, stating that one should not “expect asylum law to address ‘personal’ or ‘family’ issues.” But this argument ignores the fact that the fundamental purpose of the refugee regime is to provide a safe haven to those who are persecuted in situations where their governments fail to protect them. There is no legitimate reason to exclude women from this arc of protection.

Asylum is one of the few areas of immigration law not subject to maximum quotas; any individual who makes it to the United States and passes preliminary screening procedures can apply for protection. It should be noted however, that the process of applying is difficult, and the legal standard quite demanding. Notwithstanding these challenges, there is the fear of floodgates opening, and it is not hard to see how this fear has fueled the controversy over protection. Fear of the opening of the floodgates was repeatedly given voice around the case of Fauziya Kassindja, with some commentators observing that approximately 3 million girls are subject to FGC each year, and that a positive decision in her case would lead to the United States being deluged with girls and women seeking protection. However, the positive decision in her case came down 18 years ago, and the hordes of refugee women have not materialized. The experience of Canada also refutes this fear: it has recognized gender-based refugee claims since 1993 (including, explicitly, domestic violence) and has not experienced any appreciable increase in women's claims.

There are many reasons why skyrocketing numbers of women asylum seekers have not resulted from recognition of their legitimate claims to protection. Included is the fact that women who have claims to protection often come from countries where they have little or no rights, which limits their ability to leave in search of protection at all. They are frequently the primary caretakers for their children and extended family, and have to choose between leaving family behind or exposing them to the risks of travel to the potential country of refuge. In addition, they often have little control over family resources, making it very difficult for them to have the money to travel to countries where they might seek asylum. Unfortunately, the fear of floodgates has continued to have currency, notwithstanding the fact that predicted deluges have not materialized, and that there are genuinely good reasons that explain why they have not.

Different Asylum Claims?

A common narrative accompanying the claims of female asylum seekers is that they are asking for special treatment. This discourse assumes women fleeing gender-related persecution would not qualify for protection absent some twisting of the legal standard to accommodate their claims. This erroneous perspective harkens back to the largely repudiated vision of a human rights system, discussed above, which places women in a private sphere and privileges culture and religion over universality of rights. It is quite ironic that opponents continue to make the argument that the protection of women requires special (that is, favorable) rules, when in reality, women have been excluded from protection precisely because of a refusal to fairly apply the refugee definition in an unbiased and neutral fashion.

The multitude of harms that women (and women in particular) suffer—sexual slavery, rape, female genital cutting, honor killings—are clearly grave enough to constitute persecution. Furthermore, as early as 1985, in Matter of Acosta, US law recognized that particular social groups could be comprised of individuals who share an immutable or fundamental characteristic, such as “sex.” There is simply no credibility to the argument that recognizing women as refugees accords them special treatment or requires a distortion of the legal standards.

Conclusion

The right to protection for women fleeing female genital cutting, although contentious at the time the courts first heard the issue, was accepted almost 20 years ago in Matter of Kasinga. The principles established in that decision should have been applied to cases involving domestic violence. Instead it has taken the nearly two decades since to accept that women fleeing brutal partner abuse are entitled to protection.

There are other forms of gender violence that frequently arise in claims for protection raised by female asylum seekers. These forms include practices such as forced marriage, rape, sexual slavery, trafficking for labor or sexual exploitation, honor killings, and repressive social norms (e.g., forbidding education or employment). In a number of these areas, there is still no binding legal precedent that would assure protection for the women who have escaped such violations. In the absence of binding precedent, many judges refuse to apply the Kasinga principles to find that these harms are acts of persecution inflicted because of gender or social group membership.

It would be unfortunate if judges continued to read Kasinga and subsequently, A-R-C-G- so narrowly, viewing them simply as decisions that apply to FGC and domestic violence—rather than as landmarks with far broader implications. The legal principles in both cases chart an analytical approach for gender claims in general. The two decisions demonstrate that special interpretations and rules are not necessary in order to extend protection to women fleeing gender-motivated harms. To the contrary, the rulings stand for the proposition that an unbiased application of the law—particularly of the terms “persecution” and “particular social group”—will result in protection for women who fear grave harms because of their gender in situations where their governments cannot or will not protect them.
Danger to the Security of the Host Country

Terrorism-Related Inadmissibility Grounds (TRIG)

Statutory Amendments

The 2008 Consolidated Appropriations Act, P.L. 110-161 (2008 CAA) provided an expanded ability to designate groups that could be excluded from the definition of a Tier III terrorist organization. The previous language, included in the Casebook, only allowed Tier III groups to be excluded if they were considered Tier III organizations solely because a subgroup or faction within the organization satisfied the Tier III definition. Though no waiver was issued under this language, it would presumably apply primarily to umbrella organizations that included a faction engaging in terrorist acts as well as other non-violent groups. After the 2008 Act, any group that meets the Tier III definition—whether by the actions of a subgroup or the full organization—is able to be de-listed provided it have not engaged in terrorism against the United States and that they have not purposefully targeted civilians.1

