

Women Refugees: Forgotten No Longer?

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Editor's Note: This Article consists of three parts: the author's observations about the historical neglect of the special problems facing women refugees in obtaining political asylum; an extract from the Report on the Situation of Human Rights in Haiti, issued by the Inter-American Commission on Human Rights of the Organization of American States in February, 1995, a report made in response to calls for action by this author and others; and the Memorandum on Considerations For Asylum Officers Adjudicating Asylum Claims From Women, issued by the Immigration and Naturalization Service in May, 1995, again in response to the efforts of this author and others involved with the Women Refugees Project, a joint project of Harvard Law School's Immigration and Refugee Clinic and Cambridge and Somerville Legal Services.

The end of the Cold War has been characterized not by the diminishment, as some had hoped, but by the continued intensification in the growth of the world refugee population.¹ Refugees, including both

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1. Although that should never have been the case, in truth, the Cold War, including the third world proxy battles it spawned, was the major producer of refugees in the post-World War II era. We perceived its passing to mean that fewer refugees would be created and that millions who lost their homes and homelands would be able to return.

those who have crossed international borders and those who are internally displaced within their home countries, now make up approximately forty-five million persons, a number almost comparable to the population of France.² Referred to by some as the “forgotten majority,”³ women and their children constitute as much as eighty percent of

Roger P. Winter, *The Year in Review, WORLD REFUGEE SURVEY—1991* (U.S. Comm. for Refugees, Washington, D.C.), 1991, at 2. Mr. Winter notes that instead, the number of refugees rose in 1990; he points to a number of factors including increasing evidence that the apparent demise of the Cold War . . . [has] . . . cost most refugees and displaced people whatever strategic value they may once have had It is increasingly clear that for many in the best-off nations of the world the humanitarian needs of the poorest of the poor, those of least strategic importance, are fading from the even minuscule view they were formerly afforded.

Id. at 3.

In the 1970s, there were approximately 2.7 million refugees worldwide. In the 1980s, that number grew to 8.2 million. Sima Wali, *Refugee Women in Development, Toward Beijing: Priorities for '95, Address Before the New England Regional Conference* (March 3-4, 1995) (on file with author). According to 1995 estimates by the United States Committee for Refugees, there are currently approximately 16.3 million international refugees (those who have crossed international borders) and an additional 26 million people displaced internally within the borders of their own countries. *World Refugee Statistics, WORLD REFUGEE SURVEY—1995* (U.S. Comm. for Refugees, Washington, D.C.), 1995, at 42-44.

2. Wali, *supra* note 1 (estimates the world refugee and displaced population at 45 million, which is comparable to the population of France. Her estimates are greater than those more recently issued by the U.S. Committee for Refugees). There are varying definitions of “refugee”; there also is a complex literature on the subject which can only be briefly summarized here. The most widely used international legal concept is that of the U.N. Refugee Convention, which defines a refugee as someone who has crossed an international border owing to a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” United Nations Convention Relating to the Status of Refugees, Apr. 22, 1954, art. I, 19 U.S.T. 6223, 189 U.N.T.S. 2545 [hereinafter U.N. Refugee Convention]. The United States ratified the closely-related United Nations Protocol Relating to the Status of Refugees in 1968 and specifically adopted this definition of “refugee” into the United States domestic statute in 1980. Refugee Act of 1980 § 201, 8 U.S.C. § 1101(a)(42) (1988). The 1969 Convention of the Organization of African Unity (OAU) provides an expanded definition embracing persons who have fled generalized conditions of insecurity and oppression due to “external aggression, occupation, foreign domination or events seriously disturbing public order” OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, art. I, 1001 U.N.T.S. 14691. There has been increasing attention as well to the plight of the internally displaced, who have not left their country of origin or persecution. See generally Astri Suhrke, *Global Refugee Movements and Strategies of Response*, in U.S. IMMIGRATION AND REFUGEE POLICY: GLOBAL AND DOMESTIC ISSUES 157-62 (Mary M. Kritz ed., 1983); JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 1-33 (1991). See also *infra* notes 5-6.

3. Genevieve Camus-Jacques, *Refugee Women: The Forgotten Majority*, in REFUGEES AND INTERNATIONAL RELATIONS 141 (Gil Loescher & Laila Monahan eds., 1989).

this world refugee population.⁴ The flight of individual refugees as well as larger refugee migrations result from international and civil wars,⁵ and the failure of states, whether through deliberate action, unwillingness or inability, to protect the basic needs and rights of their populations.⁶

4. Wali, *supra* note 1; see also Juliette C. McLennan, *The Resource Crisis and the Well-being of Refugee Women and Children*, at 1, U.N. Doc. EGM/RDWC/1990/CS.11 (1990) (estimating that eight out of every ten refugees are women and children); Susan F. Martin, *Issues in Refugee and Displaced Women and Children*, Division for the Advancement of Women/UNOV, at 1, U.N. Doc. EGM/RDWC/1990/WP.1 (1990) (estimating that 75% of refugees and displaced persons are women and children); Ann Brazeau, *Gender Sensitive Development Planning in the Refugee Context*, United Nations High Commissioner for Refugees, at 2, U.N. Doc. EGM/RDWC/1990/CS.7 (1990) (stating that the "majority of refugees are women and their dependent children, often with large proportions of female heads of households."). For these and other relevant citations, see Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 625-26 n.1 (1993). Genevieve Camus-Jacques notes that, while "traditionally there has been no gender attached to the term 'refugee' . . . [o]ver the past ten years . . . most of the large-scale influxes of refugees have been predominantly of women and children." Camus-Jacques, *supra* note 3, at 143.

5. Genevieve Camus-Jacques echoes a common theme in her article on refugee women. "The world refugee map tallies almost perfectly with the world conflicts map, and illustrates the fact that the overwhelming majority of refugees come from and move between Third World countries." Camus-Jacques, *supra* note 3, at 144. In elaborating the definitional dilemma, she writes:

When we use the term refugee we refer to the generic name given to people uprooted by force. On arriving in another country all kinds of labels—refugees, displaced persons, exiles, asylum-seekers, illegal aliens—are put on people driven by fear or hunger from their homeland. Indeed, the particular label that is attached to them can be crucial in determining their fate. Yet the basic problem is not one of labels, it is the result of international conflict, global injustice, and inequality.

Id. at 143-44.

6. Fundamentally, refugee law is not concerned with rewarding courageous people, or condemning states, but with providing a form of surrogate international protection for individuals whose home countries cannot provide protection of core needs and rights. This foundation for refugee law is based in part on the liberal social contract theories of Locke and Hobbes. Hobbes in particular justifies the state's role in providing protection from internal and external aggressors in exchange for the individual's relinquishment of certain personal liberties. THOMAS HOBBS, *LEVIATHAN* (C.B. MacPherson ed., 1968) (1651).

Andrew Shacknove argues that what is universal and essential about refugeehood is the "absence of state protection of the citizen's basic needs." Andrew E. Shacknove, *Who is a Refugee?*, 95 ETHICS: AN INT'L J. OF SOC., POL., AND LEGAL PHIL. 274, 277 (1985). Refugees are persons whose home state has failed to secure their basic needs, such as physical security, vital subsistence, and liberty of political participation and physical movement. The duties that states owe to their citizens include not only refraining from aggression, but also protecting them from vulnerability to others. "To

Some of the worst features of the post-Cold War world—the increase in low intensity warfare, the violent chaos and human rights violations that have accompanied the collapse of nation states—have affected women in vast numbers and often in gender-specific ways.⁷ Of course, men

the extent that a life-threatening situation occurs because of human actions rather than natural causes, the state has left unfulfilled its basic duty to protect the citizen from the actions of others.” *Id.* at 280. Commentators on the U.N. Refugee Convention also have defined “persecution” in terms of the failure of state protection. See ATLE GRAHLMADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* (1966); HATHAWAY, *supra* note 2, at 104-05 (“[P]ersecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection.”).

International law recognizes that the granting of refugee status is a humanitarian act and should not be regarded as hostile or unfriendly towards the country of origin. The Preamble to the United Nations Declaration on Territorial Asylum reiterates the principle that every state has the right to admit into its territory any person it wishes without giving rise to complaint by a member state. “These measurers recognize that the role of the recipient countries is an essentially passive one—they admit those who arrive at their borders asking for protection under international human rights provisions.” Judith Ramirez, *The Canadian Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution*, REFUGE, Dec. 1994, at 3, 6 (1994). Because of its focus on the failure of state protection, refugee law recognizes that the agent of persecution may be a non-governmental actor. *Id.* at 5.

7. Sima Wali writes that civil conflict, war, violence and other human rights abuses further skew population demographics, resulting in populations with disproportionate numbers of women, children, and the elderly. Adult women are charged with the responsibility of taking care of children and the elderly. In addition, the legacy of war is commonly accompanied by two main population dynamics: (a) a large majority of widowed and handicapped women and their children; and (b) handicapped and/or orphaned children. These changes have important implications for women as caretakers, who are either burdened by physical vulnerability, which makes them susceptible to human rights violations such as mass/multiple rapes, abduction, torture, forced pregnancy, granting of sexual favors in exchange for food, forced prostitution, unhealthy birth-spacing, domestic violence, and trafficking in women and young girls. These human rights violations, some of which are not unique to women or refugees, compound each other as female refugees and displaced persons become the target of large-scale terror campaigns. Mental health experts widely recognize that such gender-based types of persecution have life-long effects on female victims, depleting their dignity and energy to remake their own lives. Sima Wali, *Refugee Women in Development: Developing Gender-Based Program and Donor Policies as if Refugee and Displaced Women Mattered* (unpublished manuscript, on file with author). Rather than a by-product of warfare, the violence against women and girls has become an objective of warfare, as ethnic breeding and public violence against women who do not conform to cultural practices and norms become widespread. This has important implications not only for how to protect refugee and displaced women and girls, but also how to help them rebuild their lives and families. *Id.*

Others have noted that social, political, and economic upheaval often results in women being left alone as caretakers, and thus being exposed to violent attack particularly during wars and ethnic crises. “Women forced to flee their countries as refugees face continuing gender-related abuse including sexual harassment, rape, and torture by pirates, smugglers, border guards, camp administrators, and employers.” Kelly, *supra* note 4, at 626 (citing Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 INT’L J. REFUGEE L. 518 (1989); Anders B. Johnson, *International Protection of Women Refugees: A Summary of Principle Problems and Issues*, 1 INT’L

also have suffered displacement and violations of fundamental rights as a result of these developments. But international human rights doctrines and discourse—including those related to refugees—traditionally have excluded any specific discussion of the rights of women and generally have failed to recognize sexual and related violence as serious violations, even when committed or directed by a state or an agent of the state.⁸

One hundred and twenty-three states—including all of Western Europe, some of Eastern Europe, Canada, Australia, New Zealand, and the United States—are parties to the 1954 Convention Relating to the Status of Refugees (U.N. Refugee Convention).⁹ That treaty guarantees protection from return of a refugee, defined as a person who is outside his or her country of origin owing to a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”¹⁰ Despite their majority representation among the world’s refugees, the asylum claims of women refugees largely have been unaddressed under current interpretations of the U.N. Refugee Convention.¹¹ In the United States, immigration authorities had not reported a single precedential gender-

J. REFUGEE L. 221 (1989)).

8. See generally Charlotte Bunch, *Women’s Rights as Human Rights: Towards a Revision of Human Rights*, 12 HUM. RTS. Q. 486, 486-98 (1990). Human rights organizations traditionally have focused almost exclusively on torture (excluding rape and other sexual violence), unjust imprisonment, and political persecution, rather than on those serious abuses that are perpetrated on women in less public settings. Reed Boland, *Population Policies, Human Rights, and Legal Change*, 44 AM. U. L. REV. 1257, 1258 (1995).

9. UNHCR Center for Documentation on Refugees, 13 REFUGEE SURV. Q. 102 (1994).

10. U.N. Refugee Convention, *supra* note 2.

11. Because they are poorer, responsible for children, the elderly and handicapped, and more physically vulnerable in various ways, refugee women are less mobile and arrive in the West in vastly smaller numbers than their male counterparts. Judith Ramirez notes that:

This fact alone would indicate the need to ensure that our determination systems are equipped to recognize forms of persecution suffered primarily, if not exclusively, by women. Otherwise, we perpetuate a system which doubly disadvantages women refugees. First, their lesser mobility and fewer resources limit their access to countries like the United States and Canada. And second, once they arrive (in disproportionately low numbers), their experiences of persecution and lack of state protection are less readily recognized.

