CENTER FOR
Gender & Refugee
STUDIES

Amicus Brief Filed by CGRS in *R-P-*

Overview of the Attached Brief

The attached amicus brief was filed by the Center for Gender & Refugee Studies (CGRS or Center) to the Board of Immigration Appeals (BIA) on April 20, 2012 in the matter of *R-P-*. Identifying information has been redacted in accordance with the wishes of the applicant. The brief addresses the standard for establishing that a government is unable or unwilling to control persecution and argues that Guatemala is unable or unwilling to control gender-based violence.

Organizational Overview

The Center provides legal expertise, training, and resources to attorneys representing asylum seekers, advocates to protect refugees, advances refugee law and policy, and uses domestic, regional and international human rights mechanisms to address the root causes of persecution.

Technical Assistance Provided by CGRS

As part of our core programs, CGRS engages in technical assistance and country conditions research for attorneys with gender-based, LGBTI, and child asylum claims. We provide free invaluable resources: legal consultation, country conditions information, practice advisories, unpublished immigration judge and Board of Immigration Appeals decisions, sample briefs, and expert witness affidavits developed by leading authorities in their fields in collaboration with CGRS. CGRS appears as amicus counsel or co-counsel in high impact cases. **To request assistance from CGRS, please visit our website at http://cgrs.uchastings.edu/assistance/.**

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of: [redacted]	**FILE No.:** [redacted]
In Removal Proceedings	

REQUEST TO APPEAR AS *AMICUS CURIAE*

AND

BRIEF OF THE CENTER FOR GENDER & REFUGEE STUDIES
AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

REQUEST TO APPEAR AS *AMICUS CURIAE*

The Center for Gender & Refugee Studies (CGRS or Center) hereby requests permission from the Board of Immigration Appeals (Board or BIA) to appear as *amicus curiae* in this case. The Board may grant permission to *amicus curiae* to appear, on a case-by-case basis, if the public interest will be served thereby. *See* 8 C.F.R. § 1292.1(d).

The Center, based at the University of California, Hastings College of the Law, has a direct and serious interest in the development of United States immigration law that is consistent with international obligations and norms, and in the issues under consideration in this case. Founded in 1999, CGRS provides legal expertise and resources to attorneys representing women asylum-seekers fleeing gender-based harm. CGRS attorneys are recognized experts on asylum law in general and gender asylum cases in particular. Further, having investigated and published on the problem of impunity for violence against women in Guatemala and provided technical assistance to attorneys representing asylum seekers from Guatemala in more than 600 cases since 1999, the Center has subject matter expertise directly related to the claims presented in this case that it believes can assist the Board in its review of this appeal.[1] The issues addressed in this brief are not duplicative of those in the brief of *amicus curiae*, National Immigrant Justice Center (NIJC). Therefore, CGRS can assist the Board in its consideration of this case, and the public interest will be served.

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[1] CGRS has published three reports on the subject of violence against women and impunity in Guatemala. *See* Karen Musalo et al., *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN'S L.J. 161 (2010); Katherine Ruhl, *Guatemala's Femicides and the Ongoing Struggle for Women's Human Rights: Update to CGRS's 2005 Report Getting Away with Murder*, 18 HASTINGS WOMEN'S L.J. 199 (2007); Angélica Chàzaro and Jennifer Casey, *Getting Away with Murder: Guatemala's Failure to Protect Women and Rodi Alvarado's Quest for Safety*, 17 HASTINGS WOMEN'S L.J. 141 (2006).

Respondent's counsel, [redacted], consents to this request. CGRS therefore respectfully asks for leave to appear as *amicus curiae* and file the following brief.

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SUMMARY OF ARGUMENT

In Guatemala, impunity for raping, battering and killing women is at such high levels that perpetrators rightly feel confident that there is no price to pay for their unrestrained violence. The United Nations, the Inter-American Commission on Human Rights, the U.S. Government and civil society alike have expressed deep concern about the epidemic levels of violence against women in Guatemala and the lack of an even minimally effective government response. Femicides are the most extreme expression of violence against women.[2] Of the 5,500 femicides that were documented between January 2000 and December 2010, only a fraction were investigated and brought to trial, leaving 98 out of 100 killers to literally get away with murder. The percentage of sexual offenders to have been prosecuted is even smaller.

Against the weight of the overwhelming, undisputed record evidence presented in this case substantiating the horrific violence against women in Guatemala, the immigration judge (IJ) ruled that the Respondent, [redacted], failed to show that the Guatemalan government is unable or unwilling to control her persecutors. *Amicus* Center for Gender & Refugee Studies urges the Board to rule that the IJ erred in this regard and reverse this aspect of the IJ's decision accordingly. The IJ applied the wrong legal standard and the Board should thus, at a minimum, remand this case to the IJ for reconsideration under the correct unable or unwilling test.[3]

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[2] *Amicus* uses the word femicides to denote gender-motivated killings.

[3] *Amicus* adopts herein by reference the arguments set forth in Respondent's Supplemental Brief on Remand and the brief of *Amicus* NIJC urging the Board to consider this case in concert with *Matter of K-C-*, a case raising similar issues that is also pending before the Board.