It’s worth noting that de-listing a group only exempts the non-citizen from grounds of inadmissibility that include the group as an “element” of the inadmissible activity (e.g. “has received military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization”). The non-citizen could still be found inadmissible based on preparing or planning a terrorist activity, gathering information for a terrorist activity, etc.—any ground that does not make specific reference to an organization.2

Thus, while the 2008 Consolidated Appropriations Act excluded multiple groups from the definition of a Tier III organization, DHS also had to issue an additional waiver, clarifying that “section 212(a)(3)(B) of the INA, excluding subclause (i)(II) [which excludes individuals likely to engage in terrorist activity after entry] shall not apply with respect to an alien not otherwise covered by the automatic relief provisions of section 691(b) of the CAA.”3 In this way, persons affiliated with the groups referenced in the 2008 CAA were fully protected from Terrorism-Related Inadmissibility Grounds (TRIG): by de-listing the organizations, the 2008 CAA waived the application of those grounds of inadmissibility that reference an organization as an element and DHS’s later waiver did the same for those grounds that do not make specific reference to an organization.

Since 2008, most waivers do not specifically de-list Tier III organizations but rather exempt individuals affiliated with a particular group by stating, for example, that “section 212(a)(3)(B) of the INA, excluding subclause (i)(II) shall not apply, with respect to an alien, for any activity

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1 USCIS, Implementation of Section 691 of Division J of the Consolidated Appropriations Act, 2008, and Updated Processing Requirements for Discretionary Exemptions to Terrorist Activity and Inadmissibility Grounds (July 28, 2008), http://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/07%20implementation_CAA%20groups.pdf
2 Id.
or association relating to the Iraqi National Congress…” By referencing 212(a)(3)(B) as a whole, exemptions issued after 2008 sweep broadly enough to provide full protection from TRIG without needing to both de-list a group to waive those grounds referencing an organization and issue an additional waiver to address those grounds that reference only the individual’s action. However, when an organization is de-listed, an individual does not need to obtain an exemption for the activities that include the group as an element so there is a clear advantage to having a group de-listed in addition to the waiving of related activities. The only other de-listing (other than the organizations listed in the 2008 CAA) took place in 2014, for the PUK (Patriotic Union of Kurdistan) and the KDP (Kurdistan Democratic Party), discussed below.

The language for the waiver authority continues to require a significant degree of inter-agency collaboration, noting that a waiver may be issued either by DOS in consultation with the AG and DHS or by DHS in consultation with DOS and the AG. In issuing waivers, the secretaries are statutorily prohibited from waiving 212(a)(3)(B)(i)(II): reasonable grounds to believe the non-citizen “is engaged in or is likely to engage after entry in terrorist activity.” Similarly, they may not issue a waiver for non-citizens who are (1) members/representatives of a Tier I/II organization; (2) have engaged, endorsed, espoused, or persuaded others to support a Tier I/II organization; or (3) have received military-type training from a Tier I/II organization. Waivers are also statutorily barred for groups that have engaged in terrorism against the United States or another democratic country or to those that purposefully engaged in a pattern or practice of targeting civilians. 8 USC § 1182(d)(3)(B)(i).

There does not appear to be specific guidance regarding how and when the secretaries should exercise their waiver discretion. The most recent situation-based exemptions contain some language stating the secretaries “have determined that the grounds of inadmissibility at section 212(a)(3)(B) of the INA bar certain aliens who do not pose a national security or public safety risk from admission to the United States and from obtaining immigration benefits for other status” and therefore should be waived.4 This language indicates that when the government becomes aware that a number of persons are barred due to TRIG who do not actually pose a national security/public safety risk, they will act. That said, this introductory language is a far cry from actual, clear guidance on when the waiver authority should be used.

**Overview of Waiver Use Since 2007**
The list below profiles each exemption issued since the 2008 exemptions for the Karen National Union/Karen Liberation Army; Chin National Front/Chin National Army; Chin National League for Democracy; Kayan New Land Party; Arakan Liberation Party; Mustangs; Alzados; Karenni National Progressive Party; Hmong groups; Montagnard groups.

A number of these waivers are referenced in the 2012 Teacher’s Manual and that is noted where that is the case. The entire list appears below to show the overall development of the waiver usage.

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### Situation: Material Support Provided to a Tier III Organization Under Duress

**Date:** Feb. 26, 2007 (Secretary Chertoff)

**Scope:** Non-application of material support bar (INA § 212(d)(3)(B)(iv)(VI) to a Tier III organization when the support is provided under duress.
- Must be warranted under totality of the circumstances

### Situation: Material Support Provided to a Tier I or II Organization Under Duress

**Date:** April 27, 2007 (Secretary Chertoff)

**Scope:** Non-application of material support bar to a Tier I or Tier II organization when the support is provided under duress.
- Must be warranted by the totality of the circumstances
- Will only be applied to specific Tier I or Tier II organizations after “completion of an examination of the national security implications of applying the exemption authority” to a particular group

**Note:** This waiver is referenced in the 2012 Teacher’s Manual, but its application to the following three groups in Colombia is not discussed.