Ramirez, *supra* note 6, at 3. In general, refugees arrive in the West in proportionately small numbers; 96% of the world’s refugees remain in the developing world. *Id.* at 7 n.2.

based asylum decision until April of 1995, when they issued their first.¹² Similarly, until quite recently, only two United States federal court decisions had addressed, even tangentially, the claims of women to asylum protection.¹³

That past of neglect is changing. Canada has taken the lead internationally with several major decisions addressing the gender-specific claims of women refugees.¹⁴ In 1993 Canada also was the first state

12. See *infra* note 35 and accompanying text.

13. See *Lazo-Majano v. INS*, 813 F.2d 1432, 1432 (9th Cir. 1987) (reversing administrative decision and recognizing claim of Salvadoran woman who had been raped, beaten, and brutalized by a Salvadoran sergeant who threatened to denounce her as a subversive); *Campos-Guardado v. INS*, 809 F.2d 285, 289 (5th Cir. 1987) (rejecting claim of Salvadoran woman from politically active family who, along with other female relatives, was raped by attackers chanting political slogans after they forced the women to witness the hacking to death of male family members by machete). A small number of decisions also involved non-gender-specific women's claims and largely centered on the women's familial relationships and connections. See, e.g., *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985) (reversing administrative decision and granting asylum based on targeting of members of female applicant's family including grandparents); *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985) (reversing administrative decision and granting asylum based on targeting for persecution of those who were educated, professional, and of same tribe as female applicant's family).

The reasons for this neglect are manifold. First, U.S. immigration agencies—at least up until this time—have been notoriously backward. This has been particularly true of the Board of Immigration Appeals (BIA or Board), the highest agency decisionmaker in appeals of individual claims. The Board has published few of its decisions as precedent. Those it has published have been relatively fact-specific and norm-averse, providing little coherent guidance to adjudicators. The Board also has taken a restrictive approach to interpreting the legal definition of “refugee.” For example, the Board has often dismissed claims as involving “personal” non-political disputes, a mischaracterization to which women's claims have been especially vulnerable. See, e.g., *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988) (example of case of male applicant where harm initially dismissed as personal; federal court overruled administrative decision, which had characterized extortion and brutal beating by member of Haitian security forces as personal and economic); *Campos-Guardado*, 809 F.2d at 288 (female applicant's claim mischaracterized as personal). For elaboration of this critique of the Board, see Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433 (1992).

Second, because of the low rate of success of asylum claims generally, advocates have not encouraged female applicants to come forward with their distinct claims. Instead, they often have presented the claims of women as derivative of those of their male partners. See generally Greatbatch, *supra* note 7; Kelly, *supra* note 4. Third, the manner in which adjudicators elicit information from women applicants often leads to inaccurate characterization of their claims. In particular, women may be inhibited from discussing sexual violence without encouragement and counselling. Many women are intimidated by testifying in formal adjudicatory settings in front of male adjudicators, interpreters, and government attorneys. Many women also find the presence of family members to be intimidating. See Johnson, *supra* note 7, at 223; Kelly, *supra* note 4, at 629-30.

14. See, e.g., *Incirciyan v. Minister of Employment and Immigration*, Immigration Appeal Bd. Decision No. M87-1541 (Aug. 10, 1987, Can.); *Cheung v. Canada*, 2 F.C.

party to the U.N. Refugee Convention¹⁵ to issue specific guidelines on the treatment of women asylum claimants. Approximately 600 women have benefitted from these instructions.¹⁶ UNHCR earlier had issued guidelines and recommendations on the treatment of women's claims,¹⁷ as had the European Parliament.¹⁸ The Women Refugees Project, a joint project of Harvard Law School's Immigration and Refugee Clinic and Cambridge and Somerville Legal Services, presented proposed guidelines to the United States immigration authorities one year ago.¹⁹ These proposals, which received the endorsement of thirty-six organizations, were the foundation for the Immigration and Naturalization Service (INS) Memorandum on *Considerations For Asylum Officers Adjudicating Asylum Claims From Women* (hereinafter *INS Gender*

314 (Fed. Ct. 1993). These and other Canadian decisions address an array of abuses including forced marriage, rape, forced abortion, and forced female genital mutilation (FGM). The latter practice is prevalent in some parts of Africa and the Middle East. It may include the removal of the clitoris, the labia minora, and the external genitalia. Infibulation, one form of FGM, involves sewing up of both sides of the vulva, leaving only a narrow passage for menstrual blood and urine. Often these operations are conducted, without anesthetic, on young girls in unhygienic and coercive conditions. See generally A.M. Rosenthal, *Female Genital Torture*, N.Y. TIMES, Nov. 12, 1993, at A33.

Other abuses these decisions have addressed include refusal or inability to conform to social mores (for example, severe sanctions for refusing to wear religious head coverings because of feminist or religious beliefs, or sanctions against single women living without a male relative), loss of custody due to gender (male relative's family automatically obtains custody of children over mother), and battering in certain countries where the state either in law or in practice provides no protection to the woman victim. See generally Ramirez, *supra* note 6.

15. See *supra* note 2.

16. See Ramirez, *supra* note 6. For the text of the guidelines, see IMMIGRATION AND REFUGEE BOARD OF OTTAWA, CAN., GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (Mar. 9, 1993).

17. UNHCR Refugee Women and International Protection Executive Comm., 36th Sess., Conclusion No. 39(k), U.N. Doc. A/40/12 (1985) (recognizing that women who face harsh or inhumane treatment for transgressing the social mores of their societies may be considered a "particular social group" within the terms of the U.N. Refugee Convention); UNHCR Executive Comm. on Refugee Protection and Sexual Violence, 44th Sess., Conclusion No. 73, U.N. Doc. A/AC.96/821 (1993); UNHCR Executive Comm., 36th Sess., P115(4)(k), U.N. Doc. A/AG.96/673 (1991).

18. See European Parliament Resolution on the Application of the Geneva Convention Relating to the Status of Refugees, 1984 O.J. (C 127) 137.

19. See Nancy Kelly, *Guidelines for Women's Asylum Claims*, 6 INT'L J. REFUGEE L. 517 (1994); Nancie L. Katz, *Opening Asylum Doors for Women: Guidelines for Assessing Gender Persecution Are Proposed to INS*, WASH. POST, May 22, 1994, at A11; Bruce Fein, *Seeking a Fair Deal For Women Refugees*, WASH. TIMES, June 1, 1994, at A15.

Considerations), officially issued in May of 1995.²⁰ These *INS Gender Considerations*, which contain both procedural protocols for interviewing traumatized women and substantive interpretations of the current law, open the possibility of a new era for women refugees. They establish the rights of women asylum claimants within the framework of current law and hopefully end a tradition of interpretation by which women have been excluded.

Under that past practice, the very fact that a claim had a gender-related aspect resulted in its dismissal as merely “personal” even when the applicant otherwise established eligibility within a classic analysis of, for example, persecution on account of political opinion.²¹ Despite the new *INS Gender Considerations*, it may be difficult for many women with plainly political views about the position of women in society to receive protection, because of the case law emphasis on proof of motives.²²

Administration decisions on asylum claims based on repressive population policies in China²³ which promote—or permit—coercive

20. IMMIGRATION AND NATURALIZATION SERVICE, CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS FROM WOMEN (May 26, 1995) [hereinafter *INS GENDER CONSIDERATIONS*]; Ashley Dunn, *U.S. to Accept Asylum Pleas for Sex Abuse*, N.Y. TIMES, May 27, 1995, at A1; Judith Gaines, *INS Eases Asylum Guidelines For Women*, BOSTON GLOBE, May 27, 1995, at 13.

21. See *supra* note 13; see also *infra* notes 24-27.

22. See *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (holding that the Guatemalan man whose life was threatened by anti-government guerrillas for refusing to join them had to prove his persecutor was motivated to harm him because of his political opinion). The case has been criticized and its significance questioned by some. See Deborah Anker et al., *The Supreme Court's Decision in INS v. Elias-Zacarias: Is There Any "There" There?*, 69 INTERPRETER RELEASES 285, 289 (Mar. 9, 1992); Mark G. Artlip, *Neutrality As Political Opinion: A New Asylum Standard for a Post-Elias-Zacarias World*, 61 U. CHI. L. REV. 559 (1994). *Elias-Zacarias*, however, continues to be relied upon in the denial of many asylum claims. See, e.g., *Xin-Chang Zhang v. Slattery*, 55 F.3d 732, 751 (2d Cir. 1995) (citing *Elias-Zacarias* in upholding Board's denial of asylum to Chinese applicant whose claim was based on fear of forced sterilization under China's one-child-per-family rule). The Court in *Elias-Zacarias* did emphasize that proof of motives may be direct or circumstantial. *Elias-Zacarias*, 502 U.S. at 483.

The Board of Immigration Appeals also has denied the claims of Muslim women fearing detention, beating, or other persecution (including death) because of their religious and/or political views opposing the treatment of women in those societies. See, e.g., *Fisher v. INS*, 61 F.3d 1366 (9th Cir. 1995) (overruling Board's denial of claim). In part because U.S. case law emphasizes motives, commentators have favored the developing use of the “particular social group” category for women's claims, using gender as the defining “immutable characteristic.” See, e.g., Kelly, *supra* note 4; Walter C. Long, *Escape from Wonderland: Implementing Canada's Rational Procedures to Evaluate Women's Gender-Related Asylum Claims*, 4 UCLA WOMEN'S L.J. 179 (1994).

23. Reed Boland provides a good summary of the implementation of the Chinese policy:

China has pursued the most aggressive antinatalist policy in the world. In China, coercion plays a key role in government population planning and takes

sterilization or abortion have held that these policies do not constitute persecution on the grounds that they are generally applicable, non-political, non-discriminatory laws that only concern reproduction.²⁴

many forms. Much of it is psychological in nature and is addressed to women who are perceived to be violating the mandates of the one-child-per-couple policy adopted by the Central Government. They typically are subjected to the intense pressure of neighbors, co-workers, family planning officials, and Communist party members to modify their behavior by agreeing to use contraception—most often IUDs (which they are forbidden to remove)—undergo sterilization, or, if they are pregnant and already have one child, obtain an abortion. Often this pressure is accompanied by explicit or implicit threats of physical force. In some cases, actual physical force is applied and women have been ordered to have an abortion or undergo sterilization. Indeed, many local laws call for such measures in response to violations of family planning guidelines In addition, the Government withholds various privileges, among them medical, educational, and housing benefits, from those who fail to adhere to guidelines, and imposes fines to force compliance. One result has been an increase in female infanticide and the abortion of female fetuses after the performance of prenatal tests, as many couples limited to having one child would prefer it to be male.

Boland, *supra* note 8, at 1260-61 (citations omitted). China is not unique. According to Boland, the policy of the Indian government to lower birth rates by encouraging women to give birth to male children contributes to the abortion of 50,000 female fetuses a year. "India has one of the most unbalanced ratios of women to men in the world: 929/1000 in 1991—down from 972/1000 in 1901. Due to all causes of neglect, an estimated thirty-seven million women are 'missing' in India." *Id.* at 1274.

In addition to policies like those in China which promote coercive abortion or sterilization, pronatalist policies similarly impinge on procreational freedoms. Boland cites, for example, Romania's pre-1990 policy. Concerned with that country's falling birthrate, the government instituted measures such as prohibitions on abortions and forms of contraception, "forced gynecological examinations in the workplace and monitored pregnancies to ensure that no abortions would occur." *Id.* at 1259. The result was the highest maternal and infant mortality rates in Europe (148.8 per thousand and 26 per thousand, respectively), unsafe and illegal abortions resulting in at least 500 deaths per year and twice the expected number of women suffering from sterility. Tens of thousands of children also were abandoned to state orphanages where, living under substandard conditions, many were exposed to HIV infection. Boland cites similar policies in Albania and other countries. *Id.* at 1259-60.

