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**NON-DETAINED**

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

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In the Matter of: )  
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)  
**Mei Fun WONG** ) File No.: A076-641-112  
)  
In Removal Proceedings )  
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)  

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**REQUEST TO APPEAR AS *AMICUS CURIAE***  
**AND**  
**BRIEF OF THE NATIONAL IMMIGRANT JUSTICE CENTER  
AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT**

## REQUEST TO APPEAR AS *AMICUS CURIAE*

The National Immigrant Justice Center (“NIJC”) hereby requests permission from the Board of Immigration Appeals (“Board” or “BIA”) to appear as *amicus curiae* in the above-captioned matter. The Board may grant permission to *amicus curiae* to appear, on a case-by-case basis, if the public interest will be served thereby. 8 C.F.R. § 1292.1(d).

NIJC, a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based not-for-profit organization that provides legal representation and consultation to immigrants, refugees and asylum-seekers of low-income backgrounds. Each year, NIJC represents hundreds of asylum-seekers before the immigration courts, BIA, the Courts of Appeals and the Supreme Court of the United States through its legal staff and a network of over 1000 *pro bono* attorneys.

Because NIJC represents a large number of asylum-seekers, it has a weighty interest in rational, consistent and just decision-making by the Executive Office for Immigration Review. In particular, NIJC frequently provides representation to individuals seeking protection based on gender-based persecution. Agency precedent on the issues presented by this case will impact many of the clients NIJC serves. Because NIJC has subject matter expertise concerning asylum it believes can assist the Board in its consideration of the present appeal, the public interest will be served.

NIJC therefore respectfully asks for leave to appear as *amicus curiae* and file the following brief.

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## SUMMARY OF THE ARGUMENT

*Amicus* writes in support of Mei Fun Wong's position in this case that the forced insertion of an IUD is persecution. *Amicus* also seeks to demonstrate that Ms. Wong meets the traditional definition of a refugee recognized in United States immigration law at Section 101(a)(42) of the Immigration and Nationality Act ("INA" or "The Act"). 8 U.S.C. § 1101(a)(42) (2002). Though this case, thus far, has been analyzed under the supplementary refugee definition at INA Section 101(a)(42)(B) created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), such reliance is unnecessary since Ms. Wong is a refugee under INA Section 101(a)(42)(A).<sup>1</sup>

In its decision to dismiss Ms. Wong's appeal of an immigration judge's denial of her asylum claim, the Board of Immigration Appeals ("BIA," "Board," or "this Court") held that Ms. Wong failed to establish she had been persecuted because forced insertion of an IUD, even with no ability to remove it, does not amount to a "permanent sterilization" as contemplated by IIRAIRA. *Matter of M-F-W & L-G-*, 24 I&N Dec. 633, 636 (BIA 2008). Regardless of whether this finding is legally sound, the forced insertion of an IUD should be considered persecution on its own.<sup>2</sup>

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<sup>1</sup> See *M-F-W & L-G-*, 24 I&N Dec. 633, 635 (BIA 2008) (applying only Section 601(a) of IIRAIRA, codified at 101(a)(42), to Ms. Wong's claim).

<sup>2</sup> *Amicus* agrees with Ms. Wong that her case could appropriately be granted if the refugee definition at INA §101(a)(42)(B) were correctly applied. *Amicus* agrees that the forced insertion of an IUD amounts to forced sterilization and, in some instances, forced abortion. On this latter point, *Amicus* invites the Board to consider the fact that IUD insertion is a preferred method of medical practitioners to prevent pregnancy following unprotected sex by "keeping the sperm from joining the egg or keeping a fertilized egg from attaching to the uterus." See [WomensHealth.gov](http://www.womenshealth.gov/publications/our-publications/fact-sheet/emergency-contraception.cfm), a project of the U.S. Department of Health and Human Services (<http://www.womenshealth.gov/publications/our-publications/fact-sheet/emergency-contraception.cfm>) (last accessed August 15, 2011).

In its decision, this Court correctly noted that “persecution” for the purposes of Section 601(a) shares the same meaning as “persecution” in other asylum contexts, but did not consider whether Ms. Wong had met the standard of persecution applying a traditional asylum analysis. *Id.* at 639.

Moreover, the Board’s decision only analyzed each of the harms experienced by Ms. Wong in isolation and therefore concluded that Ms. Wong had not experienced persecution. *M-F-W & L-G-*, 24 I&N at 639-42. The resulting decision forced a result that is inconsistent with analogous cases wherein courts consider the cumulative harms experienced by the asylum-seeker. *Compare M-F-W & L-G-*, 24 I&N at 639-42 *with In re O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998) (rejecting the government’s assertion that a pattern of intimidation and physical violence amounted merely to “isolated acts of violence” and instead concluding that the alleged incidents, in the aggregate, amounted to persecution); *Poradisova v. Gonzales*, 420 F.3d 70, 79 (2d Cir. 2005) (rejecting an immigration judge’s “erroneous” technique of “addressing the severity of each alleged [persecutory] event in isolation.”); *Korablina v. I.N.S.*, 158 F.3d 1038, 1044 (9th Cir. 1998) (“A single isolated incident may not rise to the level of persecution, [but] the cumulative effect of several incidents may constitute persecution”).

The mistreatment Ms. Wong experienced at the hands of Chinese officials was persecution under a traditional asylum analysis without regard to the 1996 supplemental language. Ms. Wong was forced to submit to repeated insertions of an IUD she did not want as well as regular medical examinations conducted by government officials to confirm that the IUD was still in place. *M-F-W & L-G-*, 24 I&N at 634-35. Ms. Wong also endured the attendant emotional and psychological harms that accompany an unwanted touching of her genital area, and the imposition of wholesale governmental control over her reproductive destiny. *Id.* When



Ms. Wong refused to submit to reinsertion of the IUD, she was subjected to a three-day detention and a fine. *Id.* at 634. When she attempted to flee the abuse, she was detained for four months and forced to pay a second substantial fine. *Id.* at 635. Additionally, Chinese officials threatened to punish Ms. Wong's first child for her transgressions by prohibiting him from attending school. *Mei Fun Wong v. Holder*, 633 F.3d 64, 66 (2d Cir. 2011).

The Board also held that although Ms. Wong had proven her resistance to China's family-planning policy, she had failed to establish the requisite nexus between her resistance and the suffering she endured at the hands of Chinese family-planning officials. *M-F-W & L-G-*, 24 I&N at 642-43. As demonstrated below, Ms. Wong is able to establish a strong connection between the persecution she experienced and her political opinion against Chinese family-planning policies. She also demonstrates the nexus between the persecution she experienced and her membership in the particular social group of Chinese women of child bearing age who have openly opposed or resisted China's one-child policy. Having established the elements of persecution, protected ground, and nexus under a traditional asylum analysis, Ms. Wong is able to meet the traditional definition of refugee under INA § 101(a)(42)(A).

## ARGUMENT

### I. The Board Should Hold that Forced Insertion of an IUD Is Persecution

In its first treatment of this case, the BIA found the forced insertion of an IUD was not a type of persecutory harm. *See M-F-W & L-G-*, 24 I&N Dec. at 641 (“examples of routine acts implementing China’s family-planning policy that are lacking in harm sufficient to constitute persecution include reinsertion of an IUD after the removal of an IUD . . .”). The BIA should reconsider this conclusion.

Persecution is not defined by the Act. The Second Circuit has stated that persecution “includes more than threats to life and freedom, and . . . encompasses a variety of forms of adverse treatment, including non-life-threatening violence and physical abuse, or non-physical forms of harm such as the deliberate imposition of a substantial economic disadvantage.” *Ivanishvili v. U.S. Dep’t of Justice*, 433 F.3d 332, 341 (2d Cir. 2006) (internal quotations and citations omitted); *see also Edimo-Doualla v. Gonzales*, 464 F.3d 276, 281 (2d Cir. 2006) (same). Importantly, “the difference between harassment and persecution . . . must be assessed with regard to the *context* in which the mistreatment occurs.” *Beskovic v. Gonzalez*, 467 F.3d 223, 226 (2d Cir. 2006) (emphasis in original). The Board has described persecution as harm or suffering that is inflicted upon an individual in order to punish her for possessing a belief or characteristic a persecutor seeks to overcome. *Matter of Acosta*, 19 I&N Dec. 211, 223 (BIA 1985). The forced insertion of an IUD is adverse treatment that rises to the level of persecution.

The state of Illinois holds one accountable for criminal sexual assault when he or she “commits an act of sexual penetration and uses force or the threat of force.” 720 ILCS 5/11-1.20(a)(1). Sexual penetration is defined to include “any intrusion. . .of any. . .object in the sex organ. . .of another person.” 720 ILCS 5/11-0.1. In New York, one may face criminal prosecution for sexual assault in the third degree if he or she “subjects another person to sexual

contact without the latter's consent." N.Y. Penal Code § 130.55. California assigns criminal liability to "[e]very person who induces any other person to engage in . . . sexual penetration . . . when his or her consent is procured by pretense that is made with the intent to create fear . . . that would cause a reasonable person in like circumstances to act contrary to the person's free will." Cal Penal Code Sec. 266c. The California Penal Code goes on to say, "[t]he essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime." Cal Penal Code Sec. 263.