**Note:** A later USCIS memo indicates that the provision of material support under duress to a Tier I or II organization was authorized by Sec. Chertoff “whether or not an intelligence community assessment had been prepared for the group in question, as previously had been required.”

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**Not an independent exemption—action under April 27, 2007 situational exemption**

<table>
<thead>
<tr>
<th>Group</th>
<th>United Self-Defense Forces of Colombia (AUC)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>March 10, 2008 (Secretary Chertoff)</td>
</tr>
<tr>
<td>Scope</td>
<td>DHS adds the AUC to the list of Tier I and Tier II organizations exempted for provision of material support under duress</td>
</tr>
</tbody>
</table>

**Not an independent exemption—action under April 27, 2007 situational exemption**

<table>
<thead>
<tr>
<th>Group</th>
<th>National Liberation Army of Colombia (ELN)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>December 18, 2007 (Secretary Chertoff)</td>
</tr>
<tr>
<td>Scope</td>
<td>DHS adds the ELN to the list of Tier I and Tier II organizations exempted for provision of material support under duress</td>
</tr>
</tbody>
</table>

**Not an independent exemption—action under April 27, 2007 situational exemption**

<table>
<thead>
<tr>
<th>Group</th>
<th>Revolutionary Armed Forces of Colombia (FARC)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>September 6, 2007 (Secretary Chertoff)</td>
</tr>
<tr>
<td>Scope</td>
<td>DHS adds the FARC to the list of Tier I and Tier II organizations exempted for provision of material support under duress</td>
</tr>
</tbody>
</table>

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5. [http://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/2.26%20excercise%20of%20authority.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/2.26%20excercise%20of%20authority.pdf)
<table>
<thead>
<tr>
<th>Group</th>
<th>Iraqi National Congress</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group</td>
<td>Patriotic Union of Kurdistan (PUK)</td>
</tr>
<tr>
<td>Group</td>
<td>Kurdistan Democratic Party (KDP)</td>
</tr>
<tr>
<td>Date</td>
<td>September 21, 2009 (Secretary Napolitano; Secretary Clinton)</td>
</tr>
</tbody>
</table>
| Scope                                    | TRIG does not apply to any activity or association relating to the listed groups provided the exemption is warranted by the totality of the circumstances.  
- Exemption does not apply to 212(d)(3)(B)(i)(II): likely to engage in terrorist activity after entry (statutorily prohibited from waiving this ground) |
| Note                                     | After the passage of the National Defense Authorization Act for FY2015 (P.L. 113-291, signed Dec. 19, 2014) the KDP and PUK are no longer considered Tier III organizations |
| Note                                     | The 2009 waiver for these three groups is included in the 2012 Teacher’s Manual |

<table>
<thead>
<tr>
<th>Group</th>
<th>All Burma Students’ Democratic Front¹³</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>December 16, 2010 (Secretary Napolitano)</td>
</tr>
</tbody>
</table>
| Scope                                    | TRIG does not apply to any activity or association relating to the ABSDF provided the exemption is warranted by the totality of circumstances.  
- Exemption does not apply to 212(d)(3)(B)(i)(II): likely to engage in terrorist activity after entry |
| Note                                     | Included in the 2012 Teacher’s Manual. Note that the Manual’s language implies that Sec. Napolitano also exempted the group from qualifying as a Tier III organization but this may be incorrect as the language of the December 16, 2010 waiver only focuses on individual activities and associations with the group. |

<table>
<thead>
<tr>
<th>Group</th>
<th>All India Sikh Students Federation-Bittu Faction¹⁴</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>October 18, 2010 (Secretary Napolitano)</td>
</tr>
<tr>
<td>Scope</td>
<td>Material support bar does not apply to support provided to the All India group if such an exemption is warranted under the totality of the circumstances</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Situation</th>
<th>Military Training Received Under Duress¹⁵</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>January 7, 2011 (Secretary Napolitano)</td>
</tr>
</tbody>
</table>
| Scope                                         | Inadmissibility due to receipt of military-type training from any level of terrorist organization is waived if such training was received under duress  
- Exemption does not apply if the non-citizen received training that poses a risk to the US (e.g., use of WMD, torture, espionage, etc.) |

¹⁵ [http://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/1_7_11%20exercise%20of%20authority%20_2.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/1_7_11%20exercise%20of%20authority%20_2.pdf)
<table>
<thead>
<tr>
<th>Situation</th>
<th>Solicitation of Funds or Members Under Duress&lt;sup&gt;16&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>January 7, 2011 (Secretary Napolitano)</td>
</tr>
<tr>
<td>Scope</td>
<td>Inadmissibility due to solicitation of funds or members for any level of terrorist organization is waived when such activity occurred under duress</td>
</tr>
<tr>
<td>Note</td>
<td>Included in 2012 Teacher’s Manual</td>
</tr>
</tbody>
</table>

| Group      | Kosovo Liberation Army (KLA)<sup>17</sup>               |
| Date       | June 4, 2012 (Secretary Napolitano)                     |
| Scope      | Inadmissibility based on solicitation of funds/membership; provision of material support; or receipt of military-type training is waived when such activity was related to the KLA |