BACKGROUND

The Department of Homeland Security (DHS) commenced removal proceedings against Ms. [redacted], alleging that she was removable as an alien present in the United States who has not been admitted or paroled. Administrative Record (A.R.) 719. Ms. [redacted] conceded removability and applied for asylum, withholding of removal and relief under the Convention Against Torture. A.R. 689. She argued that she suffered past persecution, a brutal gang rape resulting in pregnancy, on account of her membership in the particular social group of "Guatemalan women." A.R. 501. Ms. [redacted] testified that she did not report the rape because she believed that the police "won't do anything for something like this," and would "just make fun of [her]," A.R. 425, and that "the la[w] over there in Guatemala doesn't pay any attention, doesn't give any importance to one," A.R. 445. In support of her claim, Ms. [redacted] submitted extensive documentation regarding the proliferation of gender-based violence in Guatemala at the hands of both public and private actors, and the climate of impunity for aggressors. A.R. 533-668. DHS did not contest any of the evidence submitted by Ms. [redacted] and submitted only the then-current Department of State Country Report on Human Rights Practices in Guatemala in rebuttal. A.R. 381.

The IJ found Ms. [redacted] to be credible, but denied all forms of relief. A.R. 344, 357. The IJ held that Ms. [redacted]'s proffered social group was not cognizable and that she did not suffer persecution on account of her membership in a particular social group. The denial was also based in part on the IJ's finding that Ms. [redacted] failed to show that the government of Guatemala was unwilling or unable to control her persecutors. The IJ reasoned that Ms. [redacted] "failed to even give the police an opportunity to try to track down her attackers and rapists when she did not report the rape to the police," and that "[a]ccordingly, it is unreasonable for [her] to claim that the government was unable or unwilling

to control the private actors, considering that she never reported these incidents to the authorities." A.R. 351. The IJ found that while the record reflects that "[f]ew prosecutions" for gender-based crimes result in convictions, it also reflects that "the government of Guatemala is attempting to do something about the rapes and the killings and violence against women" and "the government does investigate and does prosecute persons for crimes against women." A.R. 354.

Ms. [redacted] appealed to the Board arguing, among other things, that the IJ erred as a matter of law and fact in holding that the record fails to establish the Guatemalan government is unwilling or unable to control gender-motivated violence. A.R. 256. The BIA dismissed the appeal, affirming the IJ's holdings that "Guatemalan women" is an overly broad particular social group and Ms. [redacted]'s gang rape was not motivated on account of a protected ground. A.R. 248. The Board did not address Ms. [redacted]'s argument with respect to the government's willingness or ability to protect.

While her appeal was pending with the U.S. Court of Appeals for the Eighth Circuit, Ms. [redacted] filed a motion to reopen to the BIA for consideration of newly available, material evidence including a series of recent studies regarding the ever-increasing levels of violence against women in Guatemala. A.R. 96. The Board denied the motion to reopen as well as her subsequent motion to reconsider and Ms. [redacted] appealed both determinations. A.R. 2-3, 36. The Eighth Circuit remanded the consolidated appeals to the Board in accordance with the unopposed motions of the parties. *See* [redacted] *v. Holder*, Nos. 10-1454, 10-2851 (8th Cir. Feb. 14, 2011), and No. 11-1558 (8th Cir. Mar. 28, 2011).

The parties filed supplemental briefs on remand and this *amicus* brief follows.

ARGUMENT

I. THE UNABLE OR UNWILLING STANDARD.

In a case involving persecution by non-State actors, an applicant must prove that the government was "unable or unwilling" to control her persecutors to establish eligibility for asylum. An applicant may demonstrate in myriad ways that her government does not provide protection, including through her own testimony and country conditions evidence on the pervasiveness of the harm suffered and general levels of impunity. She need not show how the authorities acted in her particular case if she can demonstrate that reporting to the authorities would have been futile or put her at risk for further abuse. The enactment of protective laws or official condemnation of private acts of persecution are not dispositive of a government's ability or its overall willingness to protect.

A. The Unable Or Unwilling Requirement Is Satisfied When A Government Fails To Provide Effective Protection.

Long-standing precedent establishes that a successful claim for asylum can be based on persecution inflicted by non-State actors, upon a showing that the government is either "unable or unwilling" to control these agents of persecution. *See, e.g.*, *Matter of McMullen*, 17 I. & N. Dec. 542, 544 (BIA 1980). It is axiomatic that we live in an imperfect world, and that a State cannot provide an absolute guarantee against harm. Thus, in determining whether a government is "unable or unwilling" to control non-State actors, the Board follows the approach of the United Nations High Commissioner for Refugees (UNHCR)[4] and considers if the mistreatment is "'knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.'" *Matter of Konanykhine et al.*, File No. A74-361-122, 28 Immig. Rptr. B1-

[4] The Supreme Court has recognized that UNHCR's view provides "significant guidance" in interpreting the Refugee Act. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

49 (BIA Nov. 20, 2003) (quoting UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status ¶ 65 (1979, rev. 1992)); *see also Rahimzadeh v. Holder*, 613 F.3d 916, 921 (9th Cir. 2010) (holding inability or unwillingness to control violence by private parties can be established by "demonstrating that a country's laws or customs effectively deprive the petitioner of any meaningful recourse to governmental protection"); *Matter of R-A-*, 22 I. & N. Dec. 906, 914 (BIA 1999), vacated on other grounds (AG 2001) (upholding the IJ's finding that the respondent was unable to avail herself of the protection of the Guatemalan government by crediting the respondent's testimony that she was unable to obtain "meaningful assistance" from the authorities); *Asylum and Withholding Definitions*, 65 Fed.Reg. 76588, 76597 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. § 208.15(a)) ("In evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, the immigration judge or asylum officer should consider whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the state protection that exists.").