Using these criminal definitions as guides, the forced insertion of a foreign object, including an IUD, into a woman's vagina without her consent is tantamount to sexual abuse or rape, which is recognized as a form a persecution. *Balachova v. Mukasey*, 547 F.3d 374, 386-87 (2d Cir. 2008) ("We have no doubt that rape is sufficiently serious to constitute persecution"). The forced insertion of an IUD is fraught with castigation, coercion and the infliction of emotional distress. It is inherently persecutory. Indeed, this Board found forced IUD insertion to be persecutory in *In re Chao Qun Jiang*, A78 386 894 (BIA Sept. 27, 2006). In that case, the Board found that a woman who participated in forcing women to receive IUDs committed acts that amounted to persecution.<sup>3</sup>

The Board previously assigned little weight to the fact that Ms. Wong was forced to endure the insertion of an IUD she did not want. That result seems illogical and is inconsistent with analogous cases from traditional asylum law wherein a refugee is forced to endure an act or a procedure without her consent and the mere endurance of the act causes persecutory harm. *See*

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<sup>3</sup> It is possible that the persecution identified by the Board in that case was the combination of forced IUD insertion and detention. Here, those factors are both present. As such, Ms. Wong should be found to have experienced persecution. Moreover, as then Judge Sotomayor noted, "[p]resumably, any 'forcible' insertion of an IUD presupposes a restraint of liberty, if only during the time of the procedure." *Jiang v. Bureau of Citizenship & Immig. Servs.*, 520 F.3d 132, 135 n.3 (2d Cir. 2008). The Board should not, then, require forced IUD insertion *plus* additional harm in order to find persecution.

*Mei Fun Wong*, 633 F.3d at 76 (“an act that may be voluntarily undertaken can become perspective where consent is absent.”).

In addition to the physical pain Ms. Wong suffered while subjected to the IUD, she also experienced the psychological harm that accompanies being stripped of one’s personal autonomy. As the Seventh Circuit recently recognized, such psychological harm alone can rise to the level of persecution and should be considered. *See Stanojkova v. Holder*, 645 F.3d 943 (7th Cir. 2011). Finally, the Department of Justice has also opined that the concept of persecution is broad enough to include measures designed to compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to the individual’s deepest beliefs. *See I.N.S. Considerations for Asylum Officers Adjudicating Asylum Claims From Women* at 10, attached hereto as Ex. 1.

The forced insertion of an IUD punishes, humiliates, and violates a woman. It overcomes her personal integrity by fundamentally disregarding her autonomy and her privacy. The act is base, vile and reprehensible and should be recognized as persecution by the Board.

**II. Alternatively, the Board Should Find the Forced Insertion of an IUD and Attendant Harms Endured by Ms. Wong Amounted to Persecution**

If the Board declines to find that forced IUD insertion, on its own, constitutes persecution, Ms. Wong should nonetheless be found to have experienced persecution because of the additional harms she experienced in conjunction with the IUD insertion.

As stated by the Second Circuit, “[i]ncidents alleged to constitute persecution *must* be considered cumulatively.” *Edimo-Doualla*, 464 F.3d 276 at 283 (“A series of incidents of mistreatment may together rise to the level of persecution even if each incident take alone does not.”) (emphasis added); *see also Poradisova*, 420 F.3d 70, at 79-80. When examining whether individual harms amount to persecution, courts should also look to the “overall trajectory of the

harassment.” *See, e.g., Fei Mei Cheng v. Attorney General of the U.S.*, 623 F.3d 175, 192 (3d Cir. 2010). According to the standard articulated by the BIA in the present case, aggravating circumstances which accompany the forced insertion of an IUD should be considered in determining whether the alleged harms are persecutory. *M-F-W & L-G-*, 24 I&N Dec. at 642 (“to rise to the level of harm necessary to constitute ‘persecution,’ the insertion of an IUD must involve aggravating circumstances”).

Here, the Board did not conduct an analysis of the cumulative impact of Ms. Wong’s experiences which, taken together, amount to persecution. Additionally, the BIA did not consider the trajectory of increasingly serious harms Ms. Wong endured. Finally, the BIA did not consider each of the “aggravating circumstances” which accompanied the forced reinsertion of an IUD. A careful review of the facts demonstrates that even if IUD insertion alone is not found to be persecution, Ms. Wong endured harms which cumulatively amount to persecution.

First, the government refused to remove from Ms. Wong’s body an IUD that was inserted against her will and which caused her pain and discomfort. *M-F-W & L-G-*, 24 I&N at 634. This required Ms. Wong to seek the assistance of a private doctor who removed the IUD at her request. *Id.* Ms. Wong then attempted to evade state-ordered gynecological exams so she could avoid having an IUD reinserted. *Id.* Next, having drawn state attention by failing to attend mandated exams, family-planning officials visited her home, took her into custody and forced her, unwillingly, to submit to an examination for the presence of the IUD. *Id.* When the removal of the first IUD was discovered, family-planning officials forcibly detained Ms. Wong and coerced her into undergoing the reinsertion of a second unwanted IUD as a condition of release. *Id.* at 634-35. Even after undergoing the second insertion of an IUD, Ms. Wong was not released and was instead forced to pay a fine to gain her freedom – ostensibly for missing the earlier

mandated medical exams. *Id.* at 635. After attempting to flee China to escape the continued forced use of the IUD, Ms. Wong was jailed for four months as punishment, fined 20,000 RMB and threatened with additional detention. *Id.* Officials also threatened to prohibit her son from attending school if she failed to pay the fine.<sup>4</sup> *Fun Wong v. Holder*, 633 F.3d 64 at 66. Finally, Ms. Wong also endured the emotional and psychological distress associated with the coercive overriding of her own reproductive beliefs and choices. The cumulative impact of the harms endured by Ms. Wong rises to the level of persecution.

Moreover, these experiences amount to persecution because the “trajectory of harassment” demonstrates an increasingly harsh response on the part of Chinese family-planning officials to Ms. Wong’s resistance to family-planning policies. The trajectory of harassment also demonstrates that what once was the routine, non-persecutory implementation of a family-planning policy turned into a campaign of abuse which involved aggravating factors, including forced removal from her home, threats, fines and imprisonment. The actions taken by family-planning officials against Ms. Wong were not only not “routine,” they were, cumulatively, persecutory.

In light of the foregoing, Amicus urges the Board to find that the forced insertion of an IUD amounts to persecution on its own. In the alternative, Amicus asserts the spectrum of harm experienced by Ms. Wong rises to the level of persecution for purposes of establishing eligibility for asylum.

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<sup>4</sup> Certain administrative or economic sanctions, including the withholding of social services like schooling, may also be persecutory when imposed in response to breaches of coercive family-planning laws. Such measures may make life intolerable for the family which would then be forced to pay for an education it cannot afford, or would place the child at risk of receiving no education at all. *UNHCR Note on Refugee Claims Based on Coercive Family-Planning Laws or Politics* at 6-7 (Ex. 2) (hereinafter “UNHCR Note”). While UNHCR guidelines are not binding on this Court, they have been cited by numerous courts in immigration cases as persuasive authority. *See, e.g., INS v. Cardoza-Fonesca*, 480 U.S. 421, 439 n.22 (1987).

### **III. Ms. Wong Meets the Definition of a Refugee under a Traditional Asylum Analysis**

The supplementary language added to the refugee definition in 1996 states that women who were subjected to or resisted forced sterilization or forced abortion or those who otherwise resisted population control programs have *per se* been persecuted on account of political opinion. INA § 101(a)(42)(B). Amicus asserts that Ms. Wong establishes eligibility for asylum without relying on those provisions.

#### **a. Ms. Wong was Persecuted on Account of her Political Opinion**

To obtain asylum based on a well-founded fear of future persecution due to political opinion under INA § 101(a)(42)(A), an applicant must show evidence that (1) she holds a political opinion; (2) her political opinion is known to her persecutors; and (3) the persecution has been or will be on account of the political opinion. *I.N.S. v. Elias Zacarias*, 502 U.S. 478 (1992).

Courts have not limited the definition of political opinion to matters of governmental criticism or membership in a political party or group. In fact, the notion of political opinion has been defined to include opinions based on social issues as well. *See, e.g., Fatin v. I.N.S.*, 12 F.3d 1233, 1241-42 (3d Cir. 1993) (noting that feminism could qualify as a political opinion under the Act); *Lazo-Mjano v. I.N.S.*, 813 F.2d 1432 (9th Cir. 1987) (granting asylum where woman's resistance of violence by an intimate companion, and her fleeing the country to escape it, manifested her political opinion) (overruled on other grounds by *Fisher v. I.N.S.*, 79 F.3d 955 (9th Cir. 1996)); *Sanon v. I.N.S.*, 52 F.3d 648, 652 n.2 (7th Cir. 1995) (holding that the political opinion language in the asylum and withholding of deportation statutes is not necessarily limited to traditional associations with one political party or faction; rather, refusal to associate may also provide support of a political opinion claim).