<table>
<thead>
<tr>
<th>Situation</th>
<th>Material Support, Military Training, Solicitation for Tier III Organization by Persons with Existing Immigration Benefits&lt;sup&gt;18&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>August 10, 2012 (Secretary Napolitano)</td>
</tr>
<tr>
<td>Scope</td>
<td>Persons who have existing immigration benefits but are barred under TRIG due to solicitation of funds/membership, provision of material support, or receipt of military-type training relating to a Tier III organization qualify for an exemption</td>
</tr>
<tr>
<td></td>
<td>• Immigration benefit means admission as refugee/asylee, receipt of TPS or NACARA/HRIFA adjustment, or a similar benefit other than non-immigrant visas</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Situation</th>
<th>Provision of Medical Care&lt;sup&gt;19&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>October 13, 2011 (Secretary Napolitano)</td>
</tr>
<tr>
<td>Scope</td>
<td>Inadmissibility due to material support will not apply to medical professionals when the material support was the provision of medical care to a member of any tier organization</td>
</tr>
<tr>
<td></td>
<td>• This waiver is not available for those who provided care “on behalf” of a Tier I or Tier II organization, for example “when a medical provider serves as the staff physician for an organization or provides medical care to an organization’s members in order to abet the group’s pursuits of its terrorist aims.”&lt;sup&gt;20&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

<sup>16</sup> http://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/1.7Training%20Duress%20Exemption.pdf  
<sup>17</sup> http://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/KLA%20Exercise%20of%20Authority.PDF  
<sup>18</sup> http://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/8_10%20Exercise%20of%20Authority.pdf  
<sup>19</sup> http://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/10%2013%20Authority_voluntary%20provision%20medical%20care.pdf  
<sup>20</sup> http://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/11%2020%20Implementation_voluntary%20provision%20medical%20care.pdf
<table>
<thead>
<tr>
<th>Group</th>
<th>Iraqi Uprisings of 1991&lt;sup&gt;21&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>August 17, 2012 (Secretary Napolitano)</td>
</tr>
<tr>
<td>Scope</td>
<td>TRIG grounds, except for subclause (i)(II), will not apply to activities related to the uprising against the Hussein government of Iraq between March 1 and April 5 of 1991.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Group</th>
<th>Alianza Republicana Nacionalista (ARENA)&lt;sup&gt;22&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group</td>
<td>Farabundo Marti National Liberation Front (FMLN)&lt;sup&gt;23&lt;/sup&gt;</td>
</tr>
<tr>
<td>Date</td>
<td>April 3, 2013 (Secretary Napolitano)</td>
</tr>
<tr>
<td>Scope</td>
<td>TRIG grounds, except for subclause (i)(II), will not apply to activities related to the FMLN or ARENA</td>
</tr>
<tr>
<td></td>
<td>• The exemption is only necessary for activities occurring before the groups transitioned from “terrorist organizations” to political parties: Jan. 19, 1992 (FMLN) and June 1, 1989 (ARENA).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Group</th>
<th>Oromo Liberation Front (OLF)&lt;sup&gt;24&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>October 2, 2013 (Acting Secretary Beers)</td>
</tr>
<tr>
<td>Scope</td>
<td>Inadmissibility based on solicitation of funds or members, material support, or military-type training will not apply in relation to the OLF</td>
</tr>
<tr>
<td></td>
<td>• Must have asylum/refugee status, a pending application, or an I-730 pending prior to Oct. 2 to use the waiver</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Group</th>
<th>Tigray People’s Liberation Front (TPLF)&lt;sup&gt;25&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group</td>
<td>Democratic Movement for the Liberation of Eritrean Kunama (DMLEK)&lt;sup&gt;26&lt;/sup&gt;</td>
</tr>
<tr>
<td>Group</td>
<td>Eritrean Liberation Front (ELF)&lt;sup&gt;27&lt;/sup&gt;</td>
</tr>
<tr>
<td>Group</td>
<td>Ethiopia People’s Revolutionary Party (EPRP)&lt;sup&gt;28&lt;/sup&gt;</td>
</tr>
<tr>
<td>Date</td>
<td>October 17, 2013 (Acting Secretary Beers)</td>
</tr>
<tr>
<td>Scope</td>
<td>Inadmissibility due to solicitation of funds or members, material support, or receipt of military-type training will not apply in relation to the above-named groups</td>
</tr>
<tr>
<td></td>
<td>• If the association with the ELF occurred before January 1, 1980, the non-citizen must have been granted asylum/refugee status, have a pending application, or have an I-730 filed before October 17, 2013</td>
</tr>
</tbody>
</table>