The U.S. Citizenship and Immigration Services (USCIS) has explained that asylum officers, in making a determination about the ability and willingness of a government to protect, should consider whether the government takes "reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the existing state protection." Asylum Officer Basic Training Course, *Female Asylum Applicants and Gender-Related Claims* 25 (Mar. 12, 2009) (hereinafter "AOBTC, *Female Asylum Applicants*"). According to USCIS, the "reasonable steps" taken by a State are measures that "reduce the risk of claimed harm below the well-founded fear threshold." *Id.* Internationally renowned experts in refugee law have similarly explained that "the elements of 'well-founded fear and 'protection' are to some extent

intertwined," in that "in assessing whether a person has a well-founded fear of being persecuted in any region in the country, the decision maker, in addition to identifying the serious harm that may be inflicted for a Convention reason, must also scrutinize the State's ability and willingness effectively to respond to the risk." JAMES C. HATHAWAY ET AL., *Internal protection/relocation/flight alternative as an aspect of refugee status determination*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 357, 366 (Erika Feller, ed., 2003); *see also* RODGER HAINES QC, *Gender-related persecution*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 320, 333 (Erika Feller, ed., 2003) ("The level of protection provided by a State should be such as to reduce the risk to a refugee claimant to the point where the fear of persecution could be said to be no longer well-founded."); GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 73 (2d ed. 1996) (in determining whether private acts constitute persecution, "[t]he central issue remains that of risk of harm amounting to persecution") (emphasis omitted); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 125 (1991) ("a decision on whether or not an individual faces a risk of 'persecution' must also comprehend scrutiny of the state's ability and willingness effectively to respond to that risk").

For several years, the Eighth Circuit consistently invoked the BIA's formulation of the "unwilling or unable" requirement. *See, e.g.*, *Valioukevitch v. INS*, 251 F.3d 747, 749 (8th Cir. 2001) (recognizing persecution is a harm that is inflicted either by the government or by persons or organizations the government is unable or unwilling to control); *Miranda v. INS*, 139 F.3d 624, 627 (8th Cir. 1998) (same). In 2005, the court began to articulate the "unable or unwilling" requirement in some cases as requiring that an applicant show that a government has demonstrated a "complete helplessness" to control the conduct of private actors. *See Menjivar v.*

Gonzales, 416 F.3d 918, 921 (8th Cir. 2005) (quoting *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)). The Eighth Circuit does not appear to consider the complete helplessness articulation of the standard as placing any heightened burden on the applicant. Indeed, such a reading (*i.e.*, equating "complete helplessness" as requiring that an applicant show 100% ineffectiveness on the part of the State) would be inconsistent with other Eighth Circuit as well as Board and Supreme Court precedent. It would also be in tension with the language of the statute itself requiring only that an applicant prove that her fear is well-founded. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); 8 U.S.C. § 1101(a)(42).

Furthermore, recent Eighth Circuit opinions addressing the issue make no mention of the "complete helplessness" language in setting forth the standard, considering only whether the harm was committed by "private actors that the government was unwilling or unable to control." *Osuji v. Holder*, 657 F.3d 719, 722 (8th Cir. 2011) (internal quotation omitted); *see also Shaghil v. Holder*, 638 F.3d 828, 834 (8th Cir. 2011). In addition, the Seventh Circuit decision, from which the Eighth Circuit imported the "complete helplessness" language, does not call for anything other than a showing that the government was unable or unwilling.[5] The Board should continue to read Eighth Circuit precedent as consistent with the Board's longstanding and widely adopted holding that private persecution may form the basis for asylum where the government is "unable or unwilling" to offer effective protection.

[5] In *Galina*, 213 F.3d at 957, the police took some actions against the threats the applicant had received. Thus, although "complete helplessness" was the standard applied by the court, it was not interpreted as requiring 100% ineffectiveness, and the court agreed with the Board that the government was unable or unwilling to control the persecutors.

B. The Question Of Whether A Government Is Unable Or Unwilling To Control Private Actors Is Not Answered by Whether An Applicant Reported The Abuse To The Authorities.

In cases of non-State persecution, the courts *may* consider whether the applicant reported incidents to the authorities and the ensuing response in determining whether a government is able and/or willing to protect. However, the Board and the Courts of Appeals agree that reporting persecution to the authorities is not required. *See, e.g.*, *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1057 (9th Cir. 2006) (noting there is nothing in the Refugee Act or implementing regulations requiring that an applicant seeking relief based on private persecution must have reported that persecution to the authorities); *Matter of S-A-*, 22 I. & N. Dec. 1328, 1335 (BIA 2000) (holding that the applicant satisfied the unable or unwilling requirement even though she had not requested protection from the government); *In re: Jose Luis Garcia-Gonzalez*, File No. A201-063-604, 2011 WL 7327341 (BIA Nov. 10, 2011) (affirming an IJ's finding that the applicant "established that the Mexican police were unable and/or unwilling to help him despite the fact that [he] never sought help from the Mexican police"); *see also Canada (Attorney General) v. Ward* [1993] 2 SCR 689, 724 (holding that "it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness").