24. See *Matter of Chang*, Interim Decision No. 3107 (BIA 1989). The Board commented, "We cannot find that implementation of the 'one couple, one child' policy in and of itself, even to the extent that involuntary sterilizations may occur, is persecution or creates a well-founded fear of persecution 'on account of race, religion, nationality, membership in a particular social group, or political opinion.'" *Id.* at 10-11. The Board's decision continued: "If a law or policy is not inherently persecutive . . . one cannot demonstrate that it is a persecutive measure simply with evidence that it is applied to all persons, including those who do not agree with it." *Id.* at 12. The Board subsequently reaffirmed its decision in *Matter of G—*, Interim Decision No. 3215 (BIA 1993). One court, in refusing to defer to the Board's *Chang* decision, found that there

However, Canadian courts²⁵ have found that when these policies are targeted disproportionately at women in particular they are discriminatory on the basis of gender-specific "particular social group" membership, thus meeting the requirements for asylum eligibility. Similarly, recent Canadian and U.S. administrative and judicial decisions²⁶ have recognized asylum claims of women who face severe discrimination or violent retribution in their home countries because of strongly-held religious or other beliefs that prevent them from conforming to gender-specific lifestyle strictures. Thus far, cases in this category have involved the claims of women protesting or resisting cultural or religious mores in Muslim countries.²⁷

have been contrary rulings from different Attorneys General and others within the executive branch on this issue, including Presidential directives and interim regulations stating that claims of anticipated persecution based on opposition to child-bearing policies could be a basis for asylum. See *Di v. Carroll*, 842 F. Supp. 858 (E.D. Va. 1994), *rev'd*, 66 F.3d 315 (4th Cir. 1995). However, this decision was reversed, and other circuits that have considered the issue have upheld the Board. See, e.g., *Xin-Chang Zhang v. Slatery*, 55 F.3d 732 (2d Cir. 1995). The Second Circuit Court of Appeals deferred to the *Chang* decision and it upheld the denial of a claim by an applicant who alleged that he fled because he would have been forced to undergo sterilization and also believed that people should be free to make such reproductive choices. *Id.*

25. See *Cheung v. Canada*, 2 F.C. 314 (Fed. Ct. 1993) (holding in a unanimous decision that Chinese woman who violated Chinese policy by having second child and fled after attempt to forcibly sterilize her had a well-founded fear of persecution on account of her "membership in a particular social group," within the meaning of the U.N. Refugee Convention). Another Canadian federal court denied the claim of a male applicant, rejecting, *inter alia*, the argument that he had been persecuted for his political beliefs in favor of freedom of procreational choice. *Chan v. Canada*, 3 F.C. 675 (Fed. Ct. 1993), *overruled on other grounds*, 128 D.L.R.4th 213 (Can. 1995).

26. See *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993) (upholding the denial of the particular claim but finding that feminist beliefs constitute a political opinion and that "particular social group" membership could be established for Iranian women with strongly held beliefs about the role and status of women); *Incirciyan v. Minister of Employment and Immigration*, Immigration Appeal Bd. Decision No. M87-1541 (Aug. 10, 1987, Can.) (granting asylum based on "particular social group" membership to Turkish widow living alone who was subject to daily harassment by young men, sexual assaults and an abduction attempt, where the government was unwilling to protect her because of its view that it was inappropriate for her to be living without the protection of a male relative).

27. See, e.g., *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993). One example of restrictive policies regarding cultural or religious mores are those of the current government of Iran. Fundamental to Islamic law, as interpreted by the Iranian government, is the discriminatory treatment and the relegation of women, through force when necessary, to a position of extreme subordination within the social structure of Iran. Haleh Afshar, *Khomeini's Teachings and Their Implications for Iranian Women*, in *IN THE SHADOW OF ISLAM* 75, 77, 81 (Azar Tabari & Nahid Yeganeh eds., 1992); see also Alexandra J. Zolan, *The Effect of Islamization on the Legal and Social Status of Women in Iran*, 7 B.C. THIRD WORLD L.J. 183, 189-92 (1987).

In Iran, the political and religious realms are merged. An offense against the tenets of Islam, as interpreted by the government, is viewed as an offense against the state. Afshar, *supra*, at 77-78. The legal system establishes guidelines for behavior and punishments for non-conformity. The Constitution of Iran limits women to the roles of mother and childbearer. David L. Neal, *Women as a Social Group: Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 211 (1988) (analyzing treatment of women in post-revolutionary Iran as persecution, based on social group membership).

Within the family, women are completely dependent on the dictates of men. Zolan, *supra*, at 189. Marriage is seen as a national obligation for the express purpose of procreation. Haleh Afshar, *Muslim Women and the Burden of Ideology*, 7 WOMEN'S STUD. INT'L F. 248 (1984). Men are allowed multiple wives. Neal, *supra*, at 213. In divorce, the husband is automatically given custody of a couple's children. *Id.* Women suffer extensive restrictions on employment, education, dress, and even the manner in which they may communicate with men. *Id.* at 214, 224; Zolan, *supra*, at 189.

Women need the permission of their husbands or other male relatives in order to work. *Id.* at 213-14. Their employment is limited to traditionally female sectors, such as the textile industry, and their access to professional training is limited. *Id.* In the workplace, they are segregated from men. *Id.* Day-care facilities for children are seen as undermining the family, and mothers of young children are prohibited from seeking full-time employment. Zolan, *supra*, at 190.

Women's access to education is similarly restricted. Neal, *supra*, at 214. They are segregated in classrooms, limited to certain text books and may study only specified subject areas considered appropriate for females. *Id.* at 214 n.52.

Since the revolution, the Islamic government has imposed a code of moral behavior on women that is designed to subjugate them. The reinstatement of the *hejab*, the Islamic practice of veiling, requires women to cover every part of their bodies but their faces and hands, except when in the privacy of their husbands' bedrooms. Zolan, *supra*, at 189. Women who refuse to veil themselves are deemed subversive and may be labeled as prostitutes, a charge that can result in execution. Neal, *supra*, at 218-20. Under Islamic law, a woman who is a virgin may not be executed. To conform to this precept, women facing execution are often raped by prison guards prior to their execution. As sexual intercourse outside of marriage is forbidden, "temporary" marriage ceremonies are conducted before the rape. Neal, *supra*, at 220-21. Punishment for failure to veil is at least 74 lashes, administered without legal proceedings. *Id.* at 219.

In addition to state-enforced punishment, women are also subject to abuse by the *Hezbollahi*, semi-official groups endorsed by religious and government leaders, which attack and detain women believed to violate the *hejab*. *Id.* at 220.

In criminal courts, a woman's testimony will only be accepted if corroborated by a man, and only if two men are unable to testify. Neal, *supra*, at 215. Female victims of a crime must compensate the criminal's family for the loss suffered as a result of his punishment. As a natural outcome, men may freely victimize women with little fear of legal sanction. Zolan, *supra*, at 190. The legal system permits a husband to murder his wife with impunity if he catches her in the act of adultery. *Id.*

The discrimination imposed upon women in Iran is both extreme and systematic. This is not a case of simple disparate treatment of women within society; nor is it a case in which the laws geared toward protecting women are ineffectively enforced or narrow in scope. The Iranian government has constructed a legal framework that deprives women of fundamental human rights and imposes upon them extreme and violent penalties for any attempt to refuse to conform or to enforce human rights guarantees under

Women request asylum but often are denied when the harm they fear or to which they have been subjected is rape or other sexual violence. Asylum has been denied even when that sexual violence is part of a state or military policy—as for example, in the former Yugoslavia²⁸—where sexual violence is tolerated or not controlled by the state or otherwise takes place in a context in which the state is failing in its fundamental duty to protect its populace. The issue in these cases is whether the harm or threatened harm rises to a level of severity necessary to constitute “persecution.” Cases involving rape and other sexual violence should be relatively non-controversial. More complex issues concerning the meaning of persecution²⁹ include whether isolated instances of discrimination,³⁰ mere economic disadvantage,³¹ or even a single incident of detention without physical assault or abuse, entail persecution. In contrast, there never has been any question that physical assaults and other forms of serious physical harm constitute persecution,³² even apart from the question of whether rape in these contexts constitutes torture under international law (which it does).³³ These are first-level human rights violations and seem to fit squarely within traditional interpretations of persecution under United States law.³⁴ But

international law.

28. It has been reported that, as part of the Bosnian Serb policy of “ethnic cleansing,” Bosnian Serb soldiers raped some 20,000 women. In the wake of such allegations, the U.N. Security Council established a commission to gather evidence of these and other war crimes. To this author’s knowledge, there are no asylum decisions specifically involving rape or fear of rape in the context of the conflict in the former Yugoslavia. It is cited by way of example only. See Paul Lewis, *Rape Was Weapon of Serbs*, *U.N. Says*, N.Y. TIMES, Oct. 20, 1993, at A1.

29. For a discussion of these issues, see 1 & 2 DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES: A GUIDE TO ADMINISTRATIVE PRACTICE* (forthcoming 1996) (manuscript at ch. 5, § D, on file with author).

30. “Discrimination is *not* normally persecution. However, discriminatory practices and experiences can accumulate over time or increase in intensity so that they *rise to the level of persecution*.” INS, U.S. LAW AND INS REFUGEE/ASYLUM ADJUDICATIONS: THE BASIC LAW MANUAL 24 (1994) (citing, *inter alia*, UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1988) [hereinafter INS BASIC LAW MANUAL]).

31. A state’s deliberate action to seriously impair a person’s ability to earn a livelihood may constitute persecution. See, e.g., *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988).

32. The INS explicitly makes this point in a recent memorandum. “Serious physical harm consistently has been held to constitute persecution. Rape and other forms of severe sexual violence clearly can fall within this rule.” INS GENDER CONSIDERATIONS, *supra* note 20, at 9.

33. See *infra* note 38 and accompanying text.

34. “Serious violations of basic human rights can constitute acts of persecution. . . . Forms of persecution such as torture or death are sometimes easy to identify and classify as persecution. Less egregious violations of human rights are more difficult to identify.”

in many cases—at least in the United States—the fact that the harm is sexual seems to undermine its otherwise unambiguous persecutory character.

In one recent case, for example, during the illegal regime which took control following the September 1991 coup in Haiti, military men gang-raped a woman in direct retaliation for her political activities in support of the democratically elected president and his government.³⁵ A young woman, she was made permanently unable to bear children as a result. Because the violence was sexual, its perceived aspect of sexual pleasure overwhelmed its political character as an act of violence and as a political weapon so that the original adjudicator denied her claim. Yet a man tortured or physically harmed under the same circumstances would be found eligible. Since in many cases persecution of women refugees has a dimension of sexual violence, it has been difficult for them to obtain asylum.³⁶

INS BASIC LAW MANUAL, *supra* note 30, at 123. James Hathaway analyzes persecution in terms of violations of fundamental human rights—the international standards establishing a state's duties towards its citizens—as set forth in the International Covenant on Civil and Political Rights (ICCPR), entered into force Mar. 23, 1976, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), entered into force Jan. 3, 1976. According to Hathaway, in the hierarchy of rights established by those instruments (as well as by the U.N. Declaration of Human Rights and the U.N. Charter), first-tier rights are those which are designated as non-derogative in the ICCPR and include, *inter alia*, freedom from arbitrary deprivation of life and protection against torture or cruel, inhuman, or degrading punishment or treatment. See HATHAWAY, *supra* note 2, at 109.

35. *In re D-V-*, Interim Decision No. 3252 (BIA 1993) (designated as precedent on Apr. 25, 1995). This case was unpublished and non-precedential until various advocacy groups convinced the Board to designate it as binding precedent. The applicant's name is withheld to protect her identity.

36. One vivid example is the case of *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987), involving a Salvadoran woman raped by guerrillas who chanted political slogans after forcing her and other female relatives to witness the hacking to death of male family members.