International guidelines on asylum law also provide that beliefs with regard to family-planning may be political. As the United Nations has commented, “[a] law or policy which restricts the right to found a family or to decide freely and responsibly on the number and spacing of children may be considered persecutory if the applicant holds strong political or religious convictions, the disregard of which would make his or her life intolerable.” *UNHCR Note* at 3-4 (Ex. 2). The United Nations has also noted that the active resistance to or breach of a state policy can fall within the definition of political opinion “regardless of whether the individual consciously challenges the policy as such (whether verbally or through the actual conception of more than the permitted number of children) or whether he or she refuses to comply solely because of his or her wish to have another child.” *UNHCR Note* at 9 (Ex. 2). This is because a political opinion should be understood in the broad sense as incorporating any opinion on any matter in which the machinery of State, government, society or policy may be engaged and includes the expression of an opinion through non-conformist behavior. *UNHCR Note* at 8 (Ex. 2).<sup>5</sup>

Here, Ms. Wong has demonstrated her deeply held political opposition to China's family-planning policies by risking fines and imprisonment in order to avoid being forced to submit to the insertion of an IUD she did not want. Ms. Wong's political opinion was expressed by: 1) asking that her first IUD be removed; 2) hiring a private doctor to remove an IUD that was inserted against her will and that officials refused to remove; 3) risking punishment by skipping state-ordered gynecological exams in hopes that her removal of the IUD would go undetected; 4)

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<sup>5</sup> Though American political rights and views may be expressed by challenging a law in court or supporting a like-minded candidate at the ballot box, the mere fact that a Chinese woman does not have the same opportunities to express her views in a traditionally “political” way, does not render her resistance to those policies any less of a political statement. In a society like China that is not democratic, the only option for expression of a political opinion is to resist the government's policies by refusing to consent to their implementation.



refusing to allow the reinsertion of a second IUD at the cost of being jailed a day for each day she refused; 5) attempting to flee China to escape what she viewed as an intolerable situation and enduring the resulting four-month detention and a significant fine; 6) risking a second detention and fine by fleeing China for the United States. *M-F-W & L-G-*, 24 I&N at 634-35. The actions Ms. Wong took to avoid being victimized by the state's one-child policy demonstrate that she holds a political opinion. Additionally, the fact that Ms. Wong was jailed and fined for her resistance to the government's family-planning policies demonstrates that her persecutors, family-planning officials in Fujian Province, were aware of her opinion.

Previously in Ms. Wong's case, the Board found no nexus between the harm that Chinese officials imposed and her political opinion. *M-F-W- & L-G-*, 24 I&N at 643. (Ms. Wong's "physical discomfort was not caused by a desire to persecute her.") Instead, the Board characterized Ms. Wong's mistreatment as a "routine implementation of the family-planning policy." *Id.* Because this reasoning fails to acknowledge the mixed-motives of Chinese officials, evidenced by Ms. Wong's actual experience, it should be reconsidered. *See Matter of S-P-*, 21 I&N Dec. 486, 489 (BIA 1996) (in mixed-motive cases, an asylum applicant is not obliged to show conclusively why persecution has occurred or may occur).

The Third Circuit recently addressed the same question and reversed a similar decision by the BIA. *See Fei Mei Cheng*, 623 F.3d at 195-96. In that case, the applicant had her property confiscated, an IUD forcibly inserted, and also had fines imposed for missing gynecological appointments. *Id.* As in this case, the BIA found the mistreatment "unconnected" to the applicant's resistance to the population control program where "officials expressly linked the sanctions to [her] defiance of the family-planning policies." *Id.* at 196. In other words, the BIA concluded that the punishment was inflicted merely for violating the law. The Third Circuit

disagreed and held that there was ample evidence to establish a nexus. The Third Circuit's opinion is instructive here because it demonstrates how a "trajectory of abuse" provides "circumstantial evidence of the alleged persecutor's motive." *Id.* (citing *Manzur v. Dep't of Homeland Security*, 494 F.3d 281, 290 (2d Cir. 2007)) ("[T]he motive for the harm inflicted must be analyzed in light of the *context* in which the harm occurred. The pattern provides context for the petitioner's claims and may lend evidentiary support to a conclusion that individual incidents of harm were in fact 'on account of' a ground protected by the Act.") (emphasis in original); see also *Martinez-Buendia v. Holder*, 616 F.3d 711, 717 (7th Cir. 2010) (same).

Under almost identical circumstances to those in *Cheng*, Ms. Wong has demonstrated a link between her resistance and the persecution she suffered. At each opportunity to comply with the one-child policy Ms. Wong resisted, which only prompted increasingly serious government punishment. Because she resisted the policy initially by having her IUD removed, Ms. Wong was forced to have it reinserted. *M-F-W & L-G-*, 24 I&N at 634-35. For each day that she resisted the reinsertion of her IUD, she was detained another day. *Id.* Because she missed medical examinations and attempted to flee the country, she was detained again and fined. *Id.* Finally, government officials threatened her with the denial of education benefits to her first child if she continued her campaign of non-compliance. *Fun Wong v. Holder*, 633 F.3d at 66. This "trajectory of abuse" provides ample evidence that officials were, at least in part, motivated by a desire to punish Ms. Wong for her resistance. In mixed motive cases, the applicant's burden is merely to establish facts which demonstrate that a persecutor was motivated, in part, by a ground protected in the Act. See *In re S-P-*, 21 I&N Dec. 486, 489-90 (BIA 1996) ("Persecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected

under the Act, and others not . . . . An asylum applicant is not obliged to show conclusively why persecution has occurred or may occur”). Ms. Wong has met that burden.

Because Ms. Wong manifested her political opinion by refusing to comply with the government’s IUD mandate and was subsequently subjected to persecution because of the stance she assumed on that issue, Ms. Wong has established both that she holds a political opinion against the government’s IUD policies and that she experienced persecution on account of that political opinion.

**b. Ms. Wong was Persecuted on Account of her Membership in the Particular Social Group of Chinese Women of Child-bearing Age Who Have Openly Opposed or Resisted China’s One-Child Policy**

In addition to asylum based on political opinion, Ms. Wong has also established a basis for asylum based on her membership in the particular social group of Chinese woman of child-bearing age who have openly opposed or resisted China’s one-child policy. In order to articulate her membership in a cognizable social group, an asylum applicant must share a common immutable characteristic with others. *Acosta*, 19 I&N Dec. 211 at 233. The immutable characteristic “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 and or consciences.” *Id.*

According to the United Nations High Commissioner for Refugees (“UNHCR”), “sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics . . . .” *UNHCR Guidelines on Gender-Related Persecution*, at 8, attached hereto as Ex. 3. U.S. courts have agreed with this position. *See, e.g., Mohammed v. Gonzales*, 400 F. 3d 785, 797-98 (9th Cir. 2005) (holding sex is also an immutable characteristic); *Fatin*, 12 F.3d 1233 at 1241 (recognizing that social group could be based on gender); *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Cir. 2000) (granting

asylum to gay man with female sexual identity and recognizing gender element of particular social group); *In re Kasinga*, 21 I&N Dec. 357, 367-68 (BIA 1996) (granting asylum to woman who faced the prospect of female genital mutilation and recognizing women who feared the practice as a particular social group). Finally, “women who are united in their commitment to exercise their fundamental right ‘to found a family’ and ‘to decide freely and responsibly on the number and spacing of their children’ can constitute a particular social group in a society where this right is seriously restricted.” *See, e.g., UNHCR Note* at 11 (Ex. 2).

Ms. Wong’s particular social group has elements of both gender and age which are innate characteristics that cannot be changed. Also, the members of the group share the past experience of having given birth to at least one child, making them obvious targets for monitoring by government officials under China’s one-child policy. Both the innate characteristics and the shared bond of being mothers are highly visible, or at least easily discoverable, to would-be persecutors. Additionally, women who have resisted implementation of China’s one-child policy are visible to their persecutors because the resistance itself alerts authorities to the existence of the social group. Lastly, Ms. Wong’s resistance to family-planning policies in a society where the rights are restricted unites her with similarly situated women in China. For these reasons, Ms. Wong belongs to a cognizable social group under the Act.

As detailed *supra*, Ms. Wong has experienced persecution at the hands of Chinese family-planning officials. The nexus between the persecution and Ms. Wong’s particular social group is clear. The Chinese government forcefully inserts IUDs into group members precisely because they are Chinese women of child-bearing age who resist China’s population control policies. Here, the nature of the persecution itself speaks to the reason behind the harm and reveals nexus.

Because Ms. Wong was persecuted on account of both her political opinion and her membership in a particular social group, her claim for asylum fits squarely into a traditional asylum analysis.

### CONCLUSION

The forced insertion of an IUD experienced by Mei Fun Wong should be recognized as persecution by the Board. In the alternative, forced IUD insertion in conjunction with the other harm experienced by Ms. Wong should be considered persecution. Ms. Wong's clear, unequivocal opposition to the family-planning policy – expressed through repeated actions – demonstrates her assertion of a political opinion. Also, because she possessed the immutable characteristics of gender and age and she took the irretrievable step of removing her IUD and resisting compliance with the government mandate, she is a member of a particular social group that is cognizable under the law. The record demonstrates that the persecution inflicted upon her was on account of both her political opinion and membership in a particular social group. As such, Ms. Wong satisfies the elements of asylum under a traditional asylum analysis. Amicus respectfully suggests that the Board need not assess this case through the lens of INA Section 101(a)(42)(B). Rather, the Board should engage in a traditional asylum analysis, as it could appropriately grant asylum on that basis.

Respectfully Submitted,

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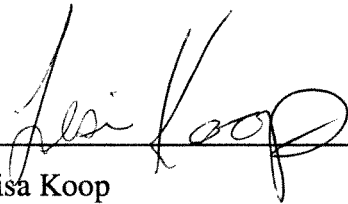
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**CERTIFICATE OF SERVICE**

I hereby certify that on August 26, 2011, I served the foregoing Brief for *Amicus Curiae* in Support of the Respondent by mailing copies of the brief by USPS priority mail service to the following:

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Lisa Koop

# **EXHIBIT 1**

# Memorandum



<b>Subject</b> Considerations For Asylum Officers Adjudicating Asylum Claims From Women	<b>Date</b> May 26, 1995
<b>To</b> All INS Asylum Office/rs HQASM Coordinators	<b>From</b> 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<sup>1</sup>, 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.<sup>2</sup> 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,<sup>3</sup> and called upon the General Assembly to adopt the Declaration on the Elimination of Violence against Women.<sup>4</sup> 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.<sup>5</sup>
- **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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<sup>1</sup> J. Greatbatch, "The Gender Difference: Feminist Critiques of Refugee Discourse" (1989), 1(4) *Int'l. J. Refugee L.* 518; A. Johnson, "The International Protection of Women Refugees: A Summary of Principal Problems and Issues" (1989), 1(2) *Int'l. 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).

