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Substantial Change in Circumstances: An Unjustified Reason to Deny Post-War Asylum Claims from Afghan and Iraqi Women

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SUBSTANTIAL CHANGE IN CIRCUMSTANCES: AN UNJUSTIFIED REASON TO DENY POST-WAR ASYLUM CLAIMS FROM AFGHAN AND IRAQI WOMEN

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I. INTRODUCTION

The status of women in Afghanistan during the Taliban era, and in Iraq during the Saddam Hussein era, was deplorable. After the events of September 11, 2001, the United States and other western nations made attempts to bring democracy to both countries. Yet, neither the liberation of the Iraqis from Saddam’s rule nor the Afghans from Taliban rule has succeeded in changing the status of women in either country more than superficially. Despite this fact, judges in immigration courts sometimes rely on “substantial change in circumstances” as a reason to deny post-war asylum claims. The stark reality is that nothing has effectively changed in the status of women in either country since the War on Terror began in 2001. While women in Afghanistan and Iraq continue to suffer gender-related persecution, asylum officers and judges in the United States are none-the-wiser.

II. BASIC LAW OF ASYLUM IN THE UNITED STATES

Under the Immigration and Nationality Act, a refugee is defined as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is

unable or unwilling to return to, and is unable or unwilling to avail . . . herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹

A refugee seeking asylum in the United States “carries the burden of proving [her] statutory ‘refugee’ status and thereby establishing asylum eligibility.”² Female applicants from Iraq and Afghanistan most often rely on the protected categories of persecution on account of political opinion and membership in a particular social group to advance their applications for asylum.³ Though the Act does not define persecution, both federal and immigration courts have held that persecution connotes extreme behavior, including “threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.”⁴ “[It] does not encompass all [types of actions] that [the American] society regards as unfair, unjust, or . . . unconstitutional.”⁵ If courts were to interpret persecution so broadly, a large majority of women in politically unstable countries would qualify for asylum in the United States.⁶ Therefore, ordinary “[d]iscrimination on the basis of race or religion, [though] morally reprehensible . . . , does not ordinarily amount to ‘persecution.’”⁷ Even officially sanctioned legal and economic discrimination against individuals does not amount to “persecution” sufficient to warrant grant of asylum.⁸ But in exceptional cases, discrimination can be “severe and pervasive [enough] to constitute ‘persecution’ within the meaning of the Act.”⁹ However, this determination is strictly made on a case-by-case basis.

“[T]o establish persecution ‘on account of’ [her] political opinion,” an applicant must show that the persecutor is motivated by his perception of the

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1. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2000).
2. *Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1230 (11th Cir. 2005) (per curiam).
3. *Id.* at 1230–31.
4. *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993).
5. *Id.*
6. *Id.*
7. *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995).
8. *See Ahmed v. Ashcroft*, 341 F.3d 214, 217 (3d Cir. 2003).
9. *Ghaly*, 58 F.3d at 1431.

applicant's opinion, rather than by his own political beliefs.¹⁰ Further, the applicant must show: 1) that she holds a political opinion; 2) that her political opinion is known to her persecutors; and 3) that the persecution was or will be on account of her political opinion.¹¹ A showing "that there exists a generalized or random possibility of persecution" on account of political opinion is not enough; the alien "must show that [s]he is at particular risk," that is, that "her predicament is appreciably different from the dangers faced by [her] fellow citizens."¹²

On the other hand, "persecution on account of membership in a particular social group" is that which is "directed toward[s] an individual who is a member of a group of persons . . . [who] share a common, immutable characteristic" like sex, color, kinship ties, a shared past experience or land ownership.¹³ "[W]hatever 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."¹⁴ An alien claiming asylum on this ground must establish that: 1) she identifies with a group that constitutes a "particular social group;" 2) "she is a member of that group;" and 3) she was persecuted or "has a well-founded fear of persecution based on that membership."¹⁵ A nexus must exist between the shared trait of the social group and the persecution suffered, such that the persecutors are motivated, at least in part, by the immutable characteristic.¹⁶

An applicant need not prove future persecution to an absolute certainty. "Even a ten percent chance that [an] applicant will be persecuted in the future is enough to establish a well-founded fear" of future persecution.¹⁷ In that regard, proof of past persecution gives rise to a presumption of a well-founded fear of future persecution and shifts the evidentiary burden to the government to rebut that presumption.¹⁸ The presumption can be rebutted with a showing: 1) that "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the [home] country" on account of the protected category; or 2) that

10. See *Zhang v. Gonzales*, 426 F.3d 540, 545 (2d Cir. 2005).

11. See *Gonzales-Neyra v. INS*, 122 F.3d 1293, 1296 (9th Cir. 1997), *amended by* 133 F.3d 726 (9th Cir. 1998).

12. *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998) (quoting *Kotasz v. INS*, 31 F.3d 847, 852 (9th Cir. 1994)).

13. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

14. *Id.*

15. *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993).

16. *In re R-A-*, 22 I. & N. Dec. 906, 920-21 (B.I.A. 1999).

17. *Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004).