The Fifth Circuit ignored the painfully obvious "political implications" of Campos-Guardado's case, and unreasonably deferred to the B.I.A. The guerrillas had used Campos-Guardado's eyes, ears, and body to make a political statement. If that were not so, they might have left her dead—an unfortunate witness whom they needed to silence. But they wanted her to speak, in order to testify as an eyewitness to the retribution meted out to their opponents. Regardless of what political opinion they might have imputed to her, they committed a violent political act against her. She was persecuted, plain and simple. It is hard to avoid the implication that the sexual aspect of the crime led the asylum decisionmakers to regard the crime as personal rather

In the human rights arena as well, there has been increasing recognition by governmental and inter-governmental organs that state-sponsored rape, during detention or military occupation, should rank among the gravest of human rights violations.³⁷ Rape, particularly when used as a political weapon, meets the definitional criteria for torture under international law.³⁸ Last year, our Women Refugees Project, represent-

than political. The several tiers of decisionmakers somehow believed the persecutors were overcome by a moment of "private" sexual instinct in the midst of their manifestly political crime. If Campos-Guardado had been a man, and nothing about the persecutory event were changed, she would have surely been granted asylum.

Long, *supra* note 22, at 209-10.

There are many women refugees' claims which are not gender-specific *per se* but which have an important gender dimension that must be recognized if these women are to be questioned with the necessary sensitivity and if distortion is to be avoided. One example is the case of a 38-year-old South African represented by the Women Refugees Project whose claim to asylum is currently pending decision. She was arrested and beaten 20 years ago because of her leadership role in a student movement protesting *apartheid*. Her application describes the actions of the security police who tied her hands and feet together while they simultaneously beat her and made her "jump like frogs." They also stripped off her clothes and "used an electric prod on [her] nipples." See Gaines, *supra* note 20, at 20 (quoting victim).

37. U.N. Comm. on the Elimination of Discrimination Against Women, 11th Sess., General Recommendation No. 19, at 2, U.N. Doc. CEDAW/C/1992/L.1/Add.15 (1992) (noting that gender-based violence violates the right not to be subject to torture or to cruel, inhuman, or degrading treatment or punishment); see also *Physical Violence Against Detained Women that is Specific to their Sex*, U.N. Economic and Social Council Commission on the Status of Women, 34th Sess., Agenda Item 5, U.N. Doc. E/CN.6/1990/L.18 (1990) (calling upon member states to take appropriate measures to eradicate these acts of violence and to report to the Secretary General on legislation and other measures they have taken to prevent such violence). See also *infra* note 38.

38. Article 1 of the U.N. Convention Against Torture defines torture as: any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1985) [hereinafter U.N. Torture Convention]. Article 2 of the Inter-American Convention to Prevent and Punish Torture defines torture as:

any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

ing many of our refugee clients, in conjunction with several other individuals and organizations including Professor Rhonda Copelon of the International Women's Human Rights Clinic at City University of New York Law School, filed a *Communication Respecting the Violations of the Human Rights of Haitian Women* with the Inter-American Commission on Human Rights of the Organization of American States (OAS).³⁹ As a result of this communication as well as its own investigations of other abuses, the Commission issued a report on Haiti under the illegal regime.⁴⁰ The Report contains findings of various violations, including sexual violence against women, used as a political weapon. The Commission also made specific legal findings that rape and other sexual violence constitute torture. The Report is excerpted here not only because it illustrates the seriousness of the violations Haitian women may face, but also because it is one extremely powerful illustration of the abuses of women generally which have received relatively little attention.

As summarized in the Report, women in Haiti during the time of the illegal regime were victims of a campaign of sexual terror, rape, and forced incest, directed by or with the consent of the former military

Basic Documents Pertaining to Human Rights in the Inter-American System, Organization of American States (OAS) 1992, at 83.

As argued by this author and others in a communication submitted to the OAS Inter-American Commission on Human Rights, recognition of the severity of sex-specific violations of women's rights is particularly important for the women who have suffered from them and from which they are struggling to survive. See Rhonda Copelon et al., *Communication Respecting the Violations of the Human Rights of Haitian Women* (Sept. 26, 1994) (unpublished investigation filed with the Inter-American Commission on Human Rights of the Organization of American States, on file with the *San Diego Law Review*). The failure to recognize these wrongs as the most serious type of violation is discriminatory and increases the survivors' suffering by shifting the blame to them from the perpetrators of such wrongs. This failure also deprives the victim-survivor of outside vindication and confirmation. Moreover, by encouraging shame, non-recognition discourages reporting. This problem is enhanced by the fact that, in many societies, of which Haiti is but one example, rape and sexual abuse are not categorized as grave crimes of violence, but rather as "assaults on the morals," wherein the focus of inquiry is on the moral standing or chastity of the women rather than the egregiousness of the perpetrators' conduct. This creates de facto impunity for these wrongs contributing to a climate that accepts, and ultimately invites, the abuse of women. See Kelly, *supra* note 4, at 674.

39. Copelon, *supra* note 38.

40. INTER-AMERICAN COMM'N ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES, REPORT ON THE SITUATION OF HUMAN RIGHTS IN HAITI (1995) [hereinafter OAS REPORT ON HUMAN RIGHTS IN HAITI].

leaders, in order to terrorize and punish them for their explicit or implicit support for democracy. It is clear that they were attacked in a gender-specific way, as women, most often in their homes, frequently in front of their children. This campaign of rape and violence directed against women struck at the very core of society; it was the military's "signal to the world that it ha[d] removed all limits to its transgressions, thereby forcing the population into compliance with its rule."⁴¹

Women who were victims of these violations and who are now in the United States should be recognized as refugees and granted asylum.⁴² Despite ongoing dangers, many of these Haitian women have expressed willingness now to come forward and give their names to legal actions, and to appear before Haiti's newly-constituted truth commission.⁴³ They are courageously taking control of their lives, forming self-help groups, supporting one another, overcoming societal and personal shame—and insisting upon justice. Even in the time of the worst abuses, one delegation noted:

What impressed us most . . . was the ability of Haitians to live with dignity—and in many cases to resist actively—in the face of economic and political conditions that are grim beyond description. . . . Amid the epic stories of terror, hunger and displacements recounted, clearly discernible was Haiti's women as a great sea of courage washing over their misery.⁴⁴

These Haitian women as well as other women human rights abuse survivors demand and deserve equity and recognition that the harms inflicted upon them cannot be excluded from consideration under the U.N. Refugee Convention, or other human rights instruments.

41. *Courage Washing Over Misery: Haitians Told Us Their Stories*, HUMAN RIGHTS WATCH, July 21, 1994, at 2 [hereinafter *Haitian Stories*].

42. Under U.S. law, past persecution provides a distinct basis for asylum eligibility, particularly where applicants can demonstrate the severity and lasting psychological and related harm stemming from that persecution. For example, one of our clients at the Harvard student legal services office, an activist Haitian woman raped twice in retaliation for her and her family's political activities, has tried to commit suicide because of the shame and the trauma she suffered.

It should be noted as well that there also is substantial evidence of ongoing danger in Haiti, despite the return of President Aristide. See *infra* note 44.

43. See *infra* note 44.

44. *Haitian Stories*, *supra* note 41, at 5, 32. For reports on continued political violence in Haiti following President Aristide's return in October 1994, see *Haiti: Security Compromised: Recycled Haitian Soldiers on the Police Frontline*, HUMAN RIGHTS WATCH Mar. 1995; Susan Benesch, *Truth and Consequences: Haiti's Investigation of Atrocities is Risky*, MIAMI HERALD, Dec. 31, 1994, at A1.

TRANSLATED EXCERPTS FROM: INTER-AMERICAN COMM'N ON
HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES, REPORT ON
THE SITUATION OF HUMAN RIGHTS IN HAITI 39-47 (1995)

The OAS Report on the Situation of Human Rights in Haiti [OAS Report on Haiti] comprehensively reviewed the political situation in Haiti during 1994 and 1995. *The OAS Report on Haiti documented the systematic human rights violations by the illegal regime that occurred during the period of the illegal regime. Of particular interest here are the sections relating to violence against women and children:*

VIOLENCE AGAINST WOMEN AND SEXUAL ABUSE

As mentioned above, since the coup d'état against President Jean - Bertrand Aristide, the illegal de facto regime has committed a multitude of human rights abuses against the civilian population, particularly since mid-1993 after the failure of the Governors Island Agreement. The destruction of democratic movements in Haiti has created a climate of terror, and women have been used as victims. The primary instruments of the repression inflicted on women and children in Haiti have been rape and other types of violence and abuse committed by members of the army and police forces, their armed civilian auxiliaries, the attaches,⁴⁵ paramilitary groups, and members of FRAPH,⁴⁶ acting with complete impunity.

45. Author's note: "Attaches are civilians who are employed, armed and directed by the military and police. Attaches are omnipresent and abuse their enormous discretionary powers through murder, torture, arrests, beating, extortion, imprisonment, and rape." *Rape in Haiti: A Weapon of Terror*, HUMAN RIGHTS WATCH, July 1994, at 11.

46. Author's note: FRAPH stands for the *Front révolutionnaire pour l'avancement et le progrès Haïtien*. (The organization renamed itself the *Front Révolutionnaire Arme*, but is known by both names.) FRAPH is a paramilitary and political force created in 1993 by members of the armed forces and other opponents of President Aristide. Its membership consists of *macoutes* and armed civilians, and it often engaged in operations with members of the army against the Haitian population. *The Situation of Democracy and Human Rights In Haiti, Note by the Secretary-General, Addendum*, U.N. GAOR International Civilian Mission, 48th Sess., Agenda Item 31, at 6, U.N. Doc. A/48/532/Add.3 (1994).

Women of varying ages and circumstances, from pregnant women to five year-old girls, are among the victims of rape. Women who played an important role in the formation of democratic institutions in Haiti were identified because of their political activities. Many Haitian women's organizations were attacked; others were destroyed. Other women were identified because of their personal links and family relationships, and reprisals were taken against them for the political ideas and activities of a spouse, son, father, nephew, or other male family member. Some women were identified because of their own status and role in helping the civil society. The fact of belonging to a popular organization or being involved in an activity whose purpose was to improve the local community was considered as the expression of a political opinion in favor of President Aristide. Numerous women were abused merely because they lived in a slum (Cite Soleil) that supports President Aristide. Remaining alone to care for their children because their husbands had to flee or were murdered, many of them were easy, defenseless prey.

The OAS/UN Mission affirmed, in this respect:

It always happens in the same way: armed men, frequently soldiers or FRAPH members, violently enter the house of a political militant to arrest him. When he is not there and the family cannot say where he is, the intruders turn against his wife, sister, daughter, or cousin.

Sexual abuse against Haitian women was carried out in various ways, but with a single aim: to create a climate of terror among people supporting Aristide. Women were generally raped by several men on the same occasion. Pregnant women and those who had just given birth were not safe from these crimes. Often, a violation occurred in the home of the victim, in front of the children and other family members, and thus not only the woman, but the entire family was terrorized. In many cases, the woman was forced to witness the rape or murder of her daughter or other family member before being herself raped. In one case of which the IACHR was informed, a 15 year-old was forced to rape his own mother.

Other forms of sexual torture included blows to the breasts and stomach, often inflicted on pregnant women with the intention of causing them to abort or damage their ability to have children. Many women were brutally murdered by soldiers or attaches, who shot them or pushed sharp objects in their vagina[s]. In addition to the sexual abuse, women were illegally detained and subjected to other forms of torture that resulted in mutilation.

Haitian women have rarely presented complaints about violations to the police, partly because of fear of reprisals, since in many cases the

perpetrators were soldiers who were part of the police. Historically in Haiti, the police force has been a part of the army, and it is essentially soldiers who carried out policing functions. In the few cases where women attempted to report violations committed by soldiers and their auxiliaries, the authorities threatened them with reprisals, or simply did not investigate their complaints [T]here was corruption and inefficiency in the judicial system and, in practical terms, in contradiction with the 1987 Constitution [Articles 42 and 43], the army, rather than the civilian authorities, investigated such cases Neither does the shame imposed by society on a woman who has been raped encouraged [sic] her to make a report on the attack. This underlines the importance of clearly recognizing sexual violence as a serious human rights violation.

The wounds inflicted on women who were abused sexually are both physical and psychological. Many of them feel shame and, what is more, cannot return to their hometowns for fear of rejection. In numerous cases, their private lives and family relationships have deteriorated. In other cases, the results of medical tests carried out on some women showed them to be HIV positive, while other women died because of sexual abuse.

