

NATIONAL
IMMIGRANT
JUSTICE CENTER

A HEARTLAND ALLIANCE PROGRAM

Particular Social Group Roundtable

Seeking Asylum Based on Membership in a Particular Social Group After M-E-V-G- and W-G-R-

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www.immigrantjustice.org

Welcome

Lisa Koop,
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About the National Immigrant Justice Center

Heartland Alliance's National Immigrant Justice Center is a Chicago-based nongovernmental organization dedicated to ensuring human rights protections and access to justice for all immigrants, refugees and asylum seekers through a unique combination of direct services, policy reform, impact litigation and public education.

NIJC serves more than 10,000 immigrants annually with the support of a professional legal staff and a network of over 1,500 *pro bono* attorneys.

NIJC's *Pro Bono* Programs

➤ NIJC's *pro bono* opportunities:

- Asylum
- Special Immigrant Juvenile Status
- VAWA/U Visa
- Deferred Action for Childhood Arrivals

➤ NIJC's *pro bono* programs

- Conduct in-depth case screening, assessment and acceptance
- Place cases with *pro bono* attorneys
- Provide case management, attorney support and technical assistance
- Represent clients through *pro bono* attorneys at law firms in Illinois, Wisconsin, and Indiana.

NIJC Asylum Statistics

- Asylum cases open today: > 250
- Asylum approval rate:
 - NIJC = 90%
 - Nationwide: ~30 % (between the court and the asylum office)
- NIJC clients who obtained protection in FY2013: > 80
- Main countries of origin: Eritrea, Ethiopia, both Congos, Cameroon, and Mexico/Central America
- Main reasons NIJC clients fear persecution: political activities, gender, sexual orientation, gang resistance, or family membership.

Why a Particular Social Group (PSG) Roundtable?

- Most complex type of asylum claim and one of the most common
- New case law has created immense confusion among adjudicators
- Success depends on
 - Careful crafting of PSG
 - Educating the adjudicator about the law



The Evolution of PSG Case Law

Lisa Koop

National Immigrant Justice Center

Asylum: Definition

- An individual is eligible for asylum if she meets the definition of a refugee. Immigration & Nationality Act (INA) § 208(b)(1)(A).
- A refugee is “any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA § 101(a)(42)(A)
 - Definition based on international law: UN Protocol Relating to the Status of Refugees, Art I(2)

Asylum: Elements

1. “Well-Founded Fear”
2. of “Persecution”
3. Perpetrated by the government or an entity the government cannot/will not control
4. “On account of”
5. – Race
 - Religion
 - Nationality
 - Political Opinion
 - Membership in a Particular Social Group

“On Account Of”

- Must establish nexus between the persecution suffered/feared and ...
- ...at least one of the five protected grounds
 - Race
 - Religion
 - Nationality
 - Political Opinion
 - Membership in a Particular Social Group
- The nexus and the protected ground are two distinct elements that require separate analyses.

Protected Grounds

1. **Race:** Broad meaning (Congolese Tutsis)
2. **Religion** (Christian, Atheist)
3. **Nationality:** Not just citizenship; can include ethnic or linguistic group. May overlap with race.
4. **Political Opinion:** Actual or Imputed (e.g. child of political activist, man who criticizes government's military policy)
5. **Membership in a Particular Social Group:** one of the most common and most complex bases for asylum.

PSG: International Definition

- UNHCR Handbook definition of a PSG : Normally comprises persons of similar background, habits or social status.
- UNHCR PSG Guidelines: Reconciles the two main approaches to the PSG analysis:
 - Immutability: innate, unchangeable characteristics, so fundamental to human dignity that group members should not be compelled to forsake them
 - Social Perception: whether a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large

UNHCR Definition

“A particular social group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”

-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 ¶ 11.

Board of Immigration Appeals Definition

- *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985)
 - Eiusdem generis (“of the same kind”)
 - Must be based on a “common, immutable characteristic” that “members of the group either cannot change, or should not be required to change.”
 - Examples: sex, kinship, shared past experience (land ownership)
 - Accepted by the U.S. Courts of Appeals and governs PSG claims for decades
 - 7th Circuit: *Lwin v. INS*, 144 F.3d 505, 511 (7th Cir. 1998) (accepting the *Acosta* definition of a PSG).