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> 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".<sup>6</sup> In October, 1993, the UNHCR Executive Committee adopted Conclusion No. 73 on Refugee Protection and Sexual Violence.<sup>7</sup> 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).<sup>8</sup> 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".<sup>9</sup> 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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<sup>6</sup> 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*.

<sup>7</sup> 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)").

<sup>8</sup> 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).

<sup>9</sup> 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.

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

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.

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

Keep in mind that, from the point of view of most applicants, Asylum Officers are authority figures and foreign government officials. Officers must also be culturally sensitive to the fact that every asylum applicant is testifying in 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.<sup>10</sup> 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 Rapals

#### (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.

<sup>10</sup> "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.

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.

*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.*

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.<sup>11</sup> 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.

<sup>11</sup> 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 abhorrent to that person's deeply held religious convictions, the resulting anguish should be considered in determining whether the authorities have engaged in 'extreme conduct' that is 'tantamount to persecution.'" 37 F.3d at 1381.

#### Nexus: the "On Account of" Requirement

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

#### A. Actual or Imputed Political Opinion

Asylum claims may often raise assertions of fear on account of a political opinion having to do with gender-related issues. The Third Circuit in Fatin had "little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes." 12 F.3d at 1242. The political opinion of the applicant in that case did not, however, provide a basis for refugee status. Though she had shown that she generally possessed political beliefs about the role of women in society that collided with those prevailing in Iran, she had not shown that she would risk severe enough punishment simply for holding such views. Nor had she shown that she actually possessed the narrower political opinion that Iran's gender-specific laws and repressive social norms must be disobeyed on grounds of conscience, although the court had indicated that the penalties for disobedience were harsh enough to amount to persecution. *Id.* at 1242-43. However, the case does make clear that an applicant who could demonstrate a well-founded fear of persecution on account of her (or his) beliefs about the role and status of women in society could be eligible for refugee status on account of political opinion.

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

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

## B. Membership in a Particular Social Group

### (1) General

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

The Board of Immigration Appeals has stated that :

"persecution on account of membership in a particular social group" encompasses persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

Acosta, 19 I&N Dec. at 233. <sup>12</sup>

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

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<sup>12</sup> 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 (2d 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).<sup>13</sup> ...

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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<sup>13</sup> 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.<sup>14</sup>

#### 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

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<sup>14</sup>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.<sup>15</sup>

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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<sup>15</sup> 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 Elsewhere in the Country?

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

This principle becomes crucial where the applicant alleges private actions -- such as domestic violence -- that the state will not protect against. In such situations the officer must explore the extent to which the government can or does offer protection or redress, and the extent to which the risk of harm extends nationwide. According to the UNHCR Handbook, "a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so." UNHCR Handbook, ¶ 91. Whether it is "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.

This memorandum is a public document and may be distributed outside INS.



## **EXHIBIT 2**



## UNHCR Note on Refugee Claims Based on Coercive Family Planning Laws or Policies

### A. Introduction

1. Family planning policies are an exercise of State authority in socio-economic development and can legitimately be aimed at improving the quality of life and common welfare of the population. As worded in Principle 5 of the 1994 Programme of Action of the United Nations International Conference on Population and Development (ICPD): "Population-related goals and policies are integral parts of cultural, economic and social development, the principal aim of which is to improve the quality of life of all people."<sup>1</sup> There is thus no inherent connection between family planning policies and persecution. Family planning per se is broadly accepted as a proper response to population pressures, provided these are not targeted at a particular group or community, but are of general application and there is no discrimination in the intent behind, or in the application of, the policy or relevant laws.

2. At the same time, while serving legitimate socio-economic objectives, population policies should be consistent with internationally recognized human rights standards, justice and the survival of national, regional and minority groups.<sup>2</sup> Hence, as evident from the wording of the 15 Principles of the Programme of Action agreed by the ICPD, a careful balance needs to be maintained between the recognition of individual human rights and the right of nations to develop.<sup>3</sup>

3. Over the past four decades, the right of parents to decide freely and responsibly on the number and the spacing of their children has developed as a key aspect of reproductive rights. The 1968 International Conference on Human Rights held in Teheran reached agreement on this particular issue, proclaiming that parents have a basic right to determine freely and responsibly the number and spacing of their children.<sup>4</sup> This emerging human right was affirmed at the World Population Conference held in Bucharest in 1974<sup>5</sup> and then given expression in treaty law in the

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<sup>1</sup> ICPD, 5–13 September 1994, Cairo, Egypt. The General Assembly has similarly affirmed that "the principal aim of social, economic and human development, of which population goals and policies are integral parts, is to improve the standards of living and quality of life of the people", A/RES/39/228, 18 December 1984, meeting no. 104, para. 5.

<sup>2</sup> World Population Plan of Action, adopted by consensus of the 137 States represented at the United Nations World Population Conference in Bucharest, August 1974, para. 14(d).

<sup>3</sup> ICPD, "Follow-up action to be taken by the United Nations: Implications of the recommendations of the International Conference on Population and Development for the work programme on population", Report of the Secretary-General, E/CN.9/1995/5, para. 9.

<sup>4</sup> Para. 16 of the resulting Proclamation of Teheran reads: "The protection of the family and of the child remains the concern of the international community. Parents have a basic human right to determine freely and responsibly the number and the spacing of their children."

<sup>5</sup> All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so; the responsibility of couples and individuals in the exercise of this right takes into account the needs of

1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 16(1)(e) of which provides:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:...The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

4. A potential conflict may arise between the interest of individuals to decide freely and responsibly on the number and spacing of their children and the interest of States in pursuing economic and social policies for the common welfare of their people through population control policies. In situations where there may be a potential conflict, it needs to be assessed whether the State, in pursuing its socio-economic objective, may legitimately restrict an individual's ability to exercise the right in question and if so, to what extent, since such an interference should not be disproportionate in relation to the legitimate aim pursued.

5. In this context, it has been widely recognized that family planning policies should not be either compulsory or coercive. For instance, the Human Rights Committee, in clarifying Article 23 of the 1966 International Covenant on Civil and Political Rights,<sup>6</sup> has stated in its General Comment No. 19: "... When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or *compulsory*..."<sup>7</sup> The same is reiterated in the ICPD Programme of Action, which states, *inter alia*: "Reproductive health-care programmes should provide the widest range of services *without any form of coercion*. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so".<sup>8</sup> It also provides: "... The principle of informed free choice is essential to the long-term success of family-planning programmes. Any form of coercion has no part to play."<sup>9</sup>

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their living and future children, and their responsibilities towards the community (Principle 14f, World Population Plan of Action).

<sup>6</sup> Article 23(2) of the 1966 International Covenant on the Civil and Political Rights (hereafter "ICCPR"), as well as Article 16(1) of the Universal Declaration of Human Rights (hereafter "UDHR"), provide for the right of men and women of marriageable age to marry and to found a family.

<sup>7</sup> General Comment No. 19, Protection of the family, the right to marriage and equality of the spouses (Article 23), 27 July 1990, para. 5 (emphasis added).

<sup>8</sup> See Principle 8, (emphasis added).

<sup>9</sup> ICPD, Programme of Action, Chapter VII, Section B on Family Planning, para. 7.12. See also Chapter VII, Section A on Reproductive Rights, para. 7.3, which states:

[R]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community. The promotion of the responsible exercise of these rights for all people should be the fundamental basis for government- and community-supported policies and programmes in the area of reproductive health, including family planning ...

6. In view of the above, coercive family planning laws or policies which prescribe the number of children parents can have and/or which provide for enforcement measures or sanctions to promote compliance with such laws or policies, or punish individuals for breaching them, are not in conformity with international human rights standards.

7. Additionally, both the means or methods used to enforce coercive family planning laws or policies and the sanctions imposed in response to breaches of such laws may result in serious human rights violations and hence persecution.

8. Proceeding on the basis that coercive forms of family planning constitute a violation of human rights, this Note seeks to provide guidance for the assessment of claims for refugee status based on a fear of persecution arising out of opposition to, or non-compliance with, compulsory family planning policies, in particular in situations where there is a refusal to forcibly abort a child conceived outside the permitted quota or to undergo sterilization. The two key issues that will be examined are the threshold at which the harm feared amounts to persecution and the nexus to one or more of the five grounds set out in the refugee definition of the 1951 Convention relating to the Status of Refugees.

## **B. Well-founded fear of persecution**

### *Persecutory laws and policies*

9. As set out above, the legitimate socio-economic and demographic objective of a family planning law or policy does not outweigh the individual's right to found a family and to decide freely and responsibly on the number and spacing of his or her children. Interference with that right, as envisaged by coercive family planning laws or policies, would therefore be disproportionate and unjustified. Even though a coercive family planning law or policy is not in conformity with accepted human rights standards, this does not in itself necessarily make it inherently persecutory, as only serious harm resulting from a human rights violation constitutes persecution. As in all cases where an applicant claims to fear persecution as a result of a law of general application, it must be established that he or she has a well-founded fear of being persecuted as a result of that law. This would not be the case, for instance, where a persecutory law continues to exist but is no longer enforced.<sup>10</sup> Similarly, if an individual is not able to have children for medical reasons, a well-founded fear of persecution based on such a law could not be established, since the individual concerned would not be able to breach the coercive family planning law.