During its visit to Haiti in May 1994, the IACHR received news of 21 cases of rape. Victims who gave their testimonies before the IACHR Delegation refused to give their names for fear of reprisals. The Commission presents a summary report of two cases which have the same elements and characteristics as contained in the 21 cases of rape.

The victim is 42 years old and a member of the National Front for the Change and Democracy (FNCD). Her husband was murdered, and she was persecuted by members of FRAPH and "macoutes." In October 1993, about 7:00 or 8:00 p.m., members of these groups went to her daughter's house to find out where she was and kill her. Three men entered the house; the others remained outside. The men were dressed in olive green clothing and carried Uzis. They threatened her: "You support Aristide. You are a 'Lavalas.' We'll kill everyone we find in the house." Two of them raped her and they took away everything she had, including money. The victim stated that she had a medical certificate. After the above-mentioned events, the victim hid a few days at the home of friends, who finally asked her to leave because they were afraid. The victim and her five children now have nowhere to live. In May 1994, she received further threats and was beaten by two civilians.

The victim is 46 years old. Around midnight on November 29, 1993 as she slept, three men entered her home. They were wearing olive green uniforms and carrying Uzis and pistols. Some wore hoods. A number of them raped her; they beat her and destroyed her property. They also threatened her, saying that if there was talk of the incident the next day on the radio, they would return

and kill her. They told her what occurred took place because she was an Aristide supporter. Although the neighbors heard noises, no one came out of their house to help her for fear of being killed.

This campaign of violations increased in intensity in early 1994. The OAS/UN International Civilian Mission pointed out that between February and July 1994, 77 cases of sexual violation were reported, including 55 against women who were militant or had close relations with male militants. Some human rights groups working specifically on the issue of women indicate that they have counted up to 18 violations in a single day, many of which were clearly reprisals for political activities. This use of sexual violence was documented in reports made by the IACHR, the OAS/UN International Civilian Mission, nongovernmental organizations such as Human Rights Watch and the National Coalition for Haitian Refugees, and a number of Haitian women who fled Haiti and obtained refuge in the United States.

The exhaustive and detailed information presented to the IACHR by representatives of nongovernmental organizations, such as Haitian Women's Advocacy Network, International Women's Human Rights of CUNY Law School, Human Rights Program, Immigration and Refugee Program of Harvard Law School, Women Refugees Project, Center for Human Rights Legal Action, Center for Constitutional Rights, MADRE, and the Law Office of Morrison and Foerster, clearly shows sexual violations and other types of violence against Haitian women as a form of reprisal, intimidation, terror, and degradation of women.

In the great majority of cases, it was demonstrated that the acts of sexual abuse were committed by representatives of the army and the police and their armed civilian auxiliaries, with the authorization or tolerance of the illegal regime. This therefore constitutes a violation of Article 5 of the American Convention on Human Rights, which deals with the right to humane treatment, and Article 11 concerning the protection of honor and dignity.

These abuses against Haitian women also constitute violations of other provisions of the Convention and of the American Declaration of the Rights and Duties of Man, as well as of other international treaties that Haiti has ratified and is obliged to respect: the Inter-American Convention to Prevent and Punish Torture and the Convention on the Elimination of All Forms of Discrimination Against Women. The relevance is also noteworthy of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, recently approved at the meeting of the OAS General Assembly in June 1994 in Belem do Para, Brazil.

In the past, the Commission considered a number of cases of sexual and other abuses against women, as a result condemning violations of the rights contained in the Convention and the American Declaration.

In the case of Haiti, sexual violations were the result of a repression for political purposes. The intention of those in power has been to destroy any democratic movement whatever, through the terror created by this series of sexual crimes.

The Commission considers that rape represents not only inhumane treatment that infringes upon physical and moral integrity under Article 5 of the Convention, but also a form of torture in the sense of Article 5(2) of that instrument.

Consistent with the definitions elaborated in the Inter-American Convention to Prevent and Punish . . . Torture, which Haiti has signed, and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Commission considers that the rape and other sexual abuse of Haitian women inflicted physical and mental pain and suffering in order to punish women for their militancy and/or their association with militant family members and to intimidate or destroy their capacity to resist the regime and sustain the civil society particularly in the poor communities. Rape and the threat of rape against women also qualifies as torture in that it represents a brutal expression of discrimination against them as women. From the testimonies and expert opinions provided in the documentation to the Commission, it is clear that in the experience of torture victims, rape and sexual abuse are forms of torture which produce some of the most severe and long-lasting traumatic effects.

The facts submitted to the Commission reflect that rape was neither random nor occasional but widespread, open and routine. Whether this occurred by direction of or with the encouragement or acquiescence of the illegal regime, the Commission considers that such use of rape as a weapon of terror also constitutes a crime against humanity under customary international law.

The Commission notes recognition in recent years of the gravity of rape in international human rights law, including the emphasis by [the] World Conference on Human Rights on the gravity of violence against women in general and in particular, of "systematic rape" brought to the fore by the atrocities in the former Yugoslavia, the approval by the General Assembly of the Declaration on the Elimination of Violence Against Women and most specifically, the reports of the Special

Rapporteur on Torture to the Human Rights Commission who described rape in detention as a form of torture. We also note that in . . . international humanitarian law, torture has been treated as a "grave breach" of the Geneva Conventions by the U.N. Human Rights Commission and by the International Committee for the Red Cross. The Statute of the International Criminal Tribunal for the Former Yugoslavia incorporates rape as a "grave breach" of the Geneva Conventions (article 2) and a violation of the laws and customs of war (article 3), and, explicitly names rape as a crime against humanity (article 5(g)).

VIOLATIONS OF THE RIGHTS OF CHILDREN

Children have also suffered violations of their human rights for the purposes of the repression carried out by soldiers. They have been victims of summary executions, attacks on their physical integrity, and other inhumane and degrading treatment. As a result of the wave of repression against the Haitian population, families and children have been affected. For example, the phenomenon of marronage⁴⁷ mentioned above has led children to flee with their families and suffer the same dangers to which the adults have been exposed, putting a sudden stop to their childhood and their school routine. In some cases, minors have been left completely on their own, since their parents were murdered.

In its report of July 1994, the OAS/UN International Civilian Mission noted that it had received news of 51 cases of human rights violations against children between February 1 and May 31. The ages of the victims varied between five months and 17 years. One half of the cases occurred in the Port-au-Prince slum, Cite Soleil. In spite of the fact that the authors of the violations wore civilian clothing, on some occasions they were identified by the local people as members of the Armed Forces or FRAPH. Similarly, the Mission indicated it had received news of 23 cases of extrajudicial executions, deaths in suspicious circumstances, and deaths as a result of torture or cruel treatment against children.

The Permanent Council of the OAS, by its Resolution 630, had expressed its concern with this type of violation and requested the IACHR to give priority to the investigation of child abductions. During its visit in May 1994, the IACHR received the testimony of members of the family of a four year-old boy who had been kidnapped in March

47. Author's note: "The phenomenon of massive displacement as a result of the repression is known as 'marronage' and has become a strategy used by soldiers to eliminate all types of opposition to the de facto regime." OAS REPORT ON HUMAN RIGHTS IN HAITI, *supra* note 40, at 37.

1994. According to the statement, three armed men arrived, saying they were looking for the child's father who was a member of a political organization of young people in Cite Soleil. When they did not find the man, they raped his wife and took away the child. The child was found unharmed four days later at a radio station.

Also during this visit, the Commission received information that mothers were raped in the presence of their children. In some cases sexual violations were committed against girls aged 10 and 12 years. In the case of arbitrary arrest, parents were detained along with their children.

The OAS Report concludes with recommendations for the provision of support to the democratic government of Haiti with regard to human rights, governance, elections, institution-building, and the strengthening of democracy.



MEMORANDUM

SUBJECT Considerations For Asylum Officers Adjudicating Asylum Claims From Women	DATE May 26, 1995
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TO All INS Asylum Office/rs
HQASM Coordinators

FROM Phyllis Coven, Office
of International Affairs

Recent international initiatives have increased awareness and suggested approaches to gender-related asylum claims. Enhancing understanding of and sensitivity to gender-related issues will improve U.S. asylum adjudications while keeping pace with these international concerns. This guidance will serve as a useful tool for new Asylum Officers, and will help to ensure uniformity and consistency in procedures and decisions. In-Service training at all Asylum Offices will be critical to using this guidance effectively.

Despite the increased attention given to this type of claim during the past decade, gender-based asylum adjudications are still relatively new developments in refugee protection. This "Considerations" memorandum is a natural and multi-faceted outgrowth of a set of gender guidelines issued by the UNHCR in 1991, the 1993 Canadian gender guidelines, a proposed set of guidelines submitted by the Women Refugees Project (WRP) of the Harvard Immigration and Refugee Program, Cambridge and Somerville Legal Services, in 1994, and recent (and still developing) U.S. caselaw. It is similar in approach to the Haiti "Considerations" memorandum of March 9, 1993 and other memoranda issued to maintain

consistency among Offices and Officers. Additionally, this memorandum seeks to enhance the ability of U.S. Asylum Officers to more sensitively deal with substantive and procedural aspects of gender-related claims, irrespective of country of origin.

I. BACKGROUND AND INTERNATIONAL GUIDANCE

This section reviews the historical and human rights context in which guidance on gender-sensitive and gender-based adjudications have evolved internationally.

Human rights violations against women are not a new phenomenon. Yet, only recently have they risen to the forefront of the international agenda. Spurred by the United Nations and a handful of commentators, notably in Canada and the United States,¹ understanding of gender-related violence in general is increasing.

The evaluation of gender-based claims must be viewed within the framework provided by existing international human rights instruments and the interpretation of these instruments by international organizations.² The following international instruments and documents contain gender-related provisions that recognize and promote the principle that women's rights are human rights, and that women's rights are universal:

- CEDAW: The 1979 *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) is the most comprehensive international human rights instrument for women. CEDAW prohibits actions by States which are discriminatory and requires States to take affirmative steps to eradicate discriminatory treatment of women.
- UN DECLARATION: In June 1993, the United Nations World Conference on Human Rights emphasized the need to incorporate the rights

1. J. Greatbatch, "The Gender Difference: Feminist Critiques of Refugee Discourse" (1989), 1(4) *Intl. J. Refugee L.* 518; A. Johnson, "The International Protection of Women Refugees: A Summary of Principal Problems and Issues" (1989), 1(2) *Intl. J. Refugee L.* 221; D. Neal, "Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum" (1988), 20 *Col. Human Rights L.R.* 203. Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 *Cornell Int'l. L.J.* 625 (1993).

2. These instruments need not be ratified by the United States to provide guidance as a source of human rights norms. See, *Basic Law Manual, Second Edition* (BLM2), at pgs. 11-12.

of women as part of universal human rights,³ and called upon the General Assembly to adopt the Declaration on the Elimination of Violence against Women.⁴ On December 20, 1993, the United Nations General Assembly adopted the Declaration. The 1993 Declaration recognizes violence against women as both a per se violation of human rights and as an impediment to the enjoyment by women of other human rights.⁵

- UNHCR CONCLUSIONS/GUIDELINES: In 1985, the UNHCR Executive Committee adopted *Conclusion* No. 39 noting that refugee women and girls constitute the majority of the world refugee population and that many of them are exposed to special problems. The *Conclusion* also recognized that States are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered a "particular social group."⁶ In October, 1993, the UNHCR Executive Committee adopted *Conclusion* No. 73 on Refugee Protection and Sexual Violence.⁷ The 1993 *Conclusion* recognizes that asylum seekers who have suffered sexual violence should be treated with particular sensitivity, and recommends the establishment of training programs designed to ensure that those involved in the refugee status determination process are adequately sensitized to issues of gender and culture. In 1991, the Office of the High Commissioner issued its *Guidelines on the Protection of Refugee Women* (document EC/SCP/67).⁸ The 1991 UNHCR guidelines primarily address issues pertaining to women in refugee camps. However, the guidelines also

3. Adoption of the Final Documents and Report of the Conference: *Report of the Drafting Committee, Addendum, Final Outcome of the World Conference on Human Rights*, 24 June 1993, A/Conf.157/DC/1/Add.1, p. 8-9, para.9.