Social Visibility as a Factor

- *Matter of C-A-*: Volunteer government informants are not a socially visible group
 - Social visibility is an important consideration in identifying a PSG
 - Prevents PSGs from being a “catch all” applicants who are not protected by other four grounds

- *Matter of H*: Applicant’s membership in the Marehan subclan in Somalia was socially visible
 - “Linguistic commonalities” of clan are recognizable
 - Note: size of group is not relevant to determining PSG

Particularity as a Factor

➤ *Matter of C-A-:*

- Not in a “substantially different” situation from anyone who “threatens the cartels interests” (conflation with nexus)
- Characteristics of social group must have significance to persecutor (conflation with nexus)
- Cannot encompass general population, must be “narrower”

Matter of S-E-G- and E-A-G-

- Designed to prevent asylum claims based on fears of gang persecution
- Established social visibility and particularity as requirements in the PSG test
- Social visibility: a group “should generally be recognizable to others in the community.”
- Particularity: a group must not be “too amorphous . . . to create a benchmark for determining group membership.”

Problems with the New PSG Test

- Circular reasoning that conflated social visibility, particularity, and nexus
- Unclear whether “particularity” means a group must be narrow and homogenous
- Literal or figurative visibility (must a group member wear a sign on her back?)
- Misinterpretation of the UNHCR test
- No explanation about how previously accepted groups remain viable

Seventh Circuit Response

- *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009)
 - Rejects social visibility because it “makes no sense” and the BIA has never explained the reasoning behind it. Social visibility does not merit deference.
- *Benitez-Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009)
 - PSG of “former gang members” is neither unspecific nor amorphous.
- *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc)
 - The breadth of a PSG is irrelevant
 - The 7th Circuit follows an *Acosta*-only formulation
 - Adjudicators must look beyond the language used to define the group to see if the group members share a characteristic they cannot or should not be required to change.

Status of Social Visibility Test in Other Circuits

Federal Court of Appeals	Case(s)	Position
First Circuit	Mendez-Barrera v. Holder, 602 F.3d 21, 26 (1st Cir. 2010); but see Rojas-Perez v. Holder, 699 F.3d 74 (1st Cir. 2012) (questioning rationality of Board's application of new rule)	Accepts Social Visibility, but doubts its rational application
Second Circuit	Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007)	Accepts Social Visibility
Third Circuit	Valdiviezo-Galdamez v. Attorney Gen. of U.S., 663 F.3d 582, 607 (3d Cir. 2011)	Rejects Social Visibility
Fourth Circuit	Lizama v. Holder, 629 F.3d 440, 446-47 (4th Cir. 2011); Crespin-Valladares v. Holder, 632 F.3d 117, 126 (4th Cir. 2011); Martinez v. Holder, 740 F.3d 902, 910 (4th Cir. 2014)	Declined to Address Social Visibility
Fifth Circuit	Orellana-Monson v. Holder, 685 F.3d 511, 520 (5th Cir. 2012)	Accepts Social Visibility
Sixth Circuit	Al-Ghorbani v. Holder, 585 F.3d 980, 991, 994 (6th Cir.2009)	Accepts Social Visibility
Seventh Circuit	Gatimi v. Holder, 578 F.3d 611, 615-16 (7th Cir.2009); Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir.2009); Cece v. Holder, 733 F.3d 662, 668 n.1 (7th Cir. 2013)	Rejects Social Visibility
Eighth Circuit	Davila-Mejia v. Mukasey, 531 F.3d 624, 629 (8th Cir.2008); Gaitan v. Holder, 671 F.3d 678, 681 (8th Cir. 2012) (noting that the court is bound by the decisions of earlier panels to find that social visibility is not arbitrary or capricious) cert. denied, 133 S. Ct. 256 (2012)	Accepts Social Visibility
Ninth Circuit	Arteaga v. Mukasey, 511 F.3d 940, 945 (9th Cir.2007); Ramos-Lopez v. Holder, 563 F.3d 855, 858-62 (9th Cir.2009); Henriquez-Rivas v. Holder, 707 F.3d 1081, 1089 (9th Cir. 2013)	Accepts Social Visibility
Tenth Circuit	Rivera-Barrientos v. Holder, 666 F.3d 641, 652-53 (10th Cir. 2012)	Accepts Social Visibility
Eleventh Circuit	Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190, 1197 (11th Cir.2006)	Accepts Social Visibility