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<sup>22</sup> [http://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/April_3_2013_Exercise_of_Authority_ARENA.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/April_3_2013_Exercise_of_Authority_ARENA.pdf)


<table>
<thead>
<tr>
<th>Situation</th>
<th>Provision of limited kinds of material support to Tier III organizations(^{29})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>February 5, 2014 (Secretary Johnson; Secretary Kerry)</td>
</tr>
</tbody>
</table>
| Scope                           | The bar based on material support to a Tier III terrorist organization will not apply in cases where the support provided was limited and involved:  
  1. Routine commercial/social transactions  
  2. Humanitarian assistance  
  3. Provision of material support under substantial pressure that does not rise to the level of duress  
    - The support may *not* have been provided with an intent to further the terrorist actions and may *not* have been of such a nature that it led directly to the commission of a terrorist act  
    - The support cannot have been provided to a Tier I or Tier II organization  
    - Excludes material support that is the provision of weapons/ammunition or the transit/storing of weapons  
    - Excludes material support involving the provision of military-type training |
| Note                            | The implementation memo provides further definition of what constitutes routine transactions (a transaction “a person could or would engage in with any individual in the ordinary course of his or her business” or one “that both satisfies and is motivated by specific, compelling, and well-established or verifiable family, social, or cultural obligations or expectations”); humanitarian assistance (including food, water, temporary shelter, hygiene and other short-term relief distinct from development assistance); and what constitutes sub-duress pressure (“A reasonably perceived threat of physical or economic harm, restraint, or serious harassment, leaving little or no reasonable alternative to complying with a demand”)\(^{30}\) |

<table>
<thead>
<tr>
<th>Situation</th>
<th>Insignificant levels of material support to a Tier III organization(^{31})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date</td>
<td>February 5, 2014 (Secretary Johnson; Secretary Kerry)</td>
</tr>
</tbody>
</table>
| Scope                           | The bar based on material support to an individual or Tier III terrorist organization will not apply in cases where such support was “insignificant”  
  - The support may *not* have been provided with an intent to further the terrorist actions and may *not* have been of such a nature that it led directly to the commission of a terrorist act  
  - The support cannot have been provided to a Tier I or Tier II organization  
  - Excludes material support involving the provision of weapons/ammunition or the transit/storing of weapons  
  - Excludes material support involving the provision of military-type training |
| Note                            | The implementation memo defines insignificant support as that which is “(1) minimal in amount; and (2) [believed to] be inconsequential in effect.” Adjudicators are |

directed to consider the “relative value, fungibility, quantity and volume, and duration and frequency” of the support in determining whether to apply the exemption.\textsuperscript{32}

Both this and the “limited material support” waiver speak to the criticism of TRIG on page 886 of the Casebook, namely, the lack of a \textit{de minimis} exemption

\textbf{Summary of Waivers}

Thus, the following waivers are now in effect:

\textit{Situation-Based Waivers}

\textbf{Applicable to Tier I and Tier II:}
1. Provision of material support under duress to \textit{specific} Tier I or Tier II groups: currently only the AUC, ELN, FARC
2. Receipt of military-type training under duress from any tier organization
3. Solicitation of funds or members under duress by any tier organization
4. Provision of medical care to a member of any tier organization

\textbf{Applicable to Tier III (note that exemptions 2-4 above also apply to Tier III organizations):}
5. Provision of material support to Tier III organization under duress
6. For persons with an existing immigration benefit: provision of material support; solicitation of funds or members; or receipt of military-type training from a Tier III organization
7. Provision of limited (specific) kinds of material support to Tier III organization
8. Provision of insignificant levels of material support to a Tier III organization

\textit{Group-Based Waivers}

\textbf{All TRIG provisions (except for subclause (i)(II)) do not apply to the following groups:}
1. INC
2. PUK
3. KDP
4. All Burma Students’ Democratic Front
5. Participants in the Iraqi Uprising of 1991
6. ARENA
7. FMLN
8. Ten organizations named in the 2008 Consolidated Appropriations Act

\textbf{Material support bar does not apply to the following groups:}
1. All India Sikh Students Federation-Bittu Faction

\textsuperscript{32} \url{http://www.uscis.gov/sites/default/files/files/nativedocuments/2015-0508_Insignificant_Material_Support_PM_Effective.pdf}
Material support; solicitation of funds/membership; receipt of military-type training
do not apply to the following groups:
1. KLA
2. OLF (must have existing immigration benefit/application)
3. TPLF
4. DMLEK
5. ELF
6. EPRP

Themes of the Waivers
In addition to the specific provisions tailored to the group or situation, the waivers also include
language specifying that the non-citizen must not have participated in activities directed at the
United States or activities targeting non-combatants. This language is consistent with the
statutory bar against waiving inadmissibility for such targeting.