18. *Popova v. INS*, 273 F.3d 1251, 1259 (9th Cir. 2001).

petitioner can “avoid future persecution by relocating to another part of the . . . country . . . and under all the circumstances, it would be reasonable to expect [her] to do so.”¹⁹ Thus, an applicant for asylum may not qualify as a refugee if the government establishes by a preponderance of the evidence that since the time the persecution occurred, conditions in the applicant’s country of nationality or last habitual residence have changed to such an extent “that the applicant no longer has a well-founded fear of [being] persecut[ed]” if she were to return.²⁰

III. GENDER GUIDELINES FROM THE UNITED NATIONS

The United Nations (UN) recommends that women fearing persecution or severe discrimination on the basis of their gender be considered members of a social group when determining whether they are eligible for refuge.²¹ These women “also often fit under the political opinion and religion grounds.”²² Additional support for gender-related asylum is contained in the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which states:

“[D]iscrimination against women” shall mean any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.²³

Similarly, the UN Declaration on the Elimination of Violence Against Women states that “‘violence against women’ means any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private

19. Procedures for Asylum and Withholding or Removal, 8 C.F.R. § 208.13(b)(1)(A)–(B) (2007).

20. *Id.* § 208.13(b)(1)(i)(A).

21. Amnesty Int’l USA, Gender-Related Asylum Fact Sheet (Aug. 12, 2005), <http://www.amnestyusa.org/women/pdf/asylum.pdf>.

22. *Id.*

23. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (Dec. 18, 1979), available at <http://www.childinfo.org/areas/fgmc/docs/cedaw.pdf>.

life.”²⁴ Amnesty International suggests that “[e]ven though the Department of Homeland Security [DHS]²⁵ and international human rights [organizations] recognize gender-related violence as human rights violations, many asylum adjudicators in the United States apply a restrictive interpretation of the international definition of a [woman] refugee entitled to protection.”²⁶

In 2002, the United Nations High Commissioner for Refugees (UNHCR), issued guidelines for governments, the judiciary, and attorneys who “carry[] out refugee status determination in the field.”²⁷ In this document, the agency acknowledged that although the term “[g]ender-related persecution’ . . . [had] no legal meaning *per se*,” gender often dictates the type of persecution and the reason for this treatment.²⁸ Gender-related claims usually covered acts of sexual violence or “domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.”²⁹ Rape, “dowry-related violence, . . . genital mutilation, [and] domestic violence . . . are acts which inflict severe” physical and mental pain and must be regarded as forms of persecution.³⁰ Therefore, there was an urgent need for procedural safeguards to ensure that adequate attention is given to women asylum seekers who base their claims on gender-related persecution.³¹

In evaluating the grounds for persecution, the guidelines suggest that a gender-sensitive interpretation be given to each category.³² For example, persecution on account of race may be carried out by “destroy[ing] the ethnic identity [and] prosperity of a racial group by killing, maiming or incarcerating the men,” and persecuting women through sexual violence and reproductive control to stop them from “propagating the ethnic or racial identity.”³³

24. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, 85th plen. mtg., U.N. Doc. A/RES/48/104 (Dec. 20, 1993), available at <http://www.un.org/documents/ga/res/48/a48r104.htm>.

25. See [Asylumlaw.org](http://www.asylumlaw.org/legal_tools/index.cfm?useaction=&countryID=194), United States, http://www.asylumlaw.org/legal_tools/index.cfm?useaction=&countryID=194 (last visited Feb. 17, 2008). DHS is the new agency which currently represents the government in asylum cases. *Id.* INS and DHS are used interchangeably throughout this paper.

26. Amnesty Int’l USA, *supra* note 21.

27. UN Refugee Agency [UNHCR], *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/01 (May 7, 2002), available at <http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf>.

28. *Id.* ¶ 1.

29. *Id.* ¶ 3.

30. *Id.* ¶ 9.

31. See *id.* ¶ 1.

32. UN Refugee Agency [UNHCR], *supra* note 27, ¶ 38.

33. *Id.* ¶ 24.

In countries where the established religion assigns particular behavioral codes to women, a woman's failure to abide by such codes is perceived as her "hold[ing] unacceptable religious opinions regardless of what she actually believes."³⁴ As to persecution on the basis of political opinion, the guidelines propose that "women are less likely than [men] to engage in [outwardly open] political activity, and are more often involved in 'low level' political [action]" like refusing to provide meals to government soldiers, "nursing sick rebel soldiers," recruiting sympathizers, and preparing and disseminating leaflets.³⁵ Therefore, in this context, it is vital to understand political opinion in the broadest sense to incorporate even indirect opinions on issues concerning the government or social policy.³⁶

IV. GENDER GUIDELINES FROM THE INS

In 1995, the Immigration and Naturalization Service (INS) published a set of guidelines to help Asylum Officers adjudicate cases of women whose "asylum claims [are] based wholly or in part on . . . gender."³⁷ In recognizing many international sources of gender-related instruments and documents, including the CEDAW, the memorandum proposes "creating a 'customer-friendly' . . . interview environment that [would] allow[] women claimants to" safely relate their stories of abuse and violence.³⁸ The memorandum explains that in countries where the laws and customs are de facto discriminatory towards women, "[b]reaching social mores [by] . . . marrying outside of an arranged marriage, wearing lipstick or failing to comply with . . . religious norms [could] result in" particularized and directed "harm, abuse or harsh treatment."³⁹ In societies that require women to "live under the protection of male family members," women become "even more vulnerable to abuse" when the male family member dies.⁴⁰ Finally, "[w]omen who have been raped or . . . sexually abused" are subject to further violence "because they are viewed as having brought shame and dishonor on themselves, their families, and their communities."⁴¹

34. *Id.* ¶ 25.

35. *Id.* ¶¶ 33, 34.

36. *See id.* ¶ 33.

37. Memorandum from Phyllis Coven, Office of International Affairs, Department of Justice to All INS Asylum Officers 1 (May 26, 1995), available at http://cgrs.uchastings.edu/documents/legal/guidelines_us.pdf [hereinafter Memorandum].

38. *Id.* at 4.