10. A law or policy which restricts the right to found a family or to decide freely and responsibly on the number and spacing of children may be considered persecutory if the applicant holds strong political or religious convictions, the disregard of which

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<sup>10</sup> 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", (hereafter "UNHCR Guidelines on Gender-Related Persecution"), HCR/GIP/02/01, 7 May 2002, para. 10.

would make his or her life intolerable.<sup>11</sup> An evaluation of the subjective element of the refugee definition must thus necessarily involve an assessment of the personality of the particular asylum-seeker.<sup>12</sup> For example, a person with strong religious beliefs or whose religion forbids family planning may suffer intolerable mental agony and harm if forced to comply with a law or policy on family planning, such as through the use of contraceptives, in order to avoid prosecution. Although an act of compliance, in the sense of refraining from having more than the permitted number of children, may not be physically painful or harmful, it could nevertheless be so abhorrent to the individual's deepest beliefs that it would be tantamount to persecution.<sup>13</sup>

11. A coercive family planning law or policy that prescribes forced abortion or forced sterilization as methods of enforcement would, however, always be considered inherently persecutory in view of the serious human rights violations each individual subject to these measures would suffer. Forced abortion and forced sterilization violate the physical integrity or security of the person and may well, in some cases, also pose a threat to life, for example, when an abortion is carried out at an advanced stage of pregnancy. The harmful physical and psychological impact of these enforcement measures has been widely acknowledged in international fora.

12. For instance, the Committee on the Elimination of Discrimination against Women has stated that “[c]ompulsory sterilization or abortion adversely affects women's physical and mental health ...”<sup>14</sup> and that “... States parties should not permit forms of coercion, such as non-consensual sterilization ... that violate women's rights to informed consent and dignity.”<sup>15</sup> In addition, forced abortion and forced sterilization were mentioned as two forms of sexual assault on women during the negotiations leading up to the adoption on the 1993 Declaration on the Elimination of Violence against Women.<sup>16</sup> The 1995 Beijing Platform for Action defined the term “violence against women” as “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 private life” and included among such acts “forced sterilization and forced abortion, coercive/forced use of contraceptives, female infanticide and prenatal sex selection”.<sup>17</sup> The Beijing Declaration also explicitly recognized and reaffirmed that the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment.<sup>18</sup>

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<sup>11</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, 1979, reedited 1992, (hereafter “UNHCR Handbook”), para. 40.

<sup>12</sup> *Ibid.*

<sup>13</sup> “Gender-related persecution: An analysis of recent trends”, prepared by UNHCR Division (now Department) of International Protection in connection with a symposium on gender-based persecution, Geneva, 1996, p. 97, referring to *Fatin v. Immigration and Naturalization Service*, US Court of Appeals Third Circuit, 20 December 1993, at 1242.

<sup>14</sup> General Recommendation No. 19, 11th session, 1992, on violence against women, para. 22 (concerning Articles 16 and 5 of CEDAW).

<sup>15</sup> General Recommendation No. 24, 20th session, 1999, on Article 12 CEDAW (women and health), para. 22.

<sup>16</sup> GA resolution, 48/104, 20 December 1993.

<sup>17</sup> Beijing Platform for Action, Strategic Objectives and Actions, Violence against Women, paras. 113 and 115.

<sup>18</sup> Beijing Declaration, para. 17.

13. Compulsory abortion or sterilization may also amount to torture, inhuman or degrading treatment constituting persecution. Indeed, the Human Rights Committee states that in order “to assess compliance with Article 7 of the Covenant ... States parties should also provide the Committee with information on measures to prevent forced abortion or forced sterilization ...”<sup>19</sup>

14. Hence, implementation of coercive family planning policies through laws which impose compulsory abortion or sterilization would seriously breach fundamental human rights of the individuals affected. Laws which prescribe the use of such measures to enforce family planning policies are therefore inherently persecutory. Whenever such laws are applied, this would give rise to serious violations of human rights amounting to persecution.

***Methods of enforcing coercive family planning laws or policies and penalties, sanctions or discriminatory treatment imposed for non-compliance***

**Parents**

15. The distinction between prosecution and punishment for a common law offence and persecution will occasionally be obscured. This may be the case if an individual is liable to excessive punishment, if he or she faces penal prosecution for a reason mentioned in the refugee definition, or if he or she, besides fearing prosecution or punishment, has a well-founded fear of persecution, for example, as a result of discriminatory measures.<sup>20</sup>

16. As indicated above, a coercive family planning law or policy which restricts an individual’s right to found a family and to decide freely and responsibly on the number and spacing of their children is not in conformity with international standards<sup>21</sup> despite the legitimate social objective it seeks to achieve. Therefore, under international human rights and criminal law standards, any punishment imposed in response to a breach of such a law or policy would be considered excessive in relation to the offence committed. However, not all punishments that would be considered excessive on the basis of international human rights and criminal law standards are necessarily persecutory, as the impact of an anticipated punishment on an individual needs to be serious in order to reach the threshold of persecution.

17. As elaborated above, where a coercive family planning law is enforced by compulsory abortion or compulsory sterilization or where these sanctions are imposed for breaches of such laws or policies, such enforcement measures and sanctions, if

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<sup>19</sup> General Comment No. 28, on Article 7 of the ICCPR, para. 11.

<sup>20</sup> UNHCR Handbook paras. 57-58.

<sup>21</sup> *Ibid.*, paras. 59–60. Para. 59 reads: “In order to determine whether prosecution amounts to persecution, it will also be necessary to refer to the laws of the country concerned, for it is possible for a law not to be in conformity with accepted human rights standards.” Para. 60 reads:

In such cases, due to the obvious difficulty involved in evaluating the laws of another country, national authorities may frequently have to take decisions by using their own national legislation as a yardstick. Moreover, recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights, which contain binding commitments for the States parties and are instruments to which many States parties to the 1951 Convention have acceded.



implemented, would result in serious breaches of human rights and their impact would amount to persecution. In this context, it needs to be recalled that there may be cases where a particular State has prohibited a persecutory practice (e.g. enforced sterilization), but still continues to condone or tolerate it or is not able to stop the practice effectively, with the result that the persecutory practice in effect continues. The fact that a law has been enacted to prohibit or denounce certain persecutory practices will, therefore, not in itself be sufficient to determine that the individual's claim to refugee status is not valid.<sup>22</sup>

18. While penal sanctions, such as imprisonment or detention are not considered excessive forms of punishment for certain types of offences, as outlined above, these would be excessive in relation to the offence of having conceived a child outside the quota permitted by a coercive family planning law or policy even if the period of imprisonment is not considered lengthy or its nature inhumane. When determining whether the threshold of persecution is reached, the anticipated impact of a penal sanction on a particular individual needs to be assessed in light of the nature and extent of the punishment. Clearly, more extreme forms of punishment such as "re-education through labour" camps<sup>23</sup> would always amount to persecution for the individuals concerned.

19. It should also be noted that penal prosecution for a reason mentioned in the refugee definition may in itself amount to persecution.<sup>24</sup> Considering the various particular social groups that may exist, as set out below, penal prosecution for having exercised one's human right to found a family and to decide freely and responsibly on the number and spacing of one's children may in itself amount to persecution.

20. Certain administrative or economic sanctions, when imposed in response to breaches of coercive family planning laws or policies, may also be persecutory. Among the sanctions that have been imposed for violations of coercive family planning laws or policies are stiff fines (often higher than a year's salary) including "social compensation fines", withholding of social services, demotion and other administrative punishments that sometimes result in loss of employment, as well as confiscation or destruction of individuals' homes or personal property by the local authorities. As with the penal sanctions above, even though economic or administrative sanctions would be considered excessive under international human rights law for such offences given the individual's recognized interest in exercising the rights in question, the anticipated impact of a particular sanction on an individual must nonetheless be assessed in order to determine if it reaches the threshold of persecution. For example, the impact of a social compensation fee on one family could be very serious and could, for example, result in a threat to the life or freedom of the persons concerned or seriously restrict the children's ability to enjoy their right to education, while the impact of a similar measure on another family could be much less serious.

21. Discriminatory measures, such as restricted enjoyment of the right to work, could also amount to persecution if they were to lead to consequences of a

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<sup>22</sup> UNHCR Guidelines on Gender-Related Persecution, para. 11.

<sup>23</sup> Amnesty International news release, 7 January 2005, available at <http://www.amnesty.org.uk/news/press/15852.shtml>.

<sup>24</sup> UNHCR Handbook, para. 57.

substantially prejudicial nature for the individual concerned (e.g. serious restrictions on his or her right to earn a livelihood)<sup>25</sup> or if they produced “a feeling of apprehension and insecurity” as regards the “future existence” of the individual and his or her family.<sup>26</sup> Various discriminatory measures imposed on individuals for reasons of their opposition to, or non-compliance with, coercive family planning laws could, for example, violate their right to enjoyment of just and favourable conditions of work,<sup>27</sup> an adequate standard of living including adequate food, clothing and housing, freedom from arbitrary or unlawful interference with privacy, family, home or correspondence and from unlawful attacks on honour and reputation,<sup>28</sup> as well as the right not to be arbitrarily deprived of one’s property.<sup>29</sup> The impact of such violations on an individual would then need to be assessed in order to determine whether the impact of the treatment feared would amount to persecution.