The waiver language generally directs the decision-maker to consider the suitability of the
waiver for an individual under the totality of the circumstances. As listed in recent waivers,
“totality of the circumstances” is comprised of the following factors:33
• “The length and nature of the TRIG-related activity;
• The amount, type, frequency, and nature of the applicant’s activity;
• The nature of the organization’s terrorist activities and the applicant’s awareness of those
activities;
• The applicant’s conduct since the association with [the group];
• The length of time that has elapsed since the applicant engaged in the TRIG-related
activity; and
• Any other relevant factors”

Thus, the totality of the circumstances approach allows for some consideration of the length of
time elapsed since the non-citizen’s actions, the lack of which was the subject of criticism of
TRIG on page 881 of the Casebook. This factor was first listed in group-based exemptions from
2013. It had been hinted at in prior formulations of the “totality of the circumstances” factors and
included in some situation-based waivers but was not stated expressly until the waivers for
ARENA and the FMLN.34 However, whether or not to consider the length of time elapsed
remains at the discretion of the adjudicator and is one factor of many.

33 See, e.g., USCIS, Implementation of New Discretionary Exemption under INA Section 212(d)(3)(B)(i) for
Activities and Associations Relating to the Democratic Movement for the Liberation of Eritrean Kunama (June 15,
2014),
on_for_Activities_or_Associations_Relating_to_DMLEK.pdf
34 USCIS, Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) for Activities and
Associations Relating to the FMLN or to the ARENA (May 22, 2013),
Exemption_for_Activities_and_Associations_Relating_to_the_FMLN_or_ARENA.pdf
Though the specifics vary based on the action addressed, the duress-based waivers generally direct the adjudicator to take into account the following factors in deciding whether duress was established:  

- “Whether the applicant reasonably could have avoided, or took steps to avoid [the action];
- The severity and type of harm inflicted or threatened and to whom the harm was directed;
- The perceived imminence of the harm threatened and the perceived likelihood that the harm would be inflicted”

**Hold Policy**

DHS has implemented a “hold policy” on TRIG cases. Rather than denying TRIG-barred cases, this guidance requires adjudicators to “hold” certain cases when the non-citizen fits into one of four designated hold categories:  

1. Inadmissible based on a voluntary activity/association relating to any Tier III organization  
2. Inadmissible under a TRIG bar other than material support for activity/association with any tier group, when the activity/association came about under duress  
3. Applicants who voluntarily provided medical care to any tier organization or to terrorists  
   a. *Note:* The hold guidance was released on November 20, 2011, a month after the issuance of the medical provision waiver, so while it’s not entirely clear from the language it appears to apply to a broader set of medical situations, e.g. doctors who provided services “on behalf” of terrorist organizations who are not covered under the waiver.  
4. Applicants inadmissible under INA § 212(a)(3)(B)(i)(IX) as spouse/children of the above three hold categories, whether or not the spouse or parent has applied for an immigration benefit

Cases held under Category 1 and 2 may be denied if it is clear that even if a relevant exemption were authorized in the future, the totality of the circumstances would likely result in a finding that the non-citizen does not warrant a favorable exercise of discretion.

The KLA waiver provides language indicating how the hold policy should operate: “A case should remain on hold if the applicant is not otherwise eligible due to additional TRIG grounds for which an exemption may become available. A future exercise of authority that is specific to the applicant’s case may afford a basis to consider an exemption.” Footnote 5 notes that “[i]f the case involves activity or association with the KLA that falls outside the scope of the exemption (for example, participation in combat), then the case may be appropriate for denial because that activity was considered but not included in the final KLA exemption.”

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Critiques of US TRIG Practices
Much of the recent writing on US TRIG practices focuses on the impact TRIG has on the resettlement of refugees from Syria.

Human Rights First
Human Rights First issued *Refuge at Risk: The Syria Crisis and U.S. Leadership* in November 2013. In identifying delays and impediments to resettlement of Syrians in the United States, HRF notes that “a major obstacle that threatens to delay and impede the resettlement of Syrians to the United States is the overly broad inadmissibility provisions under U.S. immigration law intended to bar those who engaged in terrorist activity…Currently, these definitions are being applied to anyone who at any time used armed force as a non-state actor or gave support to those who did.”

HRF makes the following recommendations in its report:

- “Allow exemptions to be issued on a case-by-case basis to anyone who voluntarily provided non-violent assistance to a Syrian armed opposition group” noting that “a great many Syrian refugees who are found to be inadmissible for contributions or assistance to armed groups will have done so under circumstances that would fall under the analogous legal concept of necessity, and that the existing exemption covering cases of duress could be expanded to resolve such cases.”
- “Provision should be made for former combatants who otherwise meet the refugee definition and are not subject to any other bars and (1) were children at the time or (2) did not participate in, or knowingly provide material support to, activities that targeted noncombatants or US interests.”
- “DHS should also complete a long-pending review of its legal interpretation of the term ‘material support.’ The current application of the ‘material support’ bar to minimal donations and to routine commercial transactions with members of armed groups is greatly inflating the number of cases unjustly affected by this provision of the immigration law.”
  - The issuance of the two waivers relating to minimal contributions and routine commercial transactions in 2014 seems to indicate that the interpretative review was completed and generally agreed with HRF’s recommendations.