"The absence of a report to police does not reveal anything about a government's ability or willingness to control private attackers." *Rahimzadeh*, 613 F.3d at 922. Rather, "it leaves a gap in proof about how the government would respond if asked, which the petitioner may attempt to fill by other methods." *Id.* These methods might include "showing that others have made reports of similar incidents to no avail, or establishing that private persecution of a particular sort is widespread and well-known but not controlled by the government." *Id.*

(internal citations omitted); *see also Asylum and Withholding Definitions*, 65 Fed.Reg. at 76597 (recognizing as pertinent to government inability/unwillingness, *inter alia*, "a pattern of government unresponsiveness," "general country conditions and the government's denial of services," and "the nature of the government's policies with respect to the harm or suffering at issue").

C. Where An Applicant Did Not Report Abuse To The Authorities, She Can Satisfy The Unable Or Unwilling Requirement By Showing That Reporting Would Have Been Futile Or Dangerous.

The Board has held that in cases where the applicant did not report private persecution to the authorities, she may meet the unable or unwilling requirement if she demonstrates that reporting would have been futile or put her at risk for further abuse. *See Matter of S-A-*, 22 I. & N. Dec. at 1335 ("Although [the applicant] did not request protection from the government, the evidence convinces us that even if [she] had turned to the government for help, [government] authorities would have been unable or unwilling to control her [persecutor's] conduct . . . and her circumstances may well have worsened."); *see also* AOBTC, *Female Asylum Applicants and Gender-Related Claims*, at 25 ("[A]n applicant may establish that state protection is unavailable even when she did not actually seek protection. For example, the evidence may indicate that the applicant would not have received assistance if she had sought it . . . [or] that seeking protection would have placed an applicant at even greater risk of persecution.").[6]

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[6] An applicant may fear reporting for a variety of reasons including risk of retaliation at the hands of her persecutor or negative reaction of her family and community as well as the potential for abuse by the authorities that are tasked with providing protection. *See, e.g.*, *Matter of S-A-*, 22 I. & N. at 1335 (recognizing that the applicant's situation may have "worsened" if returned to her abusive home); AOBTC, *Female Asylum Applicants*, at 25 (recognizing that in some countries, for example Pakistan, "women who report rape to the authorities are often themselves arrested and jailed under laws prohibiting sexual relations outside of marriage, and may be subject to verbal and physical abuse," and that, therefore, "a woman from Pakistan may reasonably fear reporting").

The Courts of Appeals, including the Eighth Circuit, follow the Board's approach. *See, e.g.*, *Shaghil*, 638 F.3d at 834 (recognizing that an applicant need not show he reported persecution to authorities if there is sufficient evidence in the record to show futility); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036 (8th Cir. 2008) (remanding where the IJ and BIA failed to address the applicant's evidence that seeking police assistance would have been futile); *Lopez v. Att'y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007) (holding that an applicant need not have reported persecution to the authorities if she "convincingly demonstrates that those authorities would have been unable or unwilling to protect her, and for that reason she could not rely on them"); *Ornelas-Chavez*, 458 F.3d at 1058 (holding that an applicant need not have reported persecution to the authorities "if he can convincingly establish that doing so would have been futile or have subjected him to further abuse"); *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 161-62 (3d Cir. 2005) (reversing the BIA's denial of asylum where the record indicated it would have been futile for applicant to report abuse to the police); *see also Valdiviezo-Galdamez v. Att'y Gen.*, 502 F.3d 285, 289 (3d Cir. 2007) (holding that "the IJ erred by requiring [the applicant] to prove that the police 'refused' to protect him, rather than that the government was simply 'unable or unwilling' to protect him").

D. Enactment Of A Law Criminalizing Acts Which Constitute Persecution Is By No Means Dispositive On The Issue Of State Willingness Or Ability To Protect.

The unable or unwilling requirement is a disjunctive test and each prong must be analyzed separately. Enactment of a law, without more, does not prove either willingness or ability to protect. For example, a State may enact a law prohibiting a certain practice, but it may totally lack the will to ever implement that law.[7] In other cases, the State may have the

[7] There are many reasons why a State might enact a law that it has no political will to enforce; among the most obvious is to respond to international criticism of its failure to take action to

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

UNHCR has recognized this reality, noting that "[e]ven though a particular State may have prohibited a persecutory practice," the State "may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively." UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees ¶ 11 (2002). In such cases, "[t]he fact that a law has been enacted to prohibit or denounce certain persecutory practices will therefore not in itself be sufficient to determine that the individual's claim to refugee status is not valid." *Id.*; *see also, e.g.*, *Fiadjoe*, 411 F.3d at 161-62 (holding that the Board erred in finding there was State protection where the evidence demonstrated that perpetrators of sex slavery were not prosecuted even though the practice was outlawed); *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23, 27 (BIA 1998) (finding a lack of State protection despite public condemnation of anti-Semitism where the government failed to prosecute claims under existing laws); *cf. Guillen-Hernandez v. Holder*, 592 F.3d 883, 887 (8th Cir. 2010) (upholding BIA finding that the state action requirement had not been met where the record demonstrated that the government was "ready and willing" to enforce relevant criminal laws).