22. Even where specific measures in themselves would not amount to persecution, they could, when combined with other adverse factors, constitute persecution. Depending on the facts of the case, there may be cases where an individual or the members of a family risk being subjected to numerous administrative and economic sanctions and/or discriminatory measures, which together could make life intolerable and amount to persecution on cumulative grounds.<sup>30</sup>

### Children

23. A well-founded fear of persecution may also be analysed from a child’s perspective. In some instances, children born in contravention of compulsory family planning policies have been subjected to concerted and severe discrimination and been denied registration and birth certificates and have been given only restricted access to food, education, health care and other social rights. Discriminatory treatment may not always be targeted directly at the child him or herself but where the parents are, for example, demoted, obliged to pay “social compensation fines” or denied subsidized education, it is the child who may ultimately suffer the consequences of his or her parents’ serious social or financial predicament. Thus, when assessing an application for asylum made by a child asylum-seeker, the impact of the penalties or measures that may be imposed in order to enforce compliance with coercive family planning laws or policies should be evaluated, taking into account the situation of the parents and the family as a whole.

24. In making the assessment as to whether the harm suffered or feared amounts to persecution, it should be recalled that there are certain child-specific rights (i.e. rights enjoyed exclusively by children) under international human rights and humanitarian law, including the 1989 Convention on Rights of the Child, which must be respected. The recognition of these child-specific rights raises the question as to whether violations of such rights would amount to persecution and, therefore, lead to forms of persecution which can be exclusively experienced by children. In order to answer this question, it must be determined whether or not the violation of a child-specific right is

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<sup>25</sup> UNHCR Handbook, para. 54.

<sup>26</sup> *Ibid.*, para. 55.

<sup>27</sup> 1966 International Covenant on Economic, Social and Cultural Rights, Article 7.

<sup>28</sup> ICCPR, Article 17.

<sup>29</sup> UDHR, Article 17.

<sup>30</sup> UNHCR Handbook, para. 53.

of a serious nature. This is particularly the case when the child's life or freedom is threatened as a result of his or her being denied basic State protection.

25. Furthermore, due to his or her age and vulnerability, a child may experience greater harm resulting from a human rights violation compared to the impact a breach of the same right would have on an able-bodied adult. Hence, a human rights violation, which may not be sufficiently serious to constitute persecution for an adult, could amount to persecution if inflicted upon a child taking into account his or her particular vulnerability.<sup>31</sup> Acts and omissions, such as the denial or discriminatory provision of food or other forms of assistance, while always constituting a human rights violation may not endanger the life or health of an adult, thereby not amounting to persecution, but may have serious, if not fatal, consequences for a child.

### **C. Nexus to the Convention grounds**

26. In the context of refugee status determination, one needs to examine whether the treatment concerned (e.g. coerced or enforced abortion and/or sterilization, as well as various penal, administrative or economic sanctions or discriminatory measures) is feared *for reasons of* one or more of the five Convention grounds. In this context, it is important to recall that nowhere in the drafting history of the 1951 Convention is it suggested that the motive or intent of the persecutor was ever to be considered as a *controlling* factor in either the definition or the determination of refugee status.<sup>32</sup> This should be noted as the question of the motive or intent of the persecutor has been considered in a number of cases related to coercive family planning policies, where refugee status has sometimes been denied with a reference to a lack of evidence of persecutory intent.<sup>33</sup>

#### ***For reasons of political opinion***

27. Claims for refugee status based on a fear of persecution for opposing or violating coercive family planning laws or policies have been argued on the basis of a well-founded fear of persecution for reasons of political opinion.

28. Political opinion should be understood in the broad sense as incorporating any opinion on any matter in which the machinery of State, government, society, or policy may be engaged. This may include an opinion as to how the government is implementing its population policies. It would also include non-conformist behaviour, which leads the persecutor to impute a political opinion to him or her. In this sense, there is not, as such, an inherently political or an inherently non-political activity but the context of the case should determine its nature, bearing in mind in particular the

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<sup>31</sup> See also references to the subjective element of fear of persecution, UNHCR Handbook, paras. 40–42 and 52.

<sup>32</sup> Guy S. Goodwin-Gill, *The Refugee in International Law*, Clarendon Press, 2<sup>nd</sup> edition, 1996, pp. 50-51.

<sup>33</sup> In these cases, adjudicators have argued that the enforcement of a compulsory family planning policy, albeit through the use of methods amounting to persecution, is not based on any motivation other than general population control. See *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 FC 314 (CA), at 319, where Linden JA said that the Refugee Division had “wrongly required that a ‘persecutory intent’ be present, whereas a ‘persecutory effect’ suffices”.

context in which the State is enforcing its population control policies. As UNHCR's Guidelines on Gender-Related Persecution note:

A claim on the basis of political opinion does, however, presuppose that the claimant holds or is assumed to hold opinions not tolerated by the authorities or society, which are critical of their policies, traditions or methods. It also presupposes that such opinions have come or could come to the notice of the authorities or relevant parts of the society, or are attributed by them to the claimant. It is not always necessary to have expressed such an opinion, or to have already suffered any form of discrimination or persecution. In such cases the test of well-founded fear would be based on an assessment of the consequences that a claimant having certain dispositions would have to face if he or she returned.<sup>34</sup>

29. Actively resisting or breaching a State policy on compulsory family planning could clearly be considered a statement directly pertaining to an important governmental policy that would fall within the ambit of the above definition of political opinion, regardless of whether the individual consciously challenges the policy as such (whether verbally or through the actual conception of more than the permitted number of children) or whether he or she refuses to comply solely because of his or her wish to have another child. Moreover, an individual's own refusal or failure to comply with a compulsory population control programme or his or her association with others who expressly resist or oppose such a programme may cause such a political opinion to be imputed to that individual.<sup>35</sup> Claims for refugee status should, therefore, not be routinely denied on the grounds that, as long as the action taken by a government official against a claimant is the enforcement of an ordinary law of general application, the government is necessarily engaging in prosecution and not persecution. In order to make a comprehensive assessment, one needs to look at all the relevant factors in the case and context, including the question as to whether, in view of their invasive and excessive character, the sanctions imposed on persons challenging the policy can be said to merely constitute the neutral efforts of a government to encourage or ensure compliance with a government policy.<sup>36</sup>

30. Hence, since opposition or resistance to a compulsory State family planning policy can be viewed as an expression of an opinion critical of the State's policy, the nexus to the political opinion ground is established if the persecutory treatment is feared or inflicted for reasons of the individual's opposition or resistance to the policy (whether verbally and/or through his or her actions).

#### ***For reasons of race***

31. When assessing claims for refugee status based on a fear of persecution for opposing or violating coercive family planning laws or policies, it may also need to be examined if certain ethnic groups are specifically targeted by such laws or policies, methods of enforcement, punishments or discriminatory measures.

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<sup>34</sup> UNHCR Guidelines on Gender-Related Persecution, para. 32.

<sup>35</sup> *In re C.Y.Z., Applicant*, Interim Decision No. 3319, US Department of Justice, BIA, 4 June 1997, p. 10.

<sup>36</sup> It is quite possible for a law or policy of general application to be persecutory where the penalty is disproportionate to the objective of the law, regardless of the authorities' intent. See Legal Services Immigration and Refugee Board, Interpretation of the Convention Refugee Definition in the Case Law, 31 December 1999, chapter 9, section 9.3.2; *Cheung v. Canada (Minister of Employment and Education)*, [1993] 2 FC 314 (CA), per Linden JA.

### *For reasons of religion*

32. Resistance to, or non-compliance with, a compulsory family planning law or policy could, in specific cases, be characterized as a manifestation of an individual's religious belief, identity or way of life.<sup>37</sup> If religious convictions can be shown to be the reason why a compulsory family planning policy is violated, (i.e. religion being the reason why a parent opposes the birth-control methods imposed), it might then be argued that the persecution was feared for reasons of religion, because religious beliefs made it impossible for an individual to comply with a coercive family planning law or policy or required the individual to act in a way which provoked the punishment. Again, each case must be determined on its merits.

### *For reasons of membership of a particular social group*

#### Parents

33. Claims for refugee status based on a fear of persecution for opposing or violating coercive family planning laws or policies have also been argued on the basis of a well-founded fear of persecution for reasons of membership of a particular social group.

34. In UNHCR's Guidelines on Membership of a Particular Social Group,<sup>38</sup> the "protected characteristics" approach and the "social perception" approach adopted in different national jurisdictions have been reconciled to produce the following definition:

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society.

The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.<sup>39</sup>

As the Guidelines note: "It is widely accepted in State practice that an applicant need not show that the members of a particular group know each other or associate with each other as a group. That is, there is no requirement that the group be 'cohesive'.<sup>40</sup>

35. By applying the "social perception" element of the definition above, one would thus need to examine, *inter alia*, whether those who verbally or through their conception of more than the permitted number of children oppose or breach a coercive family planning policy, are perceived as a cognizable group by the society in question.

36. By applying the "protected characteristics" element of the definition, one would need to examine whether the asserted group is defined

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<sup>37</sup> See UNHCR, "Guidelines on International Protection, Religion-Based Claims under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees", HCR/GIP/04/06, 28 April 2004, paras. 5–8.

<sup>38</sup> UNHCR, "Guidelines on International Protection: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees", HCR/GIP/02/02, 7 May 2002 (hereafter "Guidelines on Membership of a Particular Social Group").