Refugee Council USA (RCUSA)
In a statement submitted to the Senate Judiciary Committee in 2014, RCUSA echoed the HRF recommendations and further called for increased resettlement numbers for Syrian refugees to the US.

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TRIG Numbers
In May 2012, there were 3,618 asylee and refugee adjustment applications and 431 I-730s on hold based on TRIG. Notably, in August 2012 a waiver was issued regarding persons with existing applications barred by TRIG.\[40\]

By June 2014, “more than 12,700 TRIG exemptions [had] been granted to refugee applicants…Over 6,600 of these exemptions pertained to Burmese applicants who had associations with groups that met the statutory definition of an undesignated ‘terrorist organization’ in Section 212(a)(3)(B). Approximately 5,580 of the exemptions related to applicants who provided material support to a terrorist organization under duress.”\[41\]

By June 2015, UNHCR had submitted 14,583 Syrian cases to the United States for resettlement consideration.\[42\] However, few Syrians have actually been resettled in the United States. Advocates link the low resettlement numbers to TRIG issues, among other impediments.

The most recent available data shows the following arrival totals for Syrians via the US Refugee Admission Program:\[43\]
- FY2014: 132 Syrians resettled
- FY2013: 48 Syrians resettled
- FY2012: 35 Syrians resettled

TRIG & Case Law
Sesay v. Atty Gen. of the US, 787 F.3d 215, 224 (3d Cir. 2015)
- Since “Congress has ‘delegated to the Secretary the sole authority to waive the applicability of terrorist-related bars[,] has paid specific attention to duress waivers,’ and ‘has appreciated the distinction between voluntary and involuntary conduct…the INA precludes asylum or withholding of removal for any alien who provided material support, voluntarily or involuntarily [absent a waiver from the Executive Branch].’”
  - Illustrates the negative effects of the waiver system. Even if the waiver system were to be used robustly, the possibility of waivers makes the court reject the idea of any statutory protection which leads to harsh results for those whose actions are not the subject of a waiver

Barahona v. Holder, 691 F.3d 349, 355-56 (4th Cir. 2012)
- “In sum, Barahona’s support of the FMLN guerrillas falls under the Material Support Bar and his petition for review must be denied, even though that support was rendered involuntarily and was provided to the FMLN guerrillas under duress.”

\[42\] UNHCR, Resettlement and Other Forms of Admission for Syrian Refugees (June 29, 2015), [http://www.unhcr.org/52b2f6baf5.pdf](http://www.unhcr.org/52b2f6baf5.pdf)
o The material support at issue was the use of Barahona’s kitchen by the FMLN for the period of nearly a year.

• “Congress included voluntary support of terrorist activities in its exception to the waiver provision contained in Sec. 1182(d)(3)(B) but made no distinction between voluntary and involuntary conduct in the material support bar. We therefore assume that Congress did not intend to create an involuntariness exception to the material support bar, otherwise the voluntary support exception to the waiver provision would be rendered superfluous.”

*Bojnoordi v. Holder,* 757 F.3d 1075, 1077-78 (9th Cir. 2014)

• “We hold that the statutory terrorism bar applies retroactively to an alien’s material support of a ‘Tier III’ terrorist organization.”
  o Petitioner was involved with the MEK in the 1970s (it became a Tier I group in 1997) but because it still met the Tier III definition in the 1970s, petitioner was barred.

• “Bojnoordi passed out flyers, wrote articles, and trained MEK members on the use of guns in the mountains outside Tehran, knowing that this training would further MEK’s goals. These activities show substantial evidence of material support.”

*Viegas v. Holder,* 699 F.3d 798, 803 (4th Cir. 2012)

• Finding material support where “every month for four years, Viegas voluntarily paid dues and hung posters for the FLEC.”

• Also demonstrates a court analyzing whether a petitioner reasonably should have known the group was a Tier III organization:
  o “Indeed, the record shows a person in Viegas’s position would know—and Viegas did know—that FLEC factions frequently engaged in unlawful violence. For example, Viegas’ expert testified it was common knowledge among Cabindans that the FLEC engaged in military operations against the Angolan government, destroyed government property, and kidnapped government contractors and foreign oil workers for ransom.”

*Haile v. Holder,* 658 F.3d 1122, 1129-30 (9th Cir. 2011)

• “The BIA did not err in determining that Haile’s activities, including collecting funds for the ELF, supplying the ELF with provisions such as sugar, shoes, and cigarettes, and passing along secret documents, amount in the aggregate to ‘material support.’ We have previously remarked on the broad scope of the terrorism bars [in *Khan v. Holder,* 584 F.3d 773 (9th Cir. 2009)] and the definition of ‘material support’ is broad enough to cover Haile’s activities in this case.”