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protect vulnerable populations.

II. THE BOARD SHOULD REVERSE THE DECISION OF THE IMMIGRATION JUDGE AND FIND THAT GUATEMALA IS UNABLE OR UNWILLING TO CONTROL GENDER-BASED VIOLENCE.

The record evidence confirms a reality that has received significant international attention; violence against women is pervasive in Guatemala and is committed with virtual impunity. The situation is grim. Women live in constant fear for their lives and physical safety. Victims of femicide are dumped in public spaces with no attempts to hide the bodies. The levels of violence against women were high at the time Ms. [redacted] was brutally attacked and have consistently increased over the decade since. Women who turn to law enforcement personnel or judicial officials in Guatemala not only receive no protection, they are also subjected to humiliating and intimidating procedures and are placed at risk for retaliation and ostracism. The recent enactment of laws aimed at eradicating violence against women, while a step in the right direction, has, to date, been entirely ineffective.

The IJ applied the wrong legal standard in analyzing whether the Guatemalan government is unable or unwilling to control Ms. [redacted]'s persecutors. Despite clear Eighth Circuit and Board precedent establishing that reporting abuse to authorities is not required, the IJ faulted Ms. [redacted] for failing to do just that. The IJ further conflated the unable and unwilling prongs by apparently ruling that the government's *willingness* to control violence – as evidenced by its "attempts" to "do something" about gender violence – also established *ability* to protect. The IJ also inexplicably ignored Ms. [redacted]'s credible testimony and significant record evidence that gender-based violence is pervasive in Guatemala and committed with impunity. The Board should reverse the IJ because no reasonable factfinder viewing this record could find that the Guatemalan government is able and willing to control gender-based persecution. If however, the Board is not willing to reverse the IJ's decision, it

should – at a minimum – remand for the IJ to apply the proper legal standard and evaluate the record in its entirety.[8]

A. The IJ Applied the Wrong Legal Standard For The Unable Or Unwilling Requirement.

In evaluating the government's ability and willingness to protect against gender-based persecution, the IJ committed reversible legal error in at least two respects. First, pointing to the Eighth Circuit's opinion in *Menjivar*, 416 F.3d 918, the IJ noted that "[t]he fact that police take no action on a particular report does not necessarily mean that the government is unwilling or unable to control criminal activity, because there may be a reasonable basis for inaction." A.R. 299-300. Although that is certainly a correct observation, the IJ made an illogical leap to the conclusion that because Ms. [redacted] did not report her rape to the authorities in Guatemala, it is "unreasonable" for her to argue that the government is unwilling or unable to control her persecutors. The IJ's ruling on this point is clearly contrary to Board and Eighth Circuit precedent establishing that reporting is not required. The Eighth Circuit has clearly found error where the agency "cit[ed] only the fact that [the applicant] did not contact the police," and failed to consider an applicant's credible testimony and corroborating evidence that reporting would have been pointless. *Ngengwe*, 543 F.3d at 1035.

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[8] The Board "may review questions of law, discretion, and judgment and all other issues in appeal from decisions of the immigration judge de novo." 8 C.F.R. § 1003.1(d)(3). However, "the Board will not engage in factfinding in the course of deciding appeals." *Id.* In other words, under applicable regulations, "IJ decisions that are purely factual in nature receive clear error review," but "[*a*]*ll other decisions* are reviewed *de novo*." *Huang v. Att'y Gen.*, 620 F.3d 372, 383-84 (3d Cir. 2010) (internal citations omitted) (emphasis added); *see also* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed.Reg. 54878, 54888–89 (Aug. 26, 2002) ("Where the BIA reviews a mixed question of law and fact . . . now referred to as a discretionary decision, it should defer to the factual findings of the immigration judge unless clearly erroneous, but it retains independent judgment and discretion, subject to the applicable governing standards, regarding the review of pure questions of law and the application of the standard of law to those facts") (internal quotation marks omitted).

Furthermore, the IJ's reliance on *Menjivar* is misplaced. *Menjivar* is inapposite and does not control in cases where no report to the authorities was made. There, the applicant reported the abuse, and the police conducted a "thorough investigation" of the incident, which forced the persecutor into hiding. 416 F.3d at 922. The persecutor later reappeared, but the applicant did not notify the authorities, so the police did not have a chance to respond as they had before. Ms. Menjivar argued that country conditions evidence of record established that El Salvador was unable or unwilling to control gang violence. The court held that generalized evidence of gang violence was insufficient to prove that the government was unable or unwilling to control in light of the specific evidence of police responsiveness in the case at bar.

In this case, by contrast, no report was made to the police. The IJ should have applied precedent setting forth acceptable methods for establishing a government's inability or unwillingness to protect in situations where the petitioner did not report to governmental authorities. Instead, the IJ erroneously ruled that the failure to report was fatal. She ignored relevant evidence establishing that the government of Guatemala is unable to protect. Ms. [redacted] provided her credible testimony, corroborated by ample country conditions evidence, demonstrating the pervasive nature of gender-based violence and rates of impunity, including evidence that women rightly fear harassment and reprisal if they report abuse to authorities. The IJ ignored this evidence.