4. United Nations General Assembly, *Adoption of the Final Documents and Report of the Conference, Report of the Drafting Committee, Addendum, Final Outcome of the World Conference on Human Rights*, 24 June 1993, "A/CONF.157/DC/1/Add.1," p. 23, para. 3.

5. United Nations General Assembly, *Declaration on the Elimination of Violence Against Women* (Geneva: U.N. General Assembly, "A/RES/48/104," 23 February 1994), p. 2.

6. United Nations General Assembly, *Vienna Declaration and Programme of Action, Note by the Secretariat*, 12 July 1993, "A/CONF. 157/23," p. 18-20.

7. *Conclusions on the International Protection of Refugees* adopted by the Executive Committee of the UNHCR Programme, No. 39(k) (36th Session 1985); see also, Section III *Legal Analysis of Claims*, *infra*.

8. United Nations High Commissioner for Refugees, "Executive Committee Conclusion No. 73 Refugee Protection and Sexual Violence," *Report of the 44th Session* (Geneva: Office of the United Nations High Commissioner for Refugees, U.N. Doc. "A/AC.96/821 (1993)").

8. United Nations High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women* (Geneva: Office of the United Nations High Commissioner for Refugees, July 1991).

address gender-related persecution and recommend procedures to make the refugee adjudication process more accessible to women.

- CANADIAN GUIDELINES: On March 9, 1993, the Canadian Immigration and Refugee Board (IRB) issued the ground-breaking "Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution."⁹ The Canadian guidelines attracted considerable interest both in the United States and other countries because they are the first national guidelines to formally recognize that women fleeing persecution because of their gender can be found to be refugees. In developing the guidelines, the IRB carried out extensive consultations with interested governmental and non-governmental groups and individuals. More than two years after their release, the Canadian guidelines remain a model for gender-based asylum adjudications.

This is not intended to be a full compendium of international sources of gender-related instruments and documents, only illustrative of the types of initiatives which have taken place during recent years. All of these initiatives underscored and contributed to the development of international human rights and humanitarian law relating to women refugee claimants; and contributed directly to the formulation of the U.S. guidelines.

Like the Canadian guidelines, this guidance is a collaborative effort developed after consultations with interested governmental and non-governmental organizations (NGOs) and individuals. The Women Refugees Project (WRP) of the Harvard Immigration and Refugee Program, Cambridge and Somerville Legal Services, initially highlighted these concerns to INS and was instrumental in the development of this guidance. Representatives from the INS Office of the General Counsel, the INS Resource Information Center, and the Executive Office for Immigration Review also participated in discussions held in Washington D.C. in April, 1994. The views of various womens' and law groups, the UNHCR and the Canadian IRB added to a productive and informative dialogue.

9. Immigration and Refugee Board, *Guidelines Issued By the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa, Canada: Immigration and Refugee Board, 9 March 1993).

II. PROCEDURAL CONSIDERATIONS FOR U.S. ASYLUM OFFICERS

A. Purpose and Overview

The purpose of this section is to emphasize the importance of creating a “customer-friendly” asylum interview environment that allows women claimants to discuss freely the elements and details of their claims.

Asylum Officers should bear in mind the context of these human rights and cross-cultural considerations when dealing with women claimants:

- The laws and customs of some countries contain gender-discriminatory provisions. Breaching social mores (e.g., marrying outside of an arranged marriage, wearing lipstick or failing to comply with other cultural or religious norms) may result in harm, abuse or harsh treatment that is distinguishable from the treatment given the general population, frequently without meaningful recourse to state protection. As a result, the civil, political, social and economic rights of women are often diminished in these countries.
- Although women applicants frequently present asylum claims for reasons similar to male applicants, they may also have had experiences that are particular to their gender. A woman may present a claim that may be analyzed and approved under one or more grounds. For example, rape (including mass rape in, for example, Bosnia), sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds.
- Some societies require that women live under the protection of male family members. The death or absence of a spouse or other male family members may make a woman even more vulnerable to abuse.
- Women who have been raped or otherwise sexually abused may be seriously stigmatized and ostracized in their societies. They may also be subject to additional violence, abuse or discrimination because they are viewed as having brought shame and dishonor on themselves, their families, and their communities.

B. Asylum Interviews/Officers

All INS Asylum Officers - men and women - will be expected to conduct interviews of women with gender-based claims. To the extent that personnel resources permit, however, Asylum Offices may allow women Asylum Officers to interview these cases. An interview should

not generally be canceled because of the unavailability of a woman

Women asylum applicants who have suffered sexual violence may have inhibitions about disclosing past experiences to male interviewers

Asylum Officer. But we must also recognize that, because of the very delicate and personal issues arising from sexual abuse, some women claimants may understandably have inhibitions about disclosing past experiences to male interviewers.

Cases of this kind can often (but not always) be identified by a pre-interview reading of the Form I-589 application for asylum. Sometimes, only during the course of the asylum interview is it revealed that an applicant has suffered sexual violence. In such cases, Asylum Officers (men and women) must use their utmost care to assure that the interview continues in an atmosphere that allows for the discussion of past experiences.

C. Interpreters/Presence of Family Members

Asylum Offices do not ordinarily have control over the interpreters chosen by asylum applicants. Testimony on sensitive issues such as sexual abuse can be diluted when received through the filter of a male interpreter. It is also not difficult to imagine the reluctance of a woman applicant to testify about sexual violence through a male interpreter, particularly

if the interpreter is a family member or friend. We are hopeful that NGOs

Testimony on sensitive issues such as sexual abuse can be diluted when received through the filter of a male interpreter

will convey our openness to female interpreters. However, interviews should *not* generally be canceled and rescheduled because women with gender-based asylum claims have brought male interpreters.

Interviewing Asylum Officers should provide women with the opportunity to be interviewed outside the hearing of other members of

their family, especially male family members and children. The testimonial process can be a highly stressful experience for anyone, and there is a greater likelihood that a woman applicant may more freely communicate a claim involving sexual abuse when family members are not present. Sexual violence is seen in some cultures as a failure on the part of the woman to preserve her virginity or marital dignity. Discussing her experience in front of family members may become a further source of alienation.

D. Interview Considerations

The atmosphere created during the non-adversarial asylum interview should allow for the full discussion of past experiences. Asylum Officers may

have to build a rapport with an applicant to elicit claims and to enable the

It should not be necessary to ask for precise details of the sexual abuse; the important thing is establishing whether it has occurred and the apparent motive of the perpetrator.

applicant to recount her fears and/or past experiences. Women applicants may have difficulty speaking about past experiences that are personally degrading, humiliating, or culturally unacceptable. Officers should begin interviews with questions that do not deal with sensitive matters, and should move on to issues such as sexual abuse and violence only when well into the interview. It should not be necessary to ask for precise details of the sexual abuse; the important thing is establishing whether it has occurred and the apparent motive of the perpetrator.

Keep in mind that, from the point of view of most applicants, Asylum Officers are authority figures and foreign government officials. Officers must also be

culturally sensitive to the fact that every asylum applicant is testifying in

Gender-Based Claim:

- *Opening Statement*
- *Outside Hearing of Family*

a foreign environment and may have had experiences which give her (or him) good reason to distrust persons in authority, and a fear of encounters with government officials in countries of origin may carry

over to countries of reception. This fear may cause some asylum applicants to be initially timid.¹⁰ Asylum Officers can overcome much of this nervousness by giving a brief "Opening Statement" (see, Asylum Officer Corps Training, Interviewing Summary Of Techniques, HQ 7/14/94).

E. Demeanor/Credibility Issues

Inasmuch as Asylum Officers deal with people from a diverse array of countries, cultures and backgrounds, cross-cultural sensitivity is required of all Officers irrespective of the gender of the applicant. Nowhere is this sensitivity more needed than in assessing credibility and "demeanor". By "demeanor" is meant how a person handles himself/herself physically; for example, maintaining eye contact, shifts in posture, and hesitations in speech.

Women who have been subject to domestic or sexual abuse may be psychologically traumatized. Trauma can be suffered by any applicant, regardless of gender, and may have a significant impact on the ability to present testimony.

The demeanor of traumatized applicants can vary. They may appear numb or show emo-

From the applicant's point of view, Asylum Officers are authority figures and foreign government officials - Applicants may have had experiences which give them good reason to distrust persons in authority

tional passivity when recounting past events of mistreatment. Some applicants may give matter-of-fact recitations of serious instances of mistreatment. Trauma may also cause memory loss or distortion, and may cause other applicants to block certain experiences from their minds in order not to relive their horror by the retelling.

10. "A person who, because of his experiences, was in fear of the authorities in his [or her] own country may still feel apprehensive vis-a-vis any authority. He [or she] may therefore be afraid to speak freely and give a full and accurate account of his [or her] case." UNHCR *Handbook* at ¶ 198.

In Anglo-American cultures, people who avert their gaze when answering a question, or seem nervous, are perceived as untruthful. In other cultures, however, body language does not convey the same message. In certain Asian cultures, for example, people will avert their eyes when speaking to an authority figure as a sign of respect. This is a product of culture, not necessarily of credibility.

Questionable demeanor can be the product of trauma rather than a lack of credibility

It bears reiteration that the foregoing considerations of demeanor can be the products of trauma or culture, not credibility.¹¹ Poor interview techniques/cross-cultural skills may cause faulty negative credibility findings.

F. Derivative Status or Independent Claim

Women in many cultures are viewed as completely subordinate to their husbands; that is, not having or deriving anything independently of their spouses. Asylum Officers of course do not make this assumption regarding the asylum eligibility of spouses. When a husband does not appear to have an approvable claim, an Asylum Officer should routinely review the merits of the wife's case even though she may be listed merely as a derivative on her husband's application and may not have filed a separate Form I-589 asylum application.

G. INS Resource Information Center

Asylum Officers must be able to rely on objective and current information on the legal and cultural situation of women in their countries of origin, on the incidence of violence, including both sexual and domestic, and on the adequacy of state protection afforded to them.

11. The *BLM2* points at pg. 104 that an applicant's demeanor while testifying may aid the assessment of credibility. Demeanor may be used to determine credibility, but it is most effectively used in conjunction with other factors. HQASM cautions against reliance on demeanor as an exclusive method to assess credibility for a gender-based or any other kind of asylum claim. "Credibility involves more than demeanor. It apprehends the overall evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *In Re Lugo-Guadiana*, 12 I&N Dec. 726, 729 (BIA 1968).

To this end, the Resource Information Center (RIC) will be issuing papers ("alerts" and country profiles) dealing with these issues.

RIC will be working on a number of projects in an attempt to assure that information concerning violations of the rights of women are distributed regularly and systematically to all Asylum Offices.

III. LEGAL ANALYSIS OF CLAIMS

Women make up a large percentage of the world's refugees. In order to qualify as a refugee under our laws, female applicants must — like any applicant — show that they cannot return home and cannot avail themselves of the protection of their 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 section 101(a)(42). Often, of course, the asylum claim of a female applicant will have nothing to do with her gender. In other cases, though, the applicant's gender may bear on the claim in significant ways to which the adjudicator should be attentive. For example, the applicant may assert a particular kind of harm, like rape, that either is unique to women or befalls women more commonly than men. Or an applicant may assert that she has suffered persecution on account of her gender or because of her membership in a social group constituted by women. She might also assert that her alleged persecutors seek to harm her on account of a political or religious belief concerning gender. Such claims must be analyzed within the terms of United States law, but gender-related claims can raise issues of particular complexity, and it is important that United States asylum adjudicators understand those complexities and give proper consideration to gender-related claims.

This section will describe how such claims should be analyzed within the framework of U.S. law. As with asylum cases in general, which can be among the most complicated adjudications in U.S. administrative law, there are no special "bright line" tests for evaluating claims that are based on the applicant's gender. This is a developing area, and adjudicators should freely seek legal counsel regarding these issues as the decisional law evolves.

PERSECUTION: HOW SERIOUS IS THE HARM?