• With respect to whether she should have known the ELF was a terrorist organization, the CA9 notes that “Haile testified that the ELF used armed violence against the Ethiopian government, and that she had heard about ELF members hijacking an airplane” in finding she knew or should have known.

*Hussain v. Mukasey,* 518 F.3d 534, 538 (7th Cir. 2008)

• “[Hussain] argues futilely that nothing he did contributed to those [violent] acts; MQM-H engaged in nonviolent as well as violent activities and his work was only with the former. That is irrelevant. If you provide material support to a terrorist organization, you are
engaged in terrorist activity even if your support is confined to the non-terrorist activities of the organization. Organizations that the statute, and indeed in this instance common parlance, describes as terrorist organizations, such as Hamas in Gaza and Hezbollah in Lebanon, often operate on two tracks: a violent one and a peaceful one.”
The Migration Surge and the Government’s Response

Prior to 2012, the numbers of unaccompanied “alien” children (UAC)\(^1\) arriving to the United States was approximately 6,000-8,000 a year. The numbers began to increase with 24,000 apprehended by the Department of Homeland Security (DHS) in Fiscal Year (FY) 2012, 39,000 in FY 2013, and over 69,000 in FY 2014.

The majority of these children come from the “northern triangle” countries of El Salvador, Guatemala and Honduras, with a significant number from Mexico. A 2013 study by the United Nations High commissioner for Refugees (UNHCR), *Children on the Run*,\(^2\) examined the reasons for child migration from Mexico and the northern triangle, and concluded that 58% had “potential international protection needs,”\(^3\) thereby identifying the root cause of their flight as being related to violations of their fundamental human rights.

An overview of the conditions in the northern triangle countries make clear how strong the push factors are. Honduras, El Salvador and Guatemala have some of the highest homicide rates in the world – with Honduras having the highest globally, followed by El Salvador as the fourth highest, and Guatemala as the fifth highest. They also have extremely high levels of gender violence. In recent years El Salvador had the highest femicide (gender-motivated killings) rate in the world; Guatemala was number three and Honduras number seven. Although the reasons for the violence are multiple and complex, the proliferation of gangs and organized crime are certainly a strong factor.\(^4\)

There are special provisions for unaccompanied minors pursuant to the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), §235-36 of PL 110-457, 122 Stat. 5044 (Dec. 23, 2008). If a child is not from a contiguous country, he or she is to transferred to the Department of Health and Human Services, and is to be placed in the “least restrictive setting possible” while pursuing any potential claim for immigration relief. If applying for asylum, jurisdiction is with the Asylum Office, rather than the Immigration Court.

A child from contiguous countries (Mexico and Canada – although it is clear that the reference to contiguous countries was aimed at children from Mexico) is to be screened to determine that he or she 1) has not been a victim of severe trafficking or is at risk of being trafficked upon return; 2) does not have a credible fear of persecution; and 3) is able to make an independent decision to withdraw an application for admission to the U.S. Children who meet this criteria can be returned to the country of their nationality; those who do not are to be transferred to the Office of Refugee Resettlement (ORR) and placed in formal removal proceedings.

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1. An unaccompanied child is under the age of 18, has no lawful immigration status in the U.S., and does not have a parent or legal guardian in the U.S. available to provide care and physical custody. 6 U.S.C. § 279(g)(2).
3. Id. at 6.
As the number of unaccompanied minors, as well as mothers with children, increased beginning in 2012, the Obama Administration adopted harsh policies, which were intended to send a message of deterrence to those arriving. Families (mothers with children), who historically had not been subject to detention unless they met an individualized determination (e.g. flight risk or security risk) were subject to extended periods of detention, with the U.S. opening new “family detention” centers in Karnes and Dilley, Texas with large capacity. The Asylum Offices and the Immigration Courts were told to accelerate their handling of the cases, so that a potential removal would take place as quickly as possible.

The Administration’s policies of detention, accelerated adjudication, and related measures, have been criticized, and challenged in the courts, with some success to date. A preliminary injunction was issued in one lawsuit challenging the policy of detaining families without an individualized determination under release criteria. *R.I.L.R. v. Johnson*, 2015 WL 737117 (D.D.C. 2015).

Subsequently, in *Flores v. Johnson*, CV 85-4544 (C.D. Cal. July 24, 2015), the detention of children (who are detained with their mothers) was challenged as being in violation of the 1997 settlement in *Reno v. Flores*, 507 U.S. 292 (1993). District Court Judge Dolly M. Gee of the Federal District Court for the Central District of California, ruled that the *Flores* agreement applies to all minors, and forbids DHS from holding children in “secure” facilities, and gives them the right to be released to a parent, regardless of the parent’s immigration status. On July 30, the government filed a brief arguing that Judge Gee should reverse her order. The case remains pending.

There have been a multitude or reports and commentary on this issue. The following is just a very small selection of what is available that may be of interest:


MPI, Unaccompanied Child Migration to the United States: The Tension between Protection and Prevention (2015) at