39. *Id.*

40. *Id.*

41. *Id.* at 5.

However, in clarifying the legal analysis of claims, the memorandum states that although “[t]he form of harm or punishment may be [governed by] the gender of the victim, . . . the analysis of the claim should not vary based on the gender.”⁴² So while “[r]ape and other forms of severe sexual violence [may] fall within” the definition of persecution, the mere “appearance of sexual violence in a claim should not lead” to the automatic conclusion that there has been persecution based on a protected category.⁴³ The memorandum further outlined case law pertaining to the categories of persecution and their interpretation in several federal and immigration courts,⁴⁴ but did not give any additional guidance on how to deal with asylum cases that are not squarely addressed by case law or by directives from DHS. This set of guidelines is in itself ineffective in dealing with post-war asylum claims from women in Afghanistan and Iraq because it does not address the particularities of either society or the specific gender-related claims that continue to arise as a result of the novel political and social situation in either country past 2001. To that effect, DHS has not issued guidelines to determine what constitutes a “substantial change in circumstances” in the post-war period.

V. COUNTRY CONDITIONS PRE- AND POST-WAR ON TERROR

A. *Afghanistan and the Taliban*

In late 1994, the Taliban militia took over Afghanistan; by 1996, it had complete control over the capital, Kabul.⁴⁵ A radical Islamic movement, the Taliban, insisted on enforcing the “proper code of conduct for [all] Afghans, [which consisted of] harsh dress codes, [severe] restrictions on women,” and cruel punishment for those who violated the code of conduct.⁴⁶ The Taliban prohibited women from working outside the home, strictly obligated women to wear chadors,⁴⁷ and did not allow them to travel outside the home without being accompanied by a close male relative.⁴⁸ “It’s like having a flower, or a

42. Memorandum, *supra* note 37, at 9.

43. *Id.*

44. *Id.* at 9–11.

45. U.S. DEP’T OF STATE, AFGHANISTAN PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS REPORT 3–4 (1998), *available at* http://pards.org/paccc/Afghanistan_Jul_1998.doc [hereinafter AFGHANISTAN PROFILE OF ASYLUM].

46. *Id.* at 3.

47. A “chador” is a garment that covers a woman from head-to-toe with small openings for the eyes. Dictionary.com, Chador, <http://dictionary.reference.com/search?r=2&q=chador> (last visited Feb. 17, 2008).

48. AFGHANISTAN PROFILE OF ASYLUM, *supra* note 45, at 9.

rose. You water it and keep it at home for yourself, to look at it and smell it. It [a woman] is not supposed to be taken out of the house to be smelled.”⁴⁹

Infractions of any part of the Taliban code were dealt with brutally. In one case, a young Afghan mother was forced to travel alone across town with her feverish child.⁵⁰ When a teenage Taliban guard saw her and failed in his attempts to stop her, “he raised his weapon and shot her repeatedly” purely because she “should not have been out alone.”⁵¹ In another case, a woman who was found walking in the street “with an unrelated man . . . was publicly flogged with 100 lashes.”⁵² She was lucky—had she been married, the Taliban would have stoned her to death.⁵³ In another part of town, a ten year old girl “was sentenced to amputation of her fingers” because she had varnished her nails.⁵⁴ There are numerous credible reports of women being “whipped with chains and even shot at”⁵⁵ for showing their ankle under the full-length garb, having “too pretty” a chador, or wearing white socks, which was viewed as disrespecting the white Taliban flag.⁵⁶

The few women who were allowed to work in hospitals were not permitted to work alongside male doctors or treat male patients.⁵⁷ Male doctors could only treat “female patient[s] if [they] were fully clothed,” defeating any attempt to get an accurate diagnosis and proper treatment.⁵⁸ Due to these harsh restrictions, “an estimated forty-five women [were dying] everyday from pregnancy related causes.”⁵⁹ Moreover, the female doctors and nurses were under-trained and unable to provide more than basic medical care.⁶⁰ The primary cause being that the Taliban closed all girls’ schools and banned

49. U.S. Dep’t of State, Report on the Taliban’s War Against Women: Quotes by and About Women in Afghanistan (Nov. 17, 2001), <http://www.state.gov/g/drl/rls/6186.htm>.

50. U.S. Dep’t of State, Report on the Taliban’s War Against Women: The Taliban’s War Against Women (Nov. 17, 2001), <http://www.state.gov/g/drl/rls/6185.htm> [hereinafter Taliban’s War Against Women].

51. *Id.*

52. *Id.*

53. *Id.*

54. SOUKHRIA HAIDAR, AFGHANISTAN AND THE TALIBAN 3, in ASYLUMLAW.ORG, SITUATION OF WOMEN IN AFGHANISTAN (1998), http://www.asylumlaw.org/docs/afghanistan/coe98_afghanistan_women.pdf.

55. AFGHANISTAN PROFILE OF ASYLUM, *supra* note 45, at 7.

56. HAIDAR, *supra* note 54, at 2.

57. AFGHANISTAN PROFILE OF ASYLUM, *supra* note 45, at 6.

58. Taliban’s War Against Women, *supra* note 50.

59. HUMAN RIGHTS WATCH, HUMANITY DENIED: SYSTEMATIC VIOLATIONS OF WOMEN’S RIGHTS IN AFGHANISTAN 7 (2001), available at <http://www.hrw.org/reports/2001/afghan3/afgwr1001.pdf> [hereinafter HUMANITY DENIED]. Of every 100 women that gave birth, sixteen died during childbirth, making this the “second worst rate of maternal death” in the world. Taliban’s War Against Women, *supra* note 50.

