Memorandum

Subject Considerations For Asylum Officers Adjudicating Asylum Claims From Women	Date May 26, 1995
To All INS Asylum Office/rs HQASM Coordinators	From Phyllis Coven, Office of International Affairs

This memorandum is written to provide the INS Asylum Officer Corps (AOC) with guidance and background on adjudicating cases of women having asylum claims based wholly or in part on their gender.

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 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

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[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.

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

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 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

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[6] 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.

[7] 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).

[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).

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.

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 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.

Women asylum applicants who have suffered sexual violence may 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 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.

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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 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.

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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 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).

Gender-Based Claim:
- *Opening Statement*
- *Outside Hearing of Family*

(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.

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[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.

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.

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

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

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.

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[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).

(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. 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 abhofrent 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]

According to the Ninth Circuit, an adjudicator considering a claim of persecution on account

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[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.

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]

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.

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[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 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.

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 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 accusation, even without evidence that she actually held subversive political views. In Lazo-Majano, therefore, an

[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.)

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.

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.

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[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.

2) Is State Protection Possible Elsewnere 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.