The IJ further erred by failing to consider the government's ability to control violence separately from its willingness to do so, conflating the disjunctive prongs of the requirement. The IJ reasoned that the Guatemalan government is "attempting to do something about the rapes and the killings and violence against women." A.R. 354. Even assuming that these "attempts" demonstrate some willingness by the government to curb gender-based violence, a point which

amicus does not concede, mere attempts are not evidence that the government "has the power . . . to protect a woman in [the applicant's] position." *Sarhan v. Holder*, 658 F.3d 649, 660 (7th Cir. 2011). The record clearly reflects that any "attempts" by some members of the Guatemalan government to control gender-based violence, however commendable, have not, by any stretch, equated to the government's actual ability to control and enforce the laws. *See* Section II.D. *infra*. The Board must reverse this legal error.

B. The IJ Failed To Consider The Entire Record In Evaluating Guatemala's Ability And Willingness To Control Gender-Based Violence.

The IJ relied exclusively on a portion of the 2007 Department of State Country Report on Human Rights Practices in Guatemala submitted by DHS (hereinafter "DOS Report") to support her unable or unwilling finding. As pointed out by Ms. [redacted], the DOS Report does not support the IJ's finding. *See* Respondent's Br. on Remand at 7, 41. The 2007 DOS Report acknowledges the operation of some government programs aimed at addressing violence against women in Guatemala, including the maintenance of a special police unit for sex crimes and launch of a project to provide services for victims of domestic violence. A.R. 489. However, the Report clearly acknowledges that these programs have been largely ineffective and that sexual offenses and other violence against women "remained a common and serious problem." A.R. 489. It is hard to see how any objective adjudicator could rule that a government is able to protect when the harm at issue is documented as "remaining" a "common and serious problem." It is not clear what further indictment of inefficacy would have persuaded the judge of the Guatemalan government's inability.

Furthermore, although DOS reports "are recognized as persuasive, use of such official reports does not substitute for an analysis of the facts of each applicant's individual circumstances." *Yang v. Gonzales*, 427 F.3d 1117, 1121 (8th Cir. 2005) (internal quotation and

alterations omitted). Where, as here, an IJ decision "lacks any analysis or mention of significant evidence" in the record, including the applicant's testimony, it constitutes reversible error. *Id.* at 1122; *see, e,g., Seck v. Att'y Gen.*, 663 F.3d 1356, 1368 (11th Cir. 2011) (holding that the IJ and BIA erred by relying exclusively on general information in the State Department report without engaging in an "individualized analysis of the applicant's specific situation"); *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011) (holding BIA erred where it relied only on the State Department report to the exclusion of contrary evidence in the record); *Gomes v. Gonzales*, 473 F.3d 746, 756 (7th Cir. 2007) (remanding case where the IJ selectively read State Department reports that stood in contrast to specific evidence of record).

This case is clearly distinguishable from cases where courts have upheld a determination that a government is unable or unwilling to protect based on information contained in a State Department report. In those cases, the State Department reports contain information that directly contradicts the applicant's testimony. *See, e.g., Valioukevitch*, 251 F.3d at 749 (upholding BIA's finding that the applicant failed to demonstrate the government was unable or unwilling to protect where State Department reports contradicted the applicant's testimony); *Chatta v. Mukasey*, 523 F.3d 748, 752 (7th Cir. 2008) (same). The DOS Report here is entirely consistent with the common, undisputable theme running through Ms. [redacted]'s testimony and the extensive record evidence, discussed in detail in Section II.C., showing that, despite laws outlawing rape and gender-based violence and government programs intended, at least in name, to prevent and punish it, women in Guatemala cannot expect protection from the government. The IJ's exclusive reliance on the DOS Report to the exclusion of other, uncontested evidence of record, and Ms. [redacted]'s testimony is yet another error within the Board's purview to correct.

C. Applying The Correct Legal Standard, The Record Supports Only One Possible Conclusion: Guatemala Is Unable Or Unwilling To Control Gender-Based Violence.

As detailed in Ms. [redacted]'s brief, incorporated herein by reference, there is extensive evidence in the record documenting the widespread violence perpetrated against women in Guatemala without consequence. *See* Respondent's Br. on Remand at 6-12. Indeed, all governmental and non-governmental organizations that have evaluated the situation have reached the same conclusion, that violence against women in Guatemala is a serious problem and the government has failed to implement an effective response.

The record establishes that Guatemalan society considers violence against women as normal, and the government tolerates a climate of impunity for the aggressors. A.R. 533-672. At the time of Ms. [redacted]'s rape, the law explicitly codified discrimination and bias towards women, for example, providing that a rapist could escape charges by marrying the victim. A.R. 560. Although the law has since been amended to remove this particular provision, deep-seated attitudes persist and constitute a major hurdle to pursuing rape and other gender-based violence. It is well documented that law enforcement officials demonstrate a gender bias and humiliate and discredit victims, blaming them for the crime. A.R. 615. In the words of Ms. [redacted], the police "make fun" of women who report rape. A.R. 425.

Investigations of violence towards women are woefully inadequate, indicating a lack of will on the part of investigators as well as a lack of adequate resources and training. A.R. 580. Prosecutions are exceedingly rare. A.R. 636. The ineffectiveness of the legal system for women in Guatemala manifests more than an injustice in each individual case, rather, the government's failure to prevent or punish violence against women serves as de facto encouragement for the violence, as evidenced by its ever-rising frequency and brutality. A.R. 583.