60. See AFGHANISTAN PROFILE OF ASYLUM, *supra* note 45, at 6–7.

women from attending a university; female teachers were forbidden from teaching male students and were punished for secretly home-schooling female children.⁶¹ Over ninety percent of Afghan women remained illiterate and untrained in any skill.⁶²

Under Taliban rule, Afghan women were subjected to brutal rapes, abductions, forced marriages, honor killings, and other horrific acts of violence.⁶³ In one village, as women attempted to escape during a Taliban invasion, guards tore the women's chadors to see "if [they] were young and beautiful" so that the guards could take them away for themselves.⁶⁴ In fear, some families sent their young girls "to Pakistan [and] Iran to protect them" from these brutal acts.⁶⁵ Women who were left behind were effectively stripped of their dignity.⁶⁶

After the coalition forces invaded Afghanistan in October 2001, the Taliban gradually lost its grip over Kabul.⁶⁷ The Department of State reported that Afghan women were beginning to return to their rightful place in society, with "[s]chools . . . preparing to reopen and women [being allowed to pray] in mosques."⁶⁸ Yet, years "after the Taliban's fall, women . . . still face [the same] restrictions and violations of . . . rights, [this time at the hands of] warlords, police officers, and local officials with similar attitudes toward women. In some [provinces], the same officials who administered the anti-women policies of the Taliban remain[ed] in their positions."⁶⁹ While women in cities continue to get greater access to education, health care, and employment, women in villages and rural areas are not aware of their rights under the new constitution and continue to suffer gender driven persecution at the hands of the militia factions.⁷⁰

Rape, domestic violence, forced marriages, and honor killings remain serious problems despite attempts to improve the status of women.⁷¹ Women who report rapes and seek justice through the court system "are perceived to

61. Taliban's War Against Women, *supra* note 50.

62. HUMANITY DENIED, *supra* note 59, at 7.

63. See generally Taliban's War Against Women, *supra* note 50.

64. HUMANITY DENIED, *supra* note 59, at 20.

65. Taliban's War Against Women, *supra* note 50.

66. See *id.*

67. See *id.*

68. See generally *id.*

69. HUMAN RIGHTS WATCH, "WE WANT TO LIVE AS HUMANS": REPRESSION OF WOMEN AND GIRLS IN WESTERN AFGHANISTAN 4 (2002), available at <http://www.hrw.org/reports/2002/afghnwmm1202/Afghnwmm1202.pdf> [hereinafter LIVE AS HUMANS].

70. U.S. Dep't. of State, Country Reports on Human Rights Practices - 2006: Afghanistan (Mar. 6, 2007), <http://www.state.gov/g/drl/rls/hrrpt/2006/78868.htm> [hereinafter Afghanistan 2006].

71. *Id.*

be acting outside [the] code[] of [behavior].”⁷² Abusers are rarely prosecuted, with the accused being exonerated or punished lightly.⁷³ The victims, on the other hand, are convicted and imprisoned for having committed zina crimes.⁷⁴ “Dozens of women are [also] imprisoned . . . for ‘running away’ from . . . forced marriages, or for transgressing social norms by eloping.”⁷⁵ In one case, a girl who was raped by her brother was forced to reveal the incident to her parents after she learned that she was pregnant.⁷⁶ “In order to save the family’s reputation the parents set the girl on fire [and s]he died three days later.”⁷⁷ There has never been an investigation of this case.⁷⁸

“Sexual abuse and rape are taboo subjects within Afghan society, and as a result government officials are loathed to address the problem.”⁷⁹ As of October 2002, police in Herat, a province in Western Afghanistan, were conducting gynecological examinations on young girls to see if “they had recently had sexual intercourse.”⁸⁰ The results of these “chastity examinations” were officially reported to the criminal branch.⁸¹ In other areas, elders forego the new constitution and instead choose to rely on Shari’a law that holds a woman inferior to her male counterpart.⁸² For example, in rape cases, the victim is required to produce multiple witnesses “while the man can simply claim that it was consensual sex . . . [and have] the woman convict[ed] of adultery.”⁸³

In 2004, the first set of women graduated from the national police academy and formed a police unit to respond to crimes against women.⁸⁴ Six of those female officers “spent the first four months on the job cleaning the police station,” “were paid [ten dollars] less than their official salary, and . . .

72. BORDER & IMMIGRATION AGENCY, COUNTRY OF ORIGIN INFORMATION REPORT AFGHANISTAN § 23.16 (2007) (U.K.), available at www.homeoffice.gov.uk/rds/pdfs07/afghanistan-260407.doc [hereinafter B.I.A. AFGHANISTAN REPORT].

73. Afghan 2006, *supra* note 70.

74. WOMANKIND WORLDWIDE, TAKING STOCK: AFGHAN WOMEN AND GIRLS FIVE YEARS ON 12 (2006), http://www.womankind.org.uk/upload/Taking_Stock_5_Years_On_Oct2006_english.pdf. Zina laws criminalize sexual relations outside marriage. *Id.*

75. B.I.A. AFGHANISTAN REPORT, *supra* note 72, § 23.04.

76. Afghan 2006, *supra* note 70.

77. *Id.*

78. *Id.*

79. WOMANKIND WORLDWIDE, *supra* note 74, at 16.

80. LIVE AS HUMANS, *supra* note 69, at 20.

81. *Id.* at 21–22.

82. FREEDOM HOUSE, FREEDOM IN THE WORLD – AFGHANISTAN (2003), <http://www.freedomhouse.org/template.cfm?page=22&year=2003&country=329>.