<sup>39</sup> *Ibid.*, para. 11.

<sup>40</sup> *Ibid.*, para. 15.

(1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.<sup>41</sup>

37. In some countries, parents with more than the permitted number of children could constitute a particular social group under both of the aforementioned approaches. A parent who is expecting, or who already has more (or fewer), children than a coercive family planning law or policy permits, is likely to be part of a socially cognizable group in a society where a particular number of children is the norm. Mothers and fathers, in their role as parents of one or more children, also share a common characteristic, which is innate and unchangeable, as well as fundamental and protected.<sup>42</sup> Furthermore, mothers who are pregnant with a child conceived in breach of a family planning policy or law share another characteristic that is so fundamental to human dignity that they should not be compelled to forsake it: their right to life, liberty and security of person and to give birth to their child without interference. In this case, the risk of persecution that pregnant women may face helps to identify the social group without running foul of the rule that the persecution cannot define the group.

38. In addition, it may be possible to argue that men and women who are united in their commitment to exercise their fundamental human right “to found a family” and “to decide freely and responsibly on the number and spacing of their children” can constitute a particular social group in a society where this right is seriously restricted.

39. In this context, a particular social group may also be defined as women who have “transgressed the social mores of the society in which they live” by having more children than the number permitted by a national law or policy.<sup>43</sup>

### Children

40. Membership of a particular social group is perhaps the most evident Convention ground of relevance in cases involving children born in contravention of coercive family planning laws or policies (e.g. a child born outside an authorized marriage or born after the single child allowed under a restrictive family planning law or policy), although other grounds may also be applicable depending on the facts of the case. By applying the definition of social group, the second, third, fourth, and so on child who has been born in violation of a compulsory family planning policy in a society where usually only one child per family is the permitted norm, could be regarded as a member of the particular social group comprising children born in contravention of the family planning policy or law. This common and unchangeable characteristic unites this group of children, who may, moreover, be perceived as a cognizable group in the particular society in question. Adjudicators have used slightly different labels to define this group of children, including “children born in violation

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<sup>41</sup> *Ibid.*, para. 6.

<sup>42</sup> ICCPR, Article 23(1), provides that the family is the “natural and fundamental group unit of society” and is “entitled to protection by society and the State”.

<sup>43</sup> UNHCR Executive Committee, Conclusion No. 39 (XXVI), 1985, refugee women and international protection, para. (k).

of coercive family planning policies”, “second children” or so-called “black children” (*hei haizi*).

#### **D. Conclusion**

41. Non-discriminatory and non-coercive policies regarding family size promoted on the basis of the common welfare, whether they encourage larger or smaller families, are a legitimate exercise of State authority. However, laws or policies on family planning should be consistent with international human rights standards and should recognize that the principle of informed free choice is essential to the long-term success of family planning.

42. Coercive family planning laws or policies, which may violate the human right of individuals and couples to found a family and to decide freely and responsibly on the number and spacing of their children, can therefore give rise to justified claims for refugee status based on a fear of persecution due to the impact a restriction of these rights may have on a particular individual and/or because of the harm he or she may suffer as a result of the methods used by officials to enforce the policy or as a consequence of the penalties or sanctions imposed for non-compliance. Claims based on the methods of enforcement or on the excessive punishment imposed are more likely to meet the threshold of persecution in the refugee definition, in particular where there is a threat of forced abortion and/or enforced sterilization. There may nevertheless also be cases where the requirement to comply with the compulsory family planning policy would be so abhorrent to the individual’s deepest beliefs that it would be tantamount to persecution. This would always be the case when a law or policy prescribes the use of forced abortion or forced sterilization as methods of enforcement or as punishments for non-compliance.

43. In most of these cases, it could be argued that the fear of persecutory treatment is linked to reasons of political opinion, since opposition to, or non-compliance with, a coercive State policy on family planning is a form of political expression. Claims may also be argued based on a fear of persecution for reasons of membership of a particular social group and in some cases, the persecution may be feared for reasons of religion or race.

Protection Policy and Legal Advice Section  
Department of International Protection  
UNHCR, Geneva, August 2005

# **EXHIBIT 3**





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**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**

UNHCR issues these Guidelines pursuant to its mandate, as contained in the *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol*. These Guidelines complement the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Reedited, Geneva, January 1992)*. They further replace UNHCR's Position Paper on Gender-Related Persecution (Geneva, January 2000) and result from the Second Track of the Global Consultations on International Protection process which examined this subject at its expert meeting in San Remo in September 2001.

These Guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

**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**

**I. INTRODUCTION**

1. "Gender-related persecution" is a term that has no legal meaning *per se*. Rather, it is used to encompass the range of different claims in which gender is a relevant consideration in the determination of refugee status. These Guidelines specifically focus on the interpretation of the refugee definition contained in Article 1A(2) of the *1951 Convention relating to the Status of Refugees* (hereinafter "1951 Convention") from a gender perspective, as well as propose some procedural practices in order to ensure that proper consideration is given to women claimants in refugee status determination procedures and that the range of gender-related claims are recognised as such.
2. It is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status. This approach has been endorsed by the General Assembly, as well as the Executive Committee of UNHCR's Programme.<sup>1</sup>
3. In order to understand the nature of gender-related persecution, it is essential to define and distinguish between the terms "gender" and "sex". Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time. Gender-related claims may be brought by either women or men, although due to particular types of persecution, they are more commonly brought by women. In some cases, the claimant's sex may bear on the claim in significant ways to which the decision-maker will need to be attentive. In other cases, however, the refugee claim of a female asylum-seeker will have nothing to do with her sex. Gender-related claims have typically encompassed, although are by no means limited to, acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.
4. Adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status. The refugee claimant must establish that he or she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

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<sup>1</sup> In its Conclusions of October 1999, No. 87 (n), the Executive Committee "not[ed] with appreciation special efforts by States to incorporate gender perspectives into asylum policies, regulations and practices; encourage[d] States, UNHCR and other concerned actors to promote wider acceptance, and inclusion in their protection criteria of the notion that persecution may be gender-related or effected through sexual violence; further encourage[d] UNHCR and other concerned actors to develop, promote and implement guidelines, codes of conduct and training programmes on gender-related refugee issues, in order to support the mainstreaming of a gender perspective and enhance accountability for the implementation of gender policies." See also Executive Committee Conclusions: No. 39, Refugee Women and International Protection, 1985; No. 73, Refugee Protection and Sexual Violence, 1993; No. 77(g), General Conclusion on International Protection, 1995; No. 79(o), General Conclusion on International Protection, 1996; and No. 81(t), General Conclusion on International Protection, 1997.

## **II. SUBSTANTIVE ANALYSIS**

### **A. BACKGROUND**

5. Historically, the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women and of homosexuals, have gone unrecognised. In the past decade, however, the analysis and understanding of sex and gender in the refugee context have advanced substantially in case law, in State practice generally and in academic writing. These developments have run parallel to, and have been assisted by, developments in international human rights law and standards,<sup>2</sup> as well as in related areas of international law, including through jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Rome Statute of the International Criminal Court. In this regard, for instance, it should be noted that harmful practices in breach of international human rights law and standards cannot be justified on the basis of historical, traditional, religious or cultural grounds.
6. Even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims. As such, there is no need to add an additional ground to the 1951 Convention definition.<sup>3</sup>
7. In attempting to apply the criteria of the refugee definition in the course of refugee status determination procedures, it is important to approach the assessment holistically, and have regard to all the relevant circumstances of the case. It is essential to have both a full picture of the asylum-seeker's personality, background and personal experiences, as well as an analysis and up-to-date knowledge of historically, geographically and culturally specific circumstances in the country of origin. Making generalisations about women or men is not helpful and in doing so, critical differences, which may be relevant to a particular case, can be overlooked.
8. The elements of the definition discussed below are those that require a gender-sensitive interpretation. Other criteria (e.g. being outside the country of origin) remain, of course, also directly relevant to the holistic assessment of any claim. Throughout this document, the use of the term "women" includes the girl-child.

### **B. WELL-FOUNDED FEAR OF PERSECUTION**

9. What amounts to a well-founded fear of persecution will depend on the particular circumstances of each individual case. While female and male applicants may be subjected to the same forms of harm, they may also face forms of persecution specific to their sex. International human rights law and international criminal law

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<sup>2</sup> Useful texts include the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, the International Covenant on Economic, Social and Cultural Rights 1966, the Convention on the Political Rights of Women 1953, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, the Convention on the Rights of the Child 1989, and in particular, the Convention on the Elimination of All Forms of Discrimination Against Women 1979 and the Declaration on the Elimination of Violence against Women 1993. Relevant regional instruments include the European Convention on Human Rights and Fundamental Freedoms 1950, the American Convention on Human Rights 1969, and the African Charter on Human and Peoples' Rights 1981.

<sup>3</sup> See Summary Conclusions – Gender-Related Persecution, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, nos.1 and 3 ("Summary Conclusions – Gender-Related Persecution").

clearly identify certain acts as violations of these laws, such as sexual violence, and support their characterisation as serious abuses, amounting to persecution.<sup>4</sup> In this sense, international law can assist decision-makers to determine the persecutory nature of a particular act. There is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking,<sup>5</sup> are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors.