The BIA Tries Again:
Matter of M-E-V-G- and Matter of W-G-R-

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The Two Cases

- M-E-V-G-, 26 I&N Dec. 227 (BIA 2014) (*Valdiviezo v. Holder*, 3rd Cir.)
 - Proposed PSG: Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs (*S-E-G-* formulation)

- W-G-R-, 26 I&N Dec. 208 (BIA 2014)
 - (in the 9th Cir.)
 - Proposed PSG: Former members of the Mara 18 gang in El Salvador who have renounced their gang membership (*E-A-G-* formulation)

Social Visibility = Social Distinction

- Clarifies that social visibility does not = literal/ocular visibility, but rather, whether the PSG is recognized within society as a distinct entity.
- New name: social distinction
- Perception of society is relevant, not the perception of the persecutor

Particularity: Nothing New

- No new interpretation or clarification of “particularity.”

“A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group. . . . [T]he terms used to describe the group [must] have commonly accepted definitions in the society of which the group is a part. . . . The group must also be discrete and have definable boundaries – it must not be amorphous, overbroad, diffuse, or subjective.”

But...

- Troubling dicta: the “former gang member” group in *W-G-R-* is not sufficiently particular because
 - “the group could include persons of any age, sex, or background. It is not limited to those who have had a meaningful involvement with the gang and would thus consider themselves – and be considered by others – as “former gang members”
 - “It is doubtful” that someone who joined the gang many years ago with limited involvement would consider himself in the same category as a hardened gang member with years of criminal activity
 - “[W]hen a former association is the immutable characteristic . . . The group will often need to be further defined with respect to the duration or strength of the members’ active participation . . . and the recency of their active participation.”

Problems with the BIA's Decisions

- Post-hoc rationalization is disingenuous and inaccurate
- One test can only be met at the expense of the other test: defining a group in a sufficiently particular way will make the group fail the social distinction test
- Requires experts - precludes pro se applicants and applicants with limited resources from obtaining asylum
- Calls on adjudicators to act outside their expertise
- Flawed international law analysis
- Conflicts with ejusdem generis principles
- Only considering society's views and not the persecutor's make no sense

Brand X and *Chevron* Deference

- The BIA follows circuit precedent in any case arising in that circuit.
- If the BIA disagrees with the circuit regarding the interpretation of an ambiguous statutory provision, the BIA may invoke its authority to interpret the statute and decline to follow circuit precedent.
 - The BIA's interpretation must be permissible and reasonable
- When declining to follow circuit precedent, the BIA has explicitly said so.
- The BIA did not invoke *Brand X* or *Chevron* principles in *M-E-V-G-* or *W-G-R-* in clarifying the “social distinction” test and provided no new interpretation or clarification regarding particularity.

State of PSG Law in the Seventh Circuit

BIA

- Can't be overly broad
- Must be considered a group by society
- “Former” status/past experience is not enough
- Groups can't be overly diverse

Seventh Circuit

- Breadth is irrelevant
- No social visibility test
- “Former” status/past experience can form the basis of a social group, without more
- Diversity not an issue

➤ *NLA v. Holder*, No. 11–2706 (7th Cir. Mar. 4, 2014): reaffirmed *Cece* and the *Acosta* test.



Developing a PSG: PSG vs. Nexus

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Why Does a Proper PSG Analysis Matter?

➤ An improper analysis:

- Makes for an *ad hoc* system
- Creates an overly narrow refugee definition
- Prevents attorneys from being able to meaningfully counsel clients
- Results in erroneous asylum denials
- Overly complicates asylum claims based on PSG

Revisiting the Asylum Elements

1. “Well-Founded Fear”
2. of “Persecution”
3. Perpetrated by the government or an entity the government cannot/will not control
4. “On account of”
5. – Race
 - Religion
 - Nationality
 - Political Opinion
 - Membership in a Particular Social Group

Protected Ground

The characteristic of an asylum seeker that causes the persecutor to seek to inflict harm.