83. Afghan 2006, *supra* note 70.

84. *Id.*

were forced to wear burqas over their uniforms.”⁸⁵ In another province, female political candidates were forced to get permission from their male elders to conduct activities outside their home.⁸⁶ Attacks are routinely carried out on female government officials, journalists, teachers, and activists with the “specific goal of intimidating them and undermining their efforts to strengthen women’s status in society.”⁸⁷ Women’s rights activists still report “death threats, visits to their homes by gunmen, and dismissals from their jobs.”⁸⁸ The United Nations Office for the Coordination of Human Affairs reports that, in Basra last year, nearly eighty women were killed for violating Islamic law and almost fifty were murdered as part of honor killings.⁸⁹ “The killers enforcing their own version of Islamic justice are rarely caught, while women live in fear.”⁹⁰

From these accounts, it is plainly evident that although there has been some progress in protecting women from violence and discrimination, they continue to be plagued with harsh restrictions on their everyday life. They are systematically excluded from positions of authority and are subjected to abusive exercise of power by the government’s agents and private actors.⁹¹ Afghan women continue to be among the worst-off in the world, especially in health, deprivation of rights, protection against violence, education and literacy, and public participation.⁹² Every choice is made in light of the danger they face: “where they can go, how they can get there, whom they can go with, and how they can dress.”⁹³ Although the Taliban is no longer in power, the cultural legacy of the Taliban remains.

85. *Id.*

86. *Id.*

87. B.I.A. AFGHANISTAN REPORT, *supra* note 72, § 23.11.

88. HUMAN RIGHTS WATCH, BETWEEN HOPE & FEAR: INTIMIDATION & ATTACKS AGAINST WOMEN IN PUBLIC LIFE IN AFGHANISTAN 2 (2004), available at <http://www.hrw.org/backgrounder/asia/afghanistan1004/afghanistan1004.pdf>. “*They called me on my mobile phone, saying, ‘You are doing things you should not [do]. We will kill you. We will kill you as an example to other women.’*” *Id.* at 1.

89. Arwa Damon, CNN.com, Violations of ‘Islamic Teachings’ Take Deadly Toll on Iraqi Women, <http://www.cnn.com/2008/WORLD/meast/02/08/iraq.women/index.html> (last visited March 3, 2008).

90. *Id.*

91. *Id.*

92. See United Nations Dev. Fund for Women [UNIFEM], *UNIFEM Afghanistan–Fact Sheet 2007* (Nov. 2007), available at http://afghanistan.unifem.org/docs/pub/07/UNIFEM_factsheet_07.pdf.

93. LIVE AS HUMANS, *supra* note 69, at 4.

B. *Iraq and Saddam Hussein*

In Iraq, life for women under Saddam Hussein's reign was no better. During his time in power, the Ba'ath Party practiced arbitrary arrests, torture, lack of due process, and the expanded use of the death penalty.⁹⁴ The government used Islamic and tribal traditions to consolidate power with a disproportionate impact on women.⁹⁵ As in Afghanistan, women in Iraq had "increasing restrictions on their freedom of mobility and protections under the law."⁹⁶ The government issued numerous decrees and introduced legislation against women in the labor code and the criminal justice system.⁹⁷ For example, under one decree, "men who kill[ed] or assault[ed] their female relatives [to defend] their family's honor [were exempt] from prosecution and punishment."⁹⁸ Saddam's security forces "beheaded . . . women suspected of prostitution and . . . men suspected of facilitating . . . such activities."⁹⁹

In the area of employment in 1998, Saddam's government dismissed all females working as secretaries in governmental agencies.¹⁰⁰ The legislature then enacted a law requiring all state ministries to put restrictions on women working outside the home.¹⁰¹ Women under the age of forty-five were prohibited from leaving the country unless accompanied by a male relative.¹⁰² "[F]ormerly co-educational high schools were required by law to provide single-sex education only, further reflecting the reversion to religious and tribal traditions."¹⁰³

94. See HUMAN RIGHTS WATCH, BACKGROUND ON WOMEN'S STATUS IN IRAQ PRIOR TO THE FALL OF THE SADDAM HUSSEIN GOVERNMENT (2003), available at <http://www.hrw.org/backgrounder/wrd/iraq-women.pdf>. [hereinafter WOMEN'S STATUS IN IRAQ].

95. *Id.*

96. *Id.*

97. *Id.* at 4.

98. *Id.* n.27 (citing U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, ¶ 26, U.N. Doc. E/CN.4/2002/83 (Jan. 31, 2002) (prepared by Radhika Coomaraswamy)).

99. U.S. Dep't of State, Country Reports on Human Rights Practices - 2000: Iraq (Feb. 23, 2001), www.state.gov/g/drl/rls/hrrpt/2000/nea/787.htm [hereinafter Iraq 2000].

100. Iraq Found., Saddam Bans Iraqi Women from Work (June 15, 2000), http://www.iraqfoundation.org/news/2000/fjun/15_womenbanned.html.