As in all asylum cases, the asylum officer must assess whether the harm that the applicant fears or has suffered is serious enough to be

regarded as “persecution” as that term is understood under the relevant international and domestic law. *See Basic Law Manual: Asylum*, pp. 23-27. The Board of Immigration Appeals has interpreted persecution to include threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom. *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), overruled on other grounds by *Matter of Mogharrabi*, 19 I&N Dec, 439 (BIA 1987). “Generally harsh conditions shared by many other persons” do not amount to persecution. *Id.* *See also Kovac v. INS*, 407 F.2d 107 (9th Cir. 1969) (persecution involves “the infliction of suffering or harm upon those who differ . . . in a manner regarded as offensive”); *Hernandez-Ortiz v. INS*, 77 F.2d 509, 516 (9th Cir. 1985) (persecution can occur where “there is a difference between the persecutor’s views or status and that of the victim; it is oppression which is inflicted because of a difference the persecutor will not tolerate”). In addition, though discriminatory practices and experiences are not generally regarded by themselves as persecution, they “can accumulate over time or increase in intensity so that they may rise to the level of persecution.” *Basic Law Manual* at 22.

The forms of harm that women suffer around the world, and that therefore will arise in asylum claims, are varied. Forms of harm that have arisen in asylum claims and that are unique to or more commonly befall women have included sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence, and forced abortion. The form of harm or punishment may be selected because of the gender of the victim, but the analysis of the claim should not vary based on the gender of the victim. Asylum adjudicators should assess whether an instance of harm amounts to persecution on the basis of the general principles set out above.

A. Rape and Other Forms of Sexual Violence as Persecution

Serious physical harm consistently has been held to constitute persecution. Rape and other forms of severe sexual violence clearly can fall within this rule. *See Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987) (Salvadoran woman raped and brutalized by army sergeant who denounced her as subversive had been “persecuted” within the terms of the Act). In *Matter of —*, Krome (BIA May 25, 1993, which the Board recently voted to designate as a precedent), it was determined that the gang rape and beating of a Haitian woman in retaliation for her political activities was “grievous harm” amounting to persecution. Severe sexual abuse does not differ analytically from beatings, torture, or other forms of physical violence that are commonly held to amount to persecution. The appearance of sexual violence in a claim should not

lead adjudicators to conclude automatically that the claim is an instance of purely personal harm. As in all cases, the determination that sexual abuse may be serious enough to amount to persecution does not by itself make out a claim to asylum. The applicant must still demonstrate that the fear of persecution is well-founded and that the persecution was threatened or inflicted on account of a protected ground.

B. Violation of Fundamental Beliefs as Persecution

The Third Circuit has considered whether an Iranian woman faced with having to wear the traditional Islamic veil and to comply with other harsh rules imposed on women in Iran risked "persecution" as the Board has defined it. *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993). The record included evidence about the possibility of physical harm. The applicant had asserted in her brief that the routine penalty for women who break the moral code in Iran is "74 lashes, a year's imprisonment, and in many cases brutal rapes and death." *Id.* at 1241. These, the court stated, would constitute persecution. The court went on to assume that "the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs." *Id.* at 1242. Having to renounce religious beliefs or to desecrate an object of religious importance might, for example, be persecution if the victim held strong religious beliefs. Noting that the administrative record was "sparse," the court found that the applicant before it did not risk persecution, because she had not shown either that she would disobey the rules and risk the consequences or that obeying the rules would be "so profoundly abhorrent" as to amount to persecution. *Id.*

The court did not specify how "profoundly abhorrent" to one's beliefs forced behavior must be to constitute persecution. It did note that "the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional." *Id.* at 1240. The degree of abhorrence an applicant claims to feel at such forced behavior must be objectively reasonable — that is, it would have to be a degree of abhorrence that a reasonable person in the circumstances of the applicant could share. *Id.* at 1242 n.11.

Fisher v. INS, 37 F.3d 1371 (9th Cir. 1994) rehearing *en banc* pending, also concerned an Iranian woman whose claim was based on

failure to conform to fundamentalist religious and cultural norms. The *Fisher* court emphasized that persecution should not be evaluated “solely on the basis of the physical sanction” 37 F.3d at 1379. Citing *Fatin*, the court stated that “when a person with religious views different from those espoused by a religious regime is required to conform to, or is punished for failing to comply with laws that fundamentally are abhorrent to that person’s deeply held religious convictions, the resulting anguish should be considered in determining whether the authorities have engaged in ‘extreme conduct’ that is ‘tantamount to persecution.’” 37 F.3d at 1381.

NEXUS: THE “ON ACCOUNT OF” REQUIREMENT

Some of the most difficult issues in asylum law arise over whether a gender-based asylum claim involves persecution “on account of” one of the five statutory grounds. This is a critical part of the analysis under U.S. law. *INS v Elias-Zacarias*, ___ U.S. ___, 112 S.Ct. 812 (1991). Discussing this requirement in the context of a political opinion claim based on forced recruitment, the Supreme Court emphasized that persecution must be threatened or inflicted “on account of the *victim’s* political opinion, not the persecutor’s. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion.” *Id.* at 816. Thus harm must be inflicted in order to punish the victim for having one or more of the characteristics protected under the statute. *See Acosta*, 19 I & N Dec. at 226.

A. *Actual or Imputed Political Opinion*

Asylum claims may often raise assertions of fear on account of a political opinion having to do with gender-related issues. The Third Circuit in *Fatin* had “little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes.” 12 F.3d at 1242. The political opinion of the applicant in that case did not, however, provide a basis for refugee status. Though she had shown that she generally possessed political beliefs about the role of women in society that collided with those prevailing in Iran, she had not shown that she would risk severe enough punishment simply for holding such views. Nor had she shown that she actually possessed the narrower political opinion that Iran’s gender-specific laws and repressive social norms must be disobeyed on grounds of conscience, although the court had indicated that the penalties for disobedience were harsh enough to amount to

persecution. *Id.* at 1242-43. However, the case does make clear that an applicant who could demonstrate a well-founded fear of persecution on account of her (or his) beliefs about the role and status of women in society could be eligible for refugee status on account of political opinion.

Some tribunals have held or suggested that an applicant can establish eligibility for refugee status by demonstrating that he or she is at risk on account of a political opinion that the persecutor believes the applicant to have, whether or not the applicant actually possesses that political opinion. This is the doctrine of "imputed political opinion." *See, e.g., Ravindran v. INS*, 976 F.2d 754 (1st Cir. 1992); *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992); *Matter of R-*, Interim Decision #3195 (BIA 1992); Opinion of the General Counsel, "Continuing Viability of the Doctrine of Imputed Political Opinion" part I, pp. 1-6 (INS, January 19, 1993). Thus, in addition to the question whether views on issues that relate to gender can constitute a "political opinion" under the INA, asylum claims sometimes raise the question whether a woman has been persecuted because of a political opinion (regardless of its substance) that has been imputed to her.

In *Campos-Guardado v. INS*, 809 F.2d 285, 289 (5th Cir. 1987), for example, the Fifth Circuit considered the claim of a woman whose family members had been politically active in El Salvador. Armed attackers came to her home, bound the applicant and other female family members and forced them to watch while the attackers murdered male family members. The attackers then raped the applicant and the other female family members while one attacker chanted political slogans. In what might appear to be an extreme assessment of the evidence, the court affirmed the Board's determination that the applicant had not established that the attackers were motivated by a political opinion they imputed to the victim. Reasonable minds could differ over this record. The court might reasonably have concluded that the chanting of political slogans during the rape indicated not merely that the attackers were politically motivated, but more specifically that they believed the petitioner to have contrary political views and that they punished her because of it. In any case, *Campos-Guardado* illustrates the need for an adjudicator to carefully ascertain all the facts surrounding an allegation of persecution in order to assess whether there are indicia that the act was committed or threatened on account of a protected characteristic.

B. Membership in a Particular Social Group

1. General

“Membership in a particular social group” is perhaps the least clearly defined ground for eligibility as a refugee. See, e.g., *Fatin*, 12 F.3d at 1238 & nn. 4, 5, citing courts and commentators who have “struggled” with the concept. An applicant may, of course, have a claim based on more than one ground; “this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.” UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (“Handbook”) para. 77. Nevertheless, the Convention and the INA clearly set forth membership in a particular social group as an independent basis of refugee status.

The Board of Immigration Appeals has stated that :

“persecution on account of membership in a particular social group” encompasses persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it 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.

Acosta, 19 I&N Dec. at 233.¹²

12. According to the UNHCR *Handbook*,

A “particular social group” normally comprises persons of similar backgrounds, habits or social status Membership of such a particular social group may be at the root of persecution because there is no confidence in the group’s loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government’s policies.

Handbook, ¶¶ 77-78. These paragraphs are best understood as a possible explanation for harm directed at the members of a particular social group rather than as a requirement that the persecutor must inflict or threaten harm because it regards the group as a political opponent. The latter interpretation would render the “particular social group” category redundant. Evidence that the persecutor is motivated to act by its view of the group as subversive would likely satisfy a U.S. adjudicator that the persecutor is causing or threatening harm on account of actual or imputed political opinion.

According to the Ninth Circuit, an adjudicator considering a claim of persecution on account of membership in a particular social group must determine:

- 1) whether the class of people identified by the asylum applicant is cognizable as a particular social group under the applicable laws;
- 2) whether the applicant qualifies as a member of the group;
- 3) whether the group has in fact been targeted for persecution on account of the characteristics of the group members; and
- 4) whether "special circumstances" are present that would justify regarding mere membership in the group in itself as sufficient to recognize the applicant as a refugee.

Sanchez-Trujillo v. INS, 801 F.2d 1572, 1574-75 (9th Cir. 1986). The requirement of "special circumstances" apparently applies only when the applicant's claim is based on mere membership in the social group.

2. Social Group Defined by Gender

An increasing number of asylum applicants claim that gender, alone or along with other characteristics, can define a "particular social group." The Second Circuit has stated that gender alone cannot. "Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group." *Gomez v. INS*, 947 F.2d 660, 664 (2nd Cir 1991). The Third Circuit has taken a different view. In *Fatin*, the court emphasized that an Iranian applicant who feared persecution because she is a woman would be a member of a particular social group under the INA. Ms. Fatin was not eligible for asylum, however, because she had not shown that persecutors would seek to harm her "based *solely* on her gender." 12 F.3d at 1240 (emphasis added).¹³

13. The Eighth Circuit has adopted a similar approach. "Safaie asserts that Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group. We believe this category is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear based solely on their gender." *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994). Although this language on its face would suggest that gender could never define a particular social group, the court does not make so broad a statement. Though its language is imprecise, the *Safaie* court cites the portion of *Fatin* in which the Third Circuit concluded that, while gender can define a social group under the INA, the record

Thus, while some courts have concluded as a legal matter that gender can define a particular social group, no court has concluded as a factual matter that an applicant has demonstrated that the government (or a persecutor the government could not or would not control) would seek to harm her solely on account of her gender. The courts have then considered whether gender might be one characteristic that combines with others to define the particular social group.

In *Fatin*, for example, the applicant's primary argument was not that she risked harm simply for being female. Rather, she argued that she risked harm as a member of a "very visible and specific subgroup: Iranian women who *refuse to conform* to the government's gender-specific laws and social norms." 12 F.3d at 1241, quoting petitioner's brief (emphasis supplied by the court). This group, the court noted, is not made up of all Iranian women who hold feminist views, nor even of all those who object to the rules that govern women in that country. It is limited to the smaller group of women who so strongly object that they refuse to conform, despite the risk of severe punishment. If a person would choose to suffer severe consequences rather than to comply with rules contrary to her beliefs, the court reasoned, then those beliefs might well be so fundamental to her identity or conscience that she ought not have to change them. The subgroup that the applicant asserted therefore could be seen as a particular social group. Moreover, the record indicated that the punishment facing the members of that group is severe enough to constitute persecution. The applicant was not a refugee, though, because she had not shown that she was a member of such a group. She had testified only that she would try to avoid as much as she could the strictures that she objected to. *Id.*

Thus the *Fatin* court found that women in Iran could constitute a "particular social group" and recognized the applicant's membership, but found that the members were not at risk of persecution. The court also seemed to recognize the narrower subgroup of Iranian women who find their country's gender-specific laws offensive and do not wish to comply with them, but similarly found no evidence that people in this narrower group faced harm serious enough to constitute persecution. Last, the court recognized the narrowest subgroup of Iranian women whose opposition to Iran's gender-specific laws is so profound that they would disobey at serious peril; it held that the possible consequences of disobedience were extreme enough to be persecution but found that petitioner was not in the particular social group. In each scenario the

before it contained no evidence from which a reasonable factfinder could conclude that persecutors in Iran seek to harm people simply because they are women.

court regarded gender, either alone or as part of a combination, as a characteristic that could define a particular social group within the meaning of the INA. *Accord, Safaie*, 25 F.3d at 640, *citing Fatin* (although “a group of women, who refuse to conform [with moral code in Iran] and whose opposition is so profound that they would choose to suffer the severe consequences of noncompliance, may well satisfy the definition,” the applicant had failed to show that she fell within that group).