(Why the persecutor targeted or will target the asylum seeker)

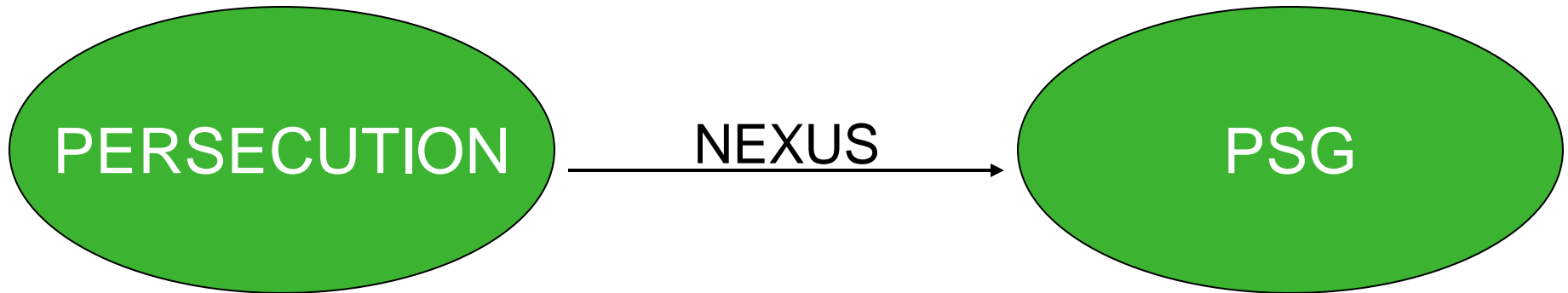
Nexus

The connection

between the harm suffered or feared
and the protected ground.

(The evidence showing that the persecutor did
or will harm the asylum seeker because of the
asylum seeker's characteristic)

“On Account Of”



Conflating the Protected Ground with the Nexus Element

“The question whether a proposed group [meets the PSG requirements] must be considered in the context of the country of concern and the persecution feared....The respondents in this case are victims of harassment, beatings, and threats from a criminal gang in El Salvador. There is little . . . evidence . . . To indicate that Salvadoran youth who are recruited by gangs but refuse to join . . . suffer from a higher incidence of crime than the rest of the population....[S]uch gangs have directed harm against anyone The respondents are therefore not in a substantially different situation from anyone who has cross the gang, or who is perceived to be a threat to the gangs interests.”

Matter of S-E-G-, 24 I&N Dec. 579, 586-87 (BIA 2008)

Conflating the Protected Ground with the Nexus Element

“We also disagree with the respondent’s claimed social group The respondent’s reliance on *Tapiero de Orejuela v. Gonzales*...is misplaced. In *Tapiero*...the group was defined not simply as wealthy landowners, but as wealthy and educated cattle farmers....The record there reflected that this particular combination of features was a target of the FARC’s violent campaigns. Here The record does not demonstrate that the FARC targets the proposed group.”

-Unpublished BIA decision, 2011.



Creating and Defending a PSG

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Step One: Determine the Characteristic(s)

- Ask, “why did the persecutor target my client in the past?” and “why will the persecutor target my client in the future?”
- Find the shared characteristic that your client cannot change or should not be required to change
- Make sure other group members share this characteristic – a PSG cannot be a group of one.

Interviewing Your Client To Determine the PSG

- Ask “What did X say while hitting/beating/threatening you.”
- Do you know anyone else who X harmed/threatened?
- Does the police help people who are beaten/harmed/threatened by X? Does the police help people who are beaten/harmed/threatened by others (in other contexts)

Interviewing Clients with Gender-Based PSG Claims

Use the same terminology (husband, partner, boyfriend etc.) as your client.

➤ **Don't ask**: Did your husband beat you?

Ask: Did your husband ever slap you, punch you, kick you, shove you, bite you, choke you, poke his finger in your chest, raise his fist at you, grab you, pull your hair, throw things at you, destroy your property, threaten to use a weapon, threaten you with a weapon, etc.?

➤ **Don't ask**: Did your husband ever rape you?

Ask: Did your husband ever force you to do anything sexually against your will?