101. *Id.*

102. Nancy Trejos, *Women Lose Ground in the New Iraq*, WASH. POST, Dec. 16, 2006, at A12.

103. WOMEN'S STATUS IN IRAQ, *supra* note 92.

“Domestic violence against women occur[ed] but little is known about its extent.”¹⁰⁴ Such abuse was often dealt with within the family without any public discussion of the subject.¹⁰⁵ But human rights organizations continued to receive reports of women who were raped by men in the security forces.¹⁰⁶ The government never “acknowledged these reports, conducted any investigation, [or took] action against” the perpetrators.¹⁰⁷ Although the laws prohibit rape, security forces routinely raped family members of persons in the opposition as a punishment for dissent.¹⁰⁸ The government used sexual violence for political purposes including videotaping “the rape of female relatives” of dissenters and using these “for blackmail . . . and to ensure future cooperation.”¹⁰⁹

After the United States-led invasion and occupation of Iraq in 2003, the coalition forces and civilian administration has failed to provide public security as women are increasingly vulnerable “to sexual violence and abduction.”¹¹⁰ “The fall of Saddam’s regime . . . left a power vacuum that [has been] rapidly . . . filled by right-wing political Islamist groups”¹¹¹ Between May and June that year, at least “twenty-five cases of sexual violence and abduction” were reported to one organization.¹¹² “[M]ore than 400 . . . women were abducted and raped within the first four months of [the] U.S. occupation.”¹¹³ In one of those cases, a forty-nine year old woman, who was suspected to have connections with Saddam’s government, was abducted at gun point from her home at night and taken to an unknown location where she was repeatedly gang-raped, burned with cigarettes, and bitten before the gunmen dropped her off at an unfamiliar location the next morning.¹¹⁴ For months she lay awake at night, in fear that the perpetrators would return.¹¹⁵

104. BORDER & IMMIGRATION AGENCY, COUNTRY ASSESSMENT-IRAQ ¶ B.5 (2001) (U.K.), available at <http://www.asylumlaw.org/docs/showDocument.cfm?documentID=844>.

105. *Id.*

106. Iraq 2000, *supra* note 97.

107. *Id.*

108. U.S. Dep’t of State, Country Reports on Human Rights Practice - 2002: Iraq (Mar. 31, 2003), <http://www.state.gov/g/drl/rls/hrrpt/2002/18277.htm>.

109. *Id.*

110. HUMAN RIGHTS WATCH, CLIMATE OF FEAR: SEXUAL VIOLENCE AND ABDUCTION OF WOMEN AND GIRLS IN BAGHDAD 1 (2003), available at <http://www.hrw.org/reports/2003/iraq0703/iraq0703.pdf> [hereinafter CLIMATE OF FEAR].

111. Jessica Moore, *From Bad to Worse – Women in Occupied Iraq*, SOCIALIST ALTERNATIVE, Mar. 1, 2004, <http://www.socialistalternative.org/news/article16.php?id=291>.

112. CLIMATE OF FEAR, *supra* note 108, at 3.

113. Yifat Susskind, MADRE, One Year Later: Women’s Human Rights in “Liberated” Iraq (Spring 2004), <http://www.madre.org/print-/articles/me/womensrights.html>.

114. CLIMATE OF FEAR, *supra* note 108, at 4–5.

115. *Id.* at 5.

Victims of rape continue to be denied medical treatment and are deprived of “access to medications to treat sexually transmitted diseases.”¹¹⁶ Those who seek treatment are turned away because they also often want forensic examinations to document their assertion that they have not been raped in order to protect themselves from possible retaliation by their family.¹¹⁷ For example, a “nine-year-old rape victim was turned away” from Iraqi hospitals even though she was still bleeding for three days after being raped.¹¹⁸ The child was finally treated at a U.S. military unit stationed nearby.¹¹⁹

Women who choose to report rapes to the police are turned away by officers, who do not recognize, “or purposefully downplay[], the seriousness . . . of sexual violence and abductions.”¹²⁰ In some police stations, officers assert that women provoke rape simply by leaving their homes.¹²¹ For cases that reach the court system, “[t]he Penal Code . . . allows perpetrators of rape, sodomy, [and] sexual violence . . . to receive reduced sentences if they marry their victims.”¹²² This effort to unite the kidnapper and the kidnapped is aimed at avoiding revenge cases.¹²³ “[A]uthorities are reluctant to acknowledge a problem” while the police force continues to be incompetent, corrupt, and overwhelmed.¹²⁴

A 2007 report states that although the new Iraqi “[C]onstitution forbids discrimination on the basis of gender, in practice, conservative societal standards impeded women’s abilities to exercise their rights.”¹²⁵ Women are subject to “increasing pressure to wear veils,” with explicit threats for non compliance.¹²⁶ Since 2003, “the number of women attacked for choosing not to wear head scarves and veils has more than tripled.”¹²⁷ Several “have been burned by acid attacks” to punish them for not wearing the proper cloth-

116. *Id.* at 8.

117. *Id.*

118. *Id.*

119. CLIMATE OF FEAR, *supra* note 108, at 9.

120. *Id.* at 11.

121. *Id.*

122. *Id.* at 14.

123. *Id.* at 15.

124. Suzanne Goldenberg, *Crime Puts Iraqi Women under House Arrest*, GUARDIAN, Oct. 11, 2003, <http://www.guardian.co.uk/world/2003/oct/11/iraq.suzannegoldenberg>.

125. U.S. Dep’t of State, *Country Reports on Human Rights Practices - 2006: Iraq* (Mar. 6, 2007), <http://www.state.gov/g/drl/rls/hrrpt/2006/78853.htm> [hereinafter *Iraq 2006*].