This is consistent with the statement of the Board in *Acosta* that “sex” might be the sort of shared characteristic that could define a particular social group. It is also consistent with the view taken by the UNHCR Executive Committee, of which the United States is a member. In 1985 the Executive Committee

recognized that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a “particular social group” within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention.

Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, No. 39(k) (36th Session 1985).

When considering whether gender might combine with other characteristics to define a particular social group, asylum adjudicators should consider whether such additional characteristics are likely to be ascertainable by persecutors. In *Gomez*, the applicant argued — in line with the suggestion in *Acosta* that a shared past experience might define a particular social group — that she was a refugee based on her membership in the class of women who had been previously battered and raped by Salvadoran guerrillas. The court denied her claim, finding that she had failed to produce evidence that persons in this group could be identified as members by would-be persecutors and would be targeted for further harm on the basis of their common characteristic — that is, having been harmed by the guerrillas in the past. For this reason, the group could not be recognized as a “particular social group” within the meaning of the INA. *Gomez*, 947 F.2d at 664.

3. *Social Group Defined by Family Membership*

Asylum seekers often claim to have suffered harm or to face the risk of harm because of a family relationship. In *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993), the court concluded: "There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of a nuclear family." This appears to follow the pronouncement of the BIA in *Matter of Acosta* that "kinship ties" could be the shared characteristic defining a particular social group. *Gebremichael* concerned an Ethiopian applicant who had been imprisoned and tortured by Dergue government officials seeking information about the applicant's brother. The court found that

the link between family membership and persecution is manifest: as the record makes clear and the INS itself concedes, the Ethiopian security forces applied to petitioner the "time-honored theory of *cherchez la famille* ('look for the family')," the terrorization of one family member to extract information about the location of another family member or to force the family member to come forward. As a result, we are compelled to conclude that no reasonable factfinder could fail to find that petitioner was singled out for mistreatment because of his relationship to his brother. Thus, this is a clear case of "[past] persecution on account of . . . membership in a particular social group."

10 F.3d at 36. See also *Ravindran v. INS*, 976 F.2d 754, 761 n.5 (1st Cir. 1992), quoting *Sanchez-Trujillo*, 801 F.2d at 1576 ("a prototypical example of a 'particular social group' would consist of the immediate members of a certain family, the family being the focus of fundamental affiliational concerns and common interests for most people"). Without mentioning *Sanchez-Trujillo*, however, or exploring the question in depth, the Ninth Circuit later held that the concept of persecution on account of membership in a particular social group does not extend to the persecution of a family. *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991).

While the state of the law is therefore uncertain in the Ninth Circuit, there is nevertheless Board and federal court support for the principle that family membership could define a "particular social group" under the asylum laws. Obviously all other elements of the definition must be satisfied for this to be the basis of eligibility as a refugee. There must be past persecution or a well-founded fear of future persecution, and the harm must be threatened or inflicted on account of the applicant's membership in the group. Adjudicators should also note that the applicant's gender need not play any role in whether family membership can define a particular social group in the context of a particular case; *Gebremichael*, for example, was male. But claims based on family membership are frequently asserted by female applicants, particularly in

countries where men tend to be more active politically than women. Thus, adjudicators should be aware of the caselaw on this point.¹⁴

PUBLIC VERSUS PRIVATE ACTS

1. *Is the Persecutor the Government or Someone the Government is Unable or Unwilling to Control?*

After the adjudicator has examined the degree of harm and whether it has been threatened or inflicted on account of one or more of the five grounds, it is still necessary to inquire about the availability of protection within the country of claimed persecution. This is based on the notion that international protection becomes appropriate where national protection is unavailable.

A person is a refugee if he or she has a well-founded fear of persecution (as a result of one of the five factors in the definition) because he or she is not adequately protected by his or her government.

Basic Law Manual at 28. Caselaw establishes that this means, in part, that the persecutor can be either the government or a non-government entity that the government is unable or unwilling to control. See *Matter of Villalta*, Int. Dec. No 3126 (BIA 1990).

In the usual case, the government will be the alleged persecutor. The question may arise, however, whether an act committed or threatened by a government official was nevertheless a purely private one. The Ninth Circuit considered whether a woman who was "singled out to be bullied, beaten, injured, raped, and enslaved" was persecuted by an agent of the government for political or for personal reasons in *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir 1987). There the persecutor, a member of the Salvadoran military, threatened to accuse the applicant of subversion. He then did so, to a friend in the police force. Based on evidence of severe treatment of subversives by Salvadoran authorities, the court determined that the applicant was a refugee on account of the political opinion that could be imputed to her because of the public

14. In addition, adjudicators analyzing the degree of harm and the reasonableness of an applicant's fear should note that "the Board and the courts of appeals have consistently recognized evidence about treatment of one's family as probative of such a threat." *Ananeh-Firempong v. INS*, 766 F.2d 621, 627 (1st Cir. 1985) (Citations omitted.)

accusation, even without evidence that she actually held subversive political views. In *Lazo-Majano*, therefore, an act that might have been regarded as personal violence not covered by the INA was held to have become persecution on account of a protected characteristic because of the conduct of the persecutor. Cf. *Matter of Pierre*, 15 I&N Dec. 461 (BIA 1975) (husband's status as a legislator in Haiti did not by itself make abuse of his wife persecution on account of political opinion even though the Haitian government would not restrain the husband).

The Sixth Circuit considered the distinction between public and private acts in a claim based on sexual harassment in *Klawitter v. INS*, 970 F.2d 149 (6th Cir. 1992). There the applicant claimed that she feared the unwanted sexual advances of a colonel in the Polish secret police. The court agreed with the position of the Board that “[h]owever distasteful his apparent treatment of the respondent may have been, such harm or threats arising from a personal dispute of this nature, even one taking place with an individual in a high governmental position, is not a ground for asylum.” . . . Although petitioner's testimony recounts an unfortunate situation, harm or threats of harm based solely on sexual attraction do not constitute ‘persecution’ under the Act.” 970 F.2d at 152.¹⁵

These cases involve public officials who commit what is commonly seen as a private act. In such situations adjudicators must determine whether a reasonable basis exists for regarding the act as a “public” one that can be attributed to the government or an agent the government is unable or unwilling to control. Compare *Klawitter* (sexual abuse by officer of Polish secret police was a purely private act) with *Lazo-Majano* (otherwise private acts of brutality by military officer treated as having become “public” when officer falsely accused victim in public of political opposition, putting her at risk of harm from other military officers). Adjudicators must also determine, as always, whether the applicant faces harm “on account of” a protected characteristic. *Elias-Zacarias*.

15. This does not mean that sexual harassment could never amount to persecution no matter the seriousness; nor does it mean that a government official could never engage in sexually abusive conduct as a means of punishing someone on account of a protected ground. *Klawitter* instead reiterates the requirement that an asylum seeker must show that harm is threatened or inflicted on account of a protected characteristic within the meaning of *Elias-Zacarias*, and that the agent of harm must be the government or someone the government is unable or unwilling to control. As in all asylum cases, the adjudicator must explore thoroughly the apparent motives of the persecutor and the level of harm inflicted or threatened in deciding cases involving sexual harassment or sexual assault. Likewise, the adjudicator must examine the identity of the alleged persecutor and the role of the government in offering protection.

As mentioned above, the persecutor might also be a person or group outside the government that the government is unable or unwilling to control. If the applicant asserts a threat of harm from a non-government source, the applicant must show that the government is unwilling or unable to protect its citizens. See *Matter of Villalta*, Int. Dec. 3126 (BIA 1990); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1005 (9th Cir. 1988). It will be important in this regard, though not conclusive, to determine whether the applicant has actually sought help from government authorities. *Id.* Evidence that such an effort would be futile would also be relevant.

2. *Is State Protection Possible Elsewhere in the Country?*

The principle that international protection becomes appropriate where national protection is unavailable also means that, to be eligible for international protection, an applicant must generally demonstrate that the danger of persecution exists nationwide. See *Acosta*, 19 I&N Dec. 211; *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988); *Matter of R-*, Int. Dec. 3195 at 7-9 (BIA 1992); *Quintanilla-Ticas v. INS*, 783 F.2d 955, 957 (9th Cir. 1986). If there is evidence that the applicant can avoid the threat by relocating to a different part of the country or that a government would offer protection from otherwise private acts of harm elsewhere in the country than the locality where those acts take place, then normally the applicant will not qualify for asylum. See *Beltran-Zavala v. INS*, 912 F.2d 1027, 1030 (9th Cir. 1990).

This principle becomes crucial where the applicant alleges private actions — such as domestic violence — that the state will not protect against. In such situations the officer must explore the extent to which the government can or does offer protection or redress, and the extent to which the risk of harm extends nationwide. According to the UNHCR *Handbook*, “a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.” UNHCR *Handbook*, ¶ 91. Whether is it “reasonable under all the circumstances” to expect an applicant to have sought refuge from acts of domestic violence or other seemingly “private” acts will of course depend on the facts of the case. Asylum adjudicators should carefully explore the circumstances giving rise to the harm or risk of harm, as well as the extent to which government

protection would have been available in other parts of the country. The adjudicator must consider whether protection was available as a factual matter as well as in the law of the country and whether, under all the circumstances, it would be reasonable to expect a woman to seek residency elsewhere in her country. This underscores the general need to develop the record fully, with respect to both the applicant's particular circumstances and the conditions prevailing in the country of origin.

IV. CONCLUSIONS: TRAINING & MONITORING/FOLLOW-UP

A. Training

This guidance is *REQUIRED READING* for all interviewing and supervising Asylum Officers. Photocopies should be made for the fullest possible distribution within the Corps. Upon receipt of this guidance, each Asylum Office must initiate four hours of in-Service training designed to help Officers to use this guidance, and reinforce their awareness of and sensitivity to gender and cross-cultural issues. Training materials will be provided by Headquarters and, in certain instances, trainers may be drawn for the ranks of concerned NGOs.

This guidance will be included in all future training sessions as a separate module. These training activities, and the information being gathered by the RIC, will enhance the ability of Asylum Officers to make informed, consistent and fair decisions.

Headquarters will continue to keep Office/rs abreast of the latest information on issues of gender and culture. Further training on these and related topics will take place as required. Training is critical to using this guidance effectively.

B. Monitoring

Asylum Officer interviewing and decisionmaking should be monitored systematically by Asylum Office Directors and Supervisory Asylum Officers. The latter will be held accountable for assuring that Asylum Officers fully implement this guidance.

As caselaw on gender-related persecution evolves, this guidance will be revised from time to time. Headquarters will keep track of all developments in the law of gender-related persecution, both in the United States and internationally. At the same time, procedures will be established to ensure collection of statistics on various aspects of gender-related claims adjudicated by the AOC.

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RECEIVED
MAY 15 1964
FROM
DR. J. H. GOLDSTEIN
100 EAST WASHINGTON STREET
CHICAGO, ILLINOIS 60601

Dear Dr. Goldstein:
I have received your letter of May 11, 1964, regarding the
loan of the NMR spectrometer to your laboratory. I am
pleased to hear that you are interested in the instrument
and would like to use it for your research. The
instrument is currently being used by Dr. [Name] and
will be available for your use starting on [Date].
I will be happy to discuss the terms of the loan
with you at your convenience.

Sincerely,
[Name]
[Title]
Department of Chemistry
The University of Chicago