Evidence of the failure of the Guatemalan justice system in this case far exceeds "generalized evidence of occasional police failures," which the Eighth Circuit has held, "without more, is insufficient to show futility." *Shaghil*, 638 F.3d at 834. Even relying solely on the DOS Report submitted by DHS, the futility of reporting gender-based violence in Guatemala is clear. The country conditions information submitted by Ms. [redacted] only further supports her claim that reporting her rape to the authorities would not have resulted in assistance, but more likely, would have subjected her to further harm:

- "Nightmarish crimes against women have been occurring with horrifying frequency in Guatemala. . . . More than ordinary incompetence is operative here. Guatemalan authorities manifest little interest in training skilled cadres who might unearth really damaging information about who is behind the crimes. . . . Family members of murdered women report that authorities show hostility towards them when they request government intervention. Guatemala's legal system is rife with provisions that minimize the seriousness of violence against women, a system codified and enforced by men who have seldom displayed any concern for the safety of women." A.R. 579-80; Exh. 6F, Michael Parenti and Lucia Munoz, *Gender Savagery in Guatemala*, Political Affairs Magazine (July 14, 2007).

- In Guatemala, "authorities have continuously failed to carry out effective investigations into violence against women and bring those responsible to justice. Police and justice institutions are weak, ineffective, and often corrupt, inspiring distrust and even fear. Their general flaws are compounded by gender biases within the institutions, which act to systematically silence and discriminate against women." A.R. 583; Exh. 6G, *Hidden in Plain Sight*, Washington Office on Latin America (Mar. 2007).

- "Sexual offenses remained a serious problem. . . . Police had minimal training or capacity for investigating or assisting victims of sexual crimes. . . . [R]ape victims sometimes did not report the crime for lack of confidence in the prosecution system and fear of reprisals." A.R. 560; Exh. 6C, *Country Reports on Human Rights Practices - 2006*, U.S. Department of State (Mar. 8, 2007).

- "Statistics reveal that so few convictions have been handed down that there is almost complete impunity for those who murder women in Guatemala. . . . Underlying the poor investigations of Guatemala's femicides is more than a lack of resources, but a lack of will on the part of investigators." A.R. 640, 651; Exh. 6L, *Guatemala's Femicides and the Ongoing Struggle for Women's Rights*, Center for Gender & Refugee Studies (2006).

- "The prosecution of those who commit violence against women is impeded by discriminatory legislation that prevents punishment for some violent crimes against women, and impunity is further fueled by deeply ingrained gender discrimination within the government agencies responsible for the investigation and prosecution of these crimes." A.R. 636; Exh. 6K, *World Report*, Human Rights Watch (2007).

- "The combination of widespread impunity enjoyed by perpetrators (a precedent set during the internal armed conflict), unjust laws, and the incompetence and inaction of authorities ultimately destroys all hope of ever prosecuting and punishing the murderers. Guatemala continues to fail to protect its women, as the government has made no progress toward amending a justice system that protects criminals instead of victims." A.R. 671; Exh. 6M, *For Women's Right to Live*, Guatemala Human Rights Commission USA (2007).

- "Corruption within the police force is particularly pronounced. . . . The judiciary is plagued by corruption, inefficiency, capacity shortages, and violent intimidation of judges, prosecutors, and witnesses. . . . Violence against women and children is widespread." A.R. 573-75; Exh. 6D, *Freedom in the World: Guatemala*, Freedom House (2007).

- "The Committee is deeply concerned about the continuing and increasing cases of disappearances, rape, torture and murders of women, the engrained culture of impunity for such crimes, and the gender-based nature of the crimes committed, which constitute grave and systematic violations of women's human rights. It is concerned about the insufficient efforts to conduct thorough investigations, the absence of protection measures for witnesses, victims and victims' families and the lack of information and data regarding the cases, the causes of violence and the profiles of the victims." A.R. 605; Exh. 6H, Concluding comments of the Committee on the Elimination of Discrimination against Women: Guatemala, CEDAW/C/GUA/CO/6 (June 2, 2006).

- "One serious outcome of the cycle of violence against women is the impunity associated with those violations of the fundamental rights of women. Both state authorities as well as representatives of civil society said repeatedly . . . that the system for administering justice had not responded effectively to those crimes and this has given rise to impunity and an [sic] increased the sense of insecurity among women. . . . The Rapporteurship heard evidence from victims in many cases that the different agencies responsible for investigating and pursuing the crime treated them in a disrespectful manner." A.R. 613, 615; Exh. 6I, *The IACHR Special Rapporteur Evaluates the Effectiveness of the Right of Women in Guatemala to Live Free from Violence and Discrimination*, Inter-American Commission on Human Rights (2004).

- "In February, the body of Silvia Patricia Madris, 25-year-old sex-worker, was found semi-naked on a road on the outskirts of Guatemala City. She had been

strangled and her body showed signs of sexual violence. The authorities did not collect evidence from the alleged murder scene." A.R. 577; Exh. 6E, *Guatemala Report*, Amnesty International (2007).

- "[T]he country's judicial system falls short on all counts—so short, in fact, that the current vice president recently declared the rule of law in Guatemala to be 'an international embarrassment'" A.R. 625; Exh. 6J, *Countries at the Crossroads: Guatemala*, Freedom House (2006).