126. *Id.*

127. *Iraq: Women Attacked for Removing Headscarves, NGO Says*, IRIN NEWS, Mar. 7, 2006, www.irinnews.org/report.aspx?reportid=26174.

ing.¹²⁸ Women are also targeted for participating in everyday activities like “driving a car, talking on a cell phone, and wearing trousers.”¹²⁹ Women continue to live in fear of death “for being a member of the wrong sect, . . . for helping their fellow women, . . . for doing jobs that the militants have decreed that they cannot do, . . . [and for being] the softest targets for . . . criminal gangs.”¹³⁰ They “live in terror of speaking their opinions . . . or defying the strict . . . prohibitions on dress and [behavior].”¹³¹

VI. PARTICULAR CASES OF GENDER-RELATED ASYLUM CLAIMS

A majority of asylum cases in the United States are disposed of at the hands of magistrates and immigration judges and are therefore not publicly documented.¹³² This fact makes it particularly cumbersome to collect detailed data tracking asylum claims from women in particular countries. Yet, there are a handful of unpublished cases where judges have used the overthrow of the Taliban and Saddam Hussein as evidence of a substantial change in circumstances to deny both male and female applicants asylum in the United States.¹³³

For example, in July 2002, the Fifth Circuit summarily rejected an Afghan man’s asylum application because of the simple fact that the Taliban regime was no longer in existence and thus his claim of fear of persecution based on his former association with a military group was destroyed.¹³⁴ Yet, scores of reports, including those assembled by the U.S. Government, make it clear that insurgency has been rampant in the country since the invasion; if anything, the persecution has only heightened since the Taliban’s fall from power, making such asylum claims all the more genuine and urgent.¹³⁵ Similarly, another Afghan man, who was suspected of being against the Taliban,

128. *Acid Attacks on Iraqi Women Increase*, FEMINIST DAILY NEWS, July 8, 2005, <http://feminist.org/news/newsbyte/printnews.asp?id=9145>.

129. Iraq 2006, *supra* note 123.

130. Peter Beaumont, *Hidden Victims of a Brutal Conflict: Iraq’s Women*, OBSERVER, Oct. 8, 2006, available at <http://www.guardian.co.uk/world/2006/oct/08/iraq.peterbeaumont>.

131. *Id.*

132. See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 404 (2007).

133. See, e.g., *Asmat v. Gonzales*, 174 F. App’x 384, 385–86 (9th Cir. 2006); *Sharaf v. Ashcroft*, 46 F. App’x 227, 227 (5th Cir. 2002).

134. *Sharaf*, 46 F. App’x at 227.

135. Richard Norton-Taylor, *Afghanistan ‘Falling into Hands of Taliban,’* GUARDIAN, Nov. 22, 2007, <http://www.guardian.co.uk/world/2007/nov/22/afghanistan.richardnortontaylor>.

was kidnapped and severely beaten for two and a half months after being accused of killing Taliban soldiers “and storing weapons in [his] store.”¹³⁶

When a Taliban judge ordered that the man be executed, the man escaped through Pakistan and was smuggled to the United States where he applied for asylum.¹³⁷ Despite presenting several reports from the Department of State and Amnesty International, various news articles, and “personal affidavits from relatives attesting to his identity” the immigration judge nonetheless denied his asylum request, reasoning that the Taliban was no longer in power and, therefore, the man had no reason to fear future persecution.¹³⁸ On appeal, the court took note of the evidence presented by the INS that the “interim government led by Hamid Karzai” was working towards reconstruction.¹³⁹ The court held that because “generally poor conditions and random private acts of violence do[es] not constitute persecution,” the court affirmed the petitioner’s denial of asylum.¹⁴⁰ Finally, in a third case, an Afghan man, who was “persecut[ed] by the Taliban based on the Taliban’s conscription of his brother” and imprisonment of his father, had his claim for asylum rejected simply because “[a]t the time of the hearing the Taliban were no longer in power.”¹⁴¹ Unfortunately, these unpublished opinions fail to outline or clearly explain what specifically has changed in the particular circumstances of the asylees with respect to the new government in Afghanistan that inexplicably gives them respite from future persecution on the same account.

Cases currently pending before immigration judges across the country include one from a Westernized Afghan woman who fears future “persecut[ion] for being perceived as Western” and defiant of established roles, and one from “a woman who was in a long term abusive marriage with an Afghani warlord” who divorced her after twenty years, forcing her to flee from the country in fear of retaliation for “being a divorced woman.”¹⁴² Another pending “[c]ase [is] of a Phoston [sic] woman who was placed in an arranged marriage against her will and . . . forced to wear a burqa. She applied for asylum based on . . . repressive social norms.”¹⁴³ A third case involved an Afghan teen who moved to the United States for one year after winning a

136. *Shah v. Ashcroft*, 72 F. App’x 875, 877 (3d Cir. 2003).

137. *Id.*

138. *Id.* at 877–78.

139. *Id.* at 880.

140. *Id.* at 881.

141. *Asmat v. Gonzales*, 174 F. App’x 384, 385 (9th Cir. 2006).

142. Email from Lisa Frydman, Staff Attorney, Center for Gender and Refugee Studies to author (Oct. 23, 2007, 13:56 EST) (on file with author) [hereinafter Frydman Email].

143. *Id.*

special scholarship, and who later applied for asylum based on her fear of “honor killing[s] and being shunned from [the] community” for “living in an American family and participating in activities . . . [like] eating meals with boys,” which would be totally unacceptable in Afghanistan.¹⁴⁴