➤ **Don't ask**: Did your husband ever threaten you?

Ask: Did your husband tell he would hurt you physically, tell you he would take your children away from you, tell you he would hurt your family, etc.?

Step Two: Determine if Alternative PSGs Should Be Provided

- More than one PSG can be provided, but too many PSGs will create confusion and an overly complex brief
- The PSG(s), like other legal arguments, must be preserved before the immigration court to be argued on appeal
- Rule of thumb: assert one PSG that meets the *Acosta*-only test and a narrower PSG that meets the BIA's new tests.

Step Three: Examine PSG Case Law

- Stick to the Seventh Circuit. Use other circuit case law only as additional back-up
- Asylum claims are very fact-specific – don't attempt to find case law that mirrors your client's case.
 - Instead, look for analogies and similarities in other asylum claims – even if they are from entirely different countries and involve completely different protected grounds

Common PSG Errors to Avoid

- Defining the PSG by the persecution suffered or feared
 - Remember, your client was not targeted for harm because she was harmed, i.e., a woman is not abused by her husband because she is a victim of domestic violence, so avoid referencing the harm suffered or feared in the PSG.
 - BUT, if the future harm feared is different than the past harm, then the PSG for the future fear claim could be related to the past persecution suffered
 - E.g., “Rape victims in X country” could be a PSG for a future fear claim based on the likelihood that a rape victim will be subjected to an “honor killing.”

Common PSG Errors to Avoid

➤ Using Ambiguous Terms

- *Wealthy*: try to find a more definitive example of why the client is perceived as wealthy – landownership; family abroad etc.
- Americanized
- Family members: specify nuclear or immediate family

➤ Defining a PSG too narrowly or with too many terms

- E.g.,: women who oppose gang leaders and are targeted by gang leaders for a relationship, but who oppose such relationships and refuse to engage in relationships with these men

Supporting Your PSG

- Use evidence to establish that the PSG is based on an immutable characteristic (and to show it is social distinct)
 - Client affidavit
 - Country condition documentation
 - Country condition expert
- The Legal Memo (Asylum Office) Brief (Immigration Court)
 - Separate the elements
 - Explain why 7th Circuit law is binding and, even if it is not, why your PSG is viable under the BIA's requirements (see NIJC's practice advisory boilerplate language)

Defending Your PSG

Common adjudicator concerns and possible responses:

1. The proposed PSG is too broad

Response: The breadth of a PSG is irrelevant to its viability. See *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) and *N-L-A- v. Holder*, No. 11–2706 (7th Cir. Mar. 4, 2014).

- *Cece* was published after SEG/EAG and since the BIA's decisions in MEVG/WGR do not reinterpret or clarify the particularity requirement, the 7th Circuit's case law regarding the breadth of a PSG remain binding on this court.

Defending Your PSG

2. The group is made up of people of different ages and socio-economic backgrounds

Response: This group is no more diverse than other groups that have been recognized by the Seventh Circuit and the BIA.

- See *Benitez-Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) (former gang members in El Salvador); *Agbor v. Gonzales*, 487 F.3d 499 (7th Cir. 2007) (women who fear being circumcised); *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990) (gay men in Cuba).
- So long as the group members share an immutable characteristic, the group is viable. See *Cece*, 733 F.3d at 672 (adjudicators must focus on the underlying characteristics that account for the fear of harm, rather than the language used when defining the PSG).
- The BIA itself has explicitly held that homogeneity is not a requirement for PSG membership. *Matter of C-A-*, 23 I&N Dec. 951, 957 (BIA 2006).

Defending Your PSG

3. People of different backgrounds are being targeted for harm by the persecutor

Response: The reasons that the persecutor may target others is not a relevant part of the inquiry. The question is whether the persecutor targeted my client on account of a protected ground. Moreover, not all members of the group need to be targeted by the persecutor.