Under even the most restrictive interpretation of the "unable or unwilling" requirement, the record before the IJ compels the Board to reverse the IJ's clearly erroneous factual finding.[9] *See Afriyie v. Holder*, 613 F.3d 924, 934 (9th Cir. 2010) (reversing BIA's unable/unwilling finding where "[g]iven this state of the credited record, any reasonable factfinder would be compelled to conclude that the Ghanaian police were unable or unwilling to protect [the applicant]"); *cf. Suprun v. Gonzales*, 442 F.3d 1078, 1081 (8th Cir. 2006) (declining to remand to the BIA to make an unable/unwilling finding in first instance where the court determined that the applicant "has not provided any evidence that would compel a reasonable fact-finder to conclude that the government was unable or unwilling to control these private actors").

D. The Recent Enactment Of Laws In Guatemala To Address Gender-Based Violence Does Not Change The Outcome In This Case.

In 2008, after the IJ rendered her decision in this case, Guatemala enacted the Law Against Femicide and Other Forms of Violence Against Women (hereinafter "Femicide Law"). The passage of the Femicide Law was hailed as a positive and necessary step. However, to date, the law has not been implemented effectively and the rates of violence against women have only increased. *See* Affidavit of Elisa Portillo Najera (Attached as Appendix A) (hereinafter "Najera

[9] Ms. [redacted] submitted additional evidence with her motion to reopen documenting the shocking levels of violence against women in Guatemala and emphasizing the utter failure of the government to prevent and respond to such violence. A.R. 106-243. While this supplemental information is added support for Ms. [redacted]'s position and her well-founded fear of persecution, the Board need not consider it to decide this case in her favor where the prior evidence is itself compelling.

Affidavit"); Karen Musalo et al., *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN'S L.J. 161 (2010) (hereinafter "Musalo, *Crimes Without Punishment*").

The failure to implement the Femicide Law is indicative of both a lack of resources (inability) and lack of political will (unwillingness). "[I]nvestigations are often inadequate due to the lack of interest officials have in solving crimes of violence against women, as well as the failure to collect and preserve evidence, coordinate efforts among law enforcement personnel and prosecutors, and contact potential witnesses." Najera Affidavit, at ¶ 23. Disparagement and mischaracterization of the law pervades all levels of the government. For example, "the governor of the Department of Jalapa, which has high levels of violence against women, openly stated that he disagreed with the 2008 Law and dismissed it as a way of allowing women to get back at men." *Id.* at ¶ 22. Prosecutors and judges have also made negative comments about the law and its constitutional validity. *See* Musalo, *Crimes Without Punishment*, at 201.

The lack of proper application of the 1996 Law to Prevent, Sanction, and Eradicate Intra-Family Violence (hereinafter "1996 Law") does not bode well for the Femicide Law's effective implementation. The 1996 Law, which was intended to prevent domestic violence, provided for the issuance of protective orders in situations of domestic violence. Lamentably, in the fifteen years since its passage, it has had little effect. The government has done virtually nothing to educate those involved in the judicial system about their responsibilities under the law, and few women seeking protection have succeeded in removing abusers from their homes, even in cases where the domestic violence resulted in injuries. *See id.* at 195.

It has been almost four years since the enactment of the Femicide Law, and there is the same lack of understanding and implementation. *Id.* Moreover, the government has yet to

implement concrete measures required by the Femicide Law to facilitate investigations and prosecutions, including the creation of specialized bodies to handle crimes involving violence against women, and the provision of free legal representation for victims. *Id.* at 198; Najera Affidavit, at ¶ 37.

The conditions giving rise to gender-based violence in Guatemala have been constructed over more than five centuries. Deep-rooted norms and practices dating back to the Colonial period, and exacerbated by brutal abuses against women and girls during the country's internal armed conflict have normalized violence against women. Musalo, *Crimes Without Punishment*, at 170, 218. It is unrealistic to expect rapid changes in attitudes and behaviors within the judicial system and society in general. However, it is certain that no changes will occur without sustained and serious efforts on the part of the Guatemalan government to assure laws enacted on paper become a reality in their implementation and enforcement.

The record in this case supports only one conclusion: the government of Guatemala is "unable or unwilling" to control gender-based violence.[10] The IJ's contrary finding is clearly erroneous and compels reversal.

[10] Even if the Board were to find that some sectors of the Guatemalan government have demonstrated a willingness to control gender-based violence (*e.g.*, through the passage of laws and the nascent efforts to enforce those laws), it is indisputable that the Guatemalan government remains "unable" to do the same. The operation of the main actors in the law enforcement system demonstrates a complete unwillingness to enforce the laws as seen through the persistence of biased and discriminatory responses to acts of violence against women.

CONCLUSION

The Board should reverse the finding of the immigration judge that Ms. [redacted] failed to prove that the Guatemalan government is unable or unwilling to control her persecutors.

DATED: April 20, 2012.

Respectfully submitted,

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In the Matter of [redacted]
File No.: [redacted]

PROOF OF SERVICE

On April 20, 2012, I, Blaine Bookey mailed a copy of this Request to Appear as Amicus Curiae and Brief of Amicus Curiae in Support of Respondent's Appeal From the Decision of the Immigration Judge on counsel in this case by mailing via United States Postal Service, first-class mail, a copy to:

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