In 2006, similar asylum cases were rejected from Iraqi women because Saddam Hussein had been removed from power and, therefore, the women could not have a well-founded fear of persecution.¹⁴⁵ For instance, an Iraqi Assyrian Christian female, who suffered broken ribs during one interrogation and was repeatedly subjected to harassing questioning about the whereabouts of her sons, was denied asylum because “[t]he immigration judge took administrative notice of the fact that the Hussein regime . . . ceased,” to exist and therefore, her fear did not justify asylum.¹⁴⁶ Similarly, the Sixth Circuit reviewed a claim from an Iraqi Chaldean Christian woman who, after suffering rape and torture over a period of a few months, claimed she feared fundamentalist insurgents.¹⁴⁷ The court rejected her application because her past tormentors had long been overthrown and “the new Iraqi regime [had intentions of recognizing] the country’s multi-religious society.”¹⁴⁸ In a final case, the Sixth Circuit rejected a claim from a Chaldean Christian Iraqi woman because there was no evidence that the new government acquiesced with the group that she feared would torture her in the future.¹⁴⁹ In March 2007, the Sixth Circuit boldly claimed “that the fall of the Hussein government rebuts *any* well-founded fear based on persecution that occurred under that regime.”¹⁵⁰ The court, therefore, effectively closed all avenues for asylum claims from women based on such types of persecution.¹⁵¹

Other cases before immigration judges include one from “an Iraqi woman . . . who married against her family’s wishes and was threatened with honor killing;” her application “was [rejected] because the [judge] did not believe women [who lived] in the capital [city and were] allowed . . . to study at [the u]niversity would be subject to honor killing[s].”¹⁵² A case now pending before an immigration judge was filed by “an Iraqi woman whose Muslim parents sent her to . . . a Christian school” where she started to “con-

144. *Id.*

145. *See, e.g.,* Margos v. Gonzales, 443 F.3d 593, 598 (7th Cir. 2006); Toma v. Gonzales, 179 F. App’x 320, 324 (6th Cir. 2006).

146. *Margos*, 443 F.3d at 595–96, 598.

147. *Toma*, 179 F. App’x at 321–22.

148. *Id.* at 324.

149. *Odisho v. Gonzales*, 206 F. App’x 465, 470 (6th Cir. 2006).

150. *Imsaiah v. Gonzales*, 225 F. App’x 362, 366 (6th Cir. 2007) (emphasis added).

151. *Id.*

152. Frydman Email, *supra* note 140.

sider[] herself Christian and . . . translated for American soldiers.”¹⁵³ “As a result, her family and individuals in her community put a reward out for her [execution].”¹⁵⁴ A final case comes from “an Iraqi woman who fled Iraq . . . because her family was persecuted for speaking out against Saddam’s regime;” after she arrived in the United States, “she had children out of wedlock and [now] fear[s] an honor killing in Iraq.”¹⁵⁵

VII. RECOMMENDATIONS FOR MAGISTRATES AND IMMIGRATION JUDGES

With this scenario in mind, immigration judges must recognize that a general change in the home country’s political condition does not render the applicant ineligible for asylum when there still exists a specific danger to the applicant.¹⁵⁶ Despite claims that women’s lives have improved since the overthrow of Saddam Hussein and the Taliban, women in both countries continue to face new challenges that have halted their effort towards gender equality.¹⁵⁷

From the very first steps of the asylum process, it is imperative that immigration officers and staff use gender-sensitive techniques to obtain information from women who may be understandably reluctant to disclose accounts of rape and sexual violence. Officers and interpreters should be female so that the interview experience is not aggravated by the presence of unknown male officials in positions of authority. Staff must be appropriately trained in applicable cultural norms to ensure a safe environment for the asylees to relate their experiences away from the presence of family members, especially their male relatives. If a woman is unable to testify in court due to shame, fear of ridicule, or reprisal, judges should allow testimony to be presented through affidavits, videotapes, or in the privacy of a judge’s chambers. In addition, any information gathered during the interview process must be kept strictly confidential outside of its use in the courtroom and in chambers.

In analyzing claims for asylum, immigration judges must be mindful that women from excessively repressive cultures are less likely to publicly engage in anti-religious or political organizations. Nevertheless, their opinions may be expressed by providing services, shelter and/or food to activists, or distributing leaflets promoting a change in the traditional social and politi-

153. *Id.*

154. *Id.*

155. *Id.*

156. *Gailius v. INS*, 147 F.3d 34, 45–47 (1st Cir. 1998).

157. MARJORIE P. LASKY ET AL., CODEPINK, IRAQI WOMEN UNDER SIEGE 4–5 (2006), available at <http://www.codepinkalert.org/downloads/IraqiWomenReport.pdf>.

cal structure. Judges must also recognize that asserting one's right to be sexually active or inactive, to exercise reproductive rights, or to refuse cultural norms are all expressions of political opinion. For example, if a woman refuses to conform to social mores, she may be perceived as being a feminist and, therefore, a political opinion may be imputed on her based on her refusal.

Given the near impossibility of obtaining documentary evidence of rape and sexual violence in the home country, judges must take into account testimony of other similarly situated women that is documented in written reports or oral statements. Summarily deciding cases based on the assumption that a country's social, economic, religious, and political conditions change when one figurehead is replaced by another, defeats the purpose and spirit of granting asylum to the genuinely persecuted. Judges must, therefore, weigh the evidence presented by the applicant in the form of testimony, affidavits, and reports on a country's conditions; specifically the status of women, as prepared by non-governmental or international organizations, or judges must carry out independent research before making their decision to reject a claim for asylum on the basis of "substantial change in circumstances."

VIII. CONCLUSION

In light of the prolonged War on Terror, restoring fairness to the asylum process has become crucial. The group of asylum seeking women from Afghanistan and Iraq need special consideration because, despite attempts by coalition forces to restore democracy and ensure everyday security for citizens, the decline in the socio-political status of women has only been exacerbated since the invasion.¹⁵⁸ A fair asylum system is, therefore, essential to ensure that the United States lives up to its obligations to protect female victims of rape and sexual violence who flee to this country as a safe haven and seek refuge on its land.

158. *See id.*