- “While we are sure that FARC would be happy to take the opportunity to rob any Colombian . . . It is those who can be identified and targeted as wealthy landowners that are at continued risk once they have been approached and refused to cooperate.” *Orejuela v. Gonzales*, 423 F.3d 666, 673 (7th Cir. 2005)
- “The statute makes eligible a person persecuted because of his membership in a protected category; it does not require that all members of that category suffer the same fate. The law calls for assessments of causation and risk; that R.R.D. is at *more* risk than that faced by "honest police" generally is a poor reason to disqualify him from asylum, if he otherwise is eligible.” *R.R.D. v. Holder*, No. 13-2141 (7th Cir., Mar. 5, 2014)

Defending Your PSG

4. The group is not socially distinct.

Response: The Seventh Circuit has rejected the social visibility/distinction requirement and the Seventh Circuit's case law remains binding because

- The BIA did not invoke *Brand X* in its decisions
- Deference to a BIA decision is not warranted because the BIA's interpretation is impermissible
- Deference to a BIA decision is not warranted because the BIA's interpretation is unreasonable
- Even if the BIA's decision should receive deference, the evidence establishes that this PSG is socially distinct.

Defending Your PSG

5. The group is not particularly defined.

Response: The PSG is defined in clear, non-amorphous terms. Any additional particularity requirements, such as homogeneity and narrowness, do not apply in the Seventh Circuit

- (See previous answers regarding breadth and diversity)
- The BIA's decisions did not re-interpret or clarify the particularity definition – it is the same definition asserted by the BIA in SEG and EAG. Thus, *Brand X* does not apply
- This PSG is defined with as much particularity as the groups in *Benitez-Ramos*, *Sarhan*, and *Cece*.

Defending Your PSG

6. Asylum law wasn't intended to protect former participants of criminal activity.

Response: The asylum statute and case law don't allow for a denial of asylum based on a policy reason.

- “[C]ongress has barred from seeking asylum or withholding of removal any person who faces persecution for having himself been a persecutor. . . or who has committed a “serious nonpolitical crime.” . . . But it has said nothing about barring former gang members The Board has never given a reasoned explanation for why the statutory bars to which we have just referred should be extended by administrative interpretation to former members of gangs.” *Benitez Ramos*, 589 F.3d at 429-30.

Hypothetical #1

Edwin is a 15 year old boy from Honduras. Edwin was walking home from school one day when two gang members approached him. One of the men told Edwin that he had to join the MS-13 gang and collect money from certain community members or they would kill him. One of the men put a gun to Edwin's head while he spoke. They gave him three weeks to decide if he would join and continued to threaten him throughout this time. Before the three week period expired, Edwin fled to the United States.

Hypothetical #2

Ana and her husband Manuel live in El Salvador. Ana's father lives in the United States and occasionally sends them money, which has allowed them to open a small store to support themselves in El Salvador. One day, a gang member came to the store and demanded she pay him "rent" to continue to operate her store. He told her he knew she had money because she had family in the United States. Soon after, men beat up her husband as he was walking home and a few days later, three men came to their house and demanded to be paid, or else they would kill Ana and her family. Ana, Manuel and their children fled to the United States soon afterwards.

Hypothetical #3

Sophie is a Congolese Tutsi whose family was targeted by Hutu militias after the Rwandan genocide. Hutu militia members killed her parents and several siblings and kidnapped Sophie and forced her to serve as the “wife” of one of the militia members. Later, after Sophie escaped, she testified against and identified several of the militia members who had killed her parents and siblings, and kidnapped and raped her. However, the Congolese government official to whom she reported these crimes dismissed her testimony and warned that she would not survive much longer. Sophie fled the DRC soon afterwards and sought asylum in the United States.

Hypothetical #4

Yesenia is a woman from Honduras. When she was 18 years old, she began dating Wilmer and soon moved in with him. Once they were living together, Wilmer became controlling and regularly beat and raped Yesenia. Yesenia remained in the relationship for nine years out of fear that Wilmer would kill her if she left him. She reported the abuse to the police, but they told her they could not help her since they never observed the abuse. Yesenia finally fled to the United States with her two children in 2012.

More Resources

- NIJC's Asylum Manual
- Gender-based asylum brief bank:
www.immigrantjustice.org/gender-based-asylum-claims
- PSG-based asylum brief bank:
<http://immigrantjustice.org/asylum-brief-bank-membership-particular-social-group>
- Register on NIJC's website to access additional materials.

THANK YOU!

For more information contact

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