10. Assessing a law to be persecutory in and of itself has proven to be material to determining some gender-related claims. This is especially so given the fact that relevant laws may emanate from traditional or cultural norms and practices not necessarily in conformity with international human rights standards. However, as in all cases, a claimant must still establish that he or she has a well-founded fear of being persecuted as a result of that law. This would not be the case, for instance, where a persecutory law continues to exist but is no longer enforced.
11. Even though a particular State may have prohibited a persecutory practice (e.g. female genital mutilation), the State may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively. In such cases, the practice would still amount to persecution. The fact that a law has been enacted to prohibit or denounce certain persecutory practices will therefore not in itself be sufficient to determine that the individual's claim to refugee status is not valid.
12. Where the penalty or punishment for non-compliance with, or breach of, a policy or law is disproportionately severe and has a gender dimension, it would amount to persecution.<sup>6</sup> Even if the law is one of general applicability, circumstances of punishment or treatment cannot be so severe as to be disproportionate to the objective of the law. Severe punishment for women who, by breaching a law, transgress social mores in a society could, therefore, amount to persecution.
13. Even where laws or policies have justifiable objectives, methods of implementation that lead to consequences of a substantially prejudicial nature for the persons concerned, would amount to persecution. For example, it is widely accepted that family planning constitutes an appropriate response to population pressures. However, implementation of such policies, through the use of forced abortions and sterilisations, would breach fundamental human rights law. Such practices, despite the fact that they may be implemented in the context of a legitimate law, are recognised as serious abuses and considered persecution.

#### **Discrimination amounting to persecution**

14. While it is generally agreed that 'mere' discrimination may not, in the normal course, amount to persecution in and of itself, a pattern of discrimination or less favourable treatment could, on cumulative grounds, amount to persecution and warrant international protection. It would, for instance, amount to persecution if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on the right to earn one's livelihood, the right to practice one's religion, or access to available educational facilities.<sup>7</sup>

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<sup>4</sup> See UNHCR's Handbook, paragraph 51.

<sup>5</sup> See below at paragraph 18.

<sup>6</sup> Persons fleeing from prosecution or punishment for a common law offence are not normally refugees, however, the distinction may be obscured, in particular, in circumstances of excessive punishment for breach of a legitimate law. See UNHCR's Handbook, paragraphs 56 and 57.

<sup>7</sup> See UNHCR's Handbook, paragraph 54.

15. Significant to gender-related claims is also an analysis of forms of discrimination by the State in failing to extend protection to individuals against certain types of harm. If the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution. Particular cases of domestic violence, or of abuse for reasons of one's differing sexual orientation, could, for example, be analysed in this context.

#### **Persecution on account of one's sexual orientation**

16. Refugee claims based on differing sexual orientation contain a gender element. A claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex. The most common claims involve homosexuals, transsexuals or transvestites, who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination.

17. Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalised, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm.

#### **Trafficking for the purposes of forced prostitution or sexual exploitation as a form of persecution<sup>8</sup>**

18. Some trafficked women or minors may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identify documents. In addition, trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination. In individual cases, being trafficked for the purposes of forced prostitution or sexual

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<sup>8</sup> For the purposes of these Guidelines, "trafficking" is defined as per article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, 2000. Article 3(1) provides that trafficking in persons means "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm.<sup>9</sup>

#### **Agents of Persecution**

19. There is scope within the refugee definition to recognise both State and non-State actors of persecution. While persecution is most often perpetrated by the authorities of a country, serious discriminatory or other offensive acts committed by the local populace, or by individuals, can also be considered persecution if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection.<sup>10</sup>

#### **C. THE CAUSAL LINK ("for reasons of")**

20. The well-founded fear of being persecuted must be related to one or more of the Convention grounds. That is, it must be "for reasons of" race, religion, nationality, membership of a particular social group, or political opinion. The Convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause. In many jurisdictions the causal link ("for reasons of") must be explicitly established (e.g. some Common Law States) while in other States causation is not treated as a separate question for analysis, but is subsumed within the holistic analysis of the refugee definition. In many gender-related claims, the difficult issue for a decision-maker may not be deciding upon the applicable ground, so much as the causal link: that the well-founded fear of being persecuted was for reasons of that ground. Attribution of the Convention ground to the claimant by the State or non-State actor of persecution is sufficient to establish the required causal connection.
21. In cases where there is a risk of being persecuted at the hands of a non-State actor (e.g. husband, partner or other non-State actor) for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.<sup>11</sup>

#### **D. CONVENTION GROUNDS**

22. Ensuring that a gender-sensitive interpretation is given to each of the Convention grounds is important in determining whether a particular claimant has fulfilled the criteria of the refugee definition. In many cases, claimants may face persecution because of a Convention ground which is attributed or imputed to them. In many societies a woman's political views, race, nationality, religion or social affiliations, for example, are often seen as aligned with relatives or associates or with those of her community.
23. It is also important to be aware that in many gender-related claims, the persecution feared could be for one, or more, of the Convention grounds. For example, a claim for refugee status based on transgression of social or religious norms may be analysed in terms of religion, political opinion or membership of a particular social group. The claimant is not required to identify accurately the reason why he or she has a well-founded fear of being persecuted.

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<sup>9</sup> Trafficking for other purposes could also amount to persecution in a particular case, depending on the circumstances.

<sup>10</sup> See UNHCR's *Handbook*, paragraph 65.

<sup>11</sup> See Summary Conclusions – Gender-Related Persecution, no. 6.

## Race

24. Race for the purposes of the refugee definition has been defined to include all kinds of ethnic groups that are referred to as "races" in common usage.<sup>12</sup> Persecution for reasons of race may be expressed in different ways against men and women. For example, the persecutor may choose to destroy the ethnic identity and/or prosperity of a racial group by killing, maiming or incarcerating the men, while the women may be viewed as propagating the ethnic or racial identity and persecuted in a different way, such as through sexual violence or control of reproduction.

## Religion

25. In certain States, the religion assigns particular roles or behavioural codes to women and men respectively. Where a woman does not fulfil her assigned role or refuses to abide by the codes, and is punished as a consequence, she may have a well-founded fear of being persecuted for reasons of religion. Failure to abide by such codes may be perceived as evidence that a woman holds unacceptable religious opinions regardless of what she actually believes. A woman may face harm for her particular religious beliefs or practices, or those attributed to her, including her refusal to hold particular beliefs, to practise a prescribed religion or to conform her behaviour in accordance with the teachings of a prescribed religion.

26. There is some overlap between the grounds of religion and political opinion in gender-related claims, especially in the realm of imputed political opinion. While religious tenets require certain kinds of behaviour from a woman, contrary behaviour may be perceived as evidence of an unacceptable political opinion. For example, in certain societies, the role ascribed to women may be attributable to the requirements of the State or official religion. The authorities or other actors of persecution may perceive the failure of a woman to conform to this role as the failure to practice or to hold certain religious beliefs. At the same time, the failure to conform could be interpreted as holding an unacceptable political opinion that threatens the basic structure from which certain political power flows. This is particularly true in societies where there is little separation between religious and State institutions, laws and doctrines.

## Nationality

27. Nationality is not to be understood only as "citizenship". It also refers to membership of an ethnic or linguistic group and may occasionally overlap with the term "race".<sup>13</sup> Although persecution on the grounds of nationality (as with race) is not specific to women or men, in many instances the nature of the persecution takes a gender-specific form, most commonly that of sexual violence directed against women and girls.

## Membership of a Particular Social Group<sup>14</sup>

28. Gender-related claims have often been analysed within the parameters of this ground, making a proper understanding of this term of paramount importance. However, in some cases, the emphasis given to the social group ground has meant that other applicable grounds, such as religion or political opinion, have been over-

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<sup>12</sup> See UNHCR's *Handbook*, paragraph 68.

<sup>13</sup> See UNHCR's *Handbook*, paragraph 74.

<sup>14</sup> For more information, see UNHCR's *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/02, 7 May 2002).

looked. Therefore, the interpretation given to this ground cannot render the other four Convention grounds superfluous.

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

30. It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men.<sup>15</sup> Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries.<sup>16</sup> Equally, this definition would encompass homosexuals, transsexuals, or transvestites.

31. The size of the group has sometimes been used as a basis for refusing to recognise 'women' generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size. There should equally be no requirement that the particular social group be cohesive or that members of it voluntarily associate,<sup>17</sup> or that every member of the group is at risk of persecution.<sup>18</sup> It is well-accepted that it should be possible to identify the group independently of the persecution, however, discrimination or persecution may be a relevant factor in determining the visibility of the group in a particular context.<sup>19</sup>

#### Political Opinion

32. Under this ground, a claimant must show that he or she has a well-founded fear of being persecuted for holding certain political opinions (usually different from those of the Government or parts of the society), or because the holding of such opinions has been attributed to him or her. Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged. This may include an opinion as to gender roles. It would also include non-conformist behaviour which leads the persecutor to impute a political opinion to him or her. In this sense, there is not as such an inherently political or an inherently non-political activity, but the context of the case should determine its nature. A claim on the basis of political opinion does, however, presuppose that the claimant holds or is assumed to hold opinions not tolerated by the authorities or society, which are critical of their policies, traditions or methods. It also presupposes that such opinions have come or could come to the notice of the authorities or relevant parts of the society, or are attributed by them to the claimant. It is not always necessary to have expressed such an opinion, or to have already suffered any form of discrimination or persecution. In such cases the test of well-founded fear would be based on an assessment of the consequences that a claimant having certain dispositions would have to face if he or she returned.

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<sup>15</sup> See Summary Conclusions – Gender-Related Persecution, no. 5.

<sup>16</sup> See also Executive Committee Conclusion No. 39, Refugee Women and International Protection, 1985: "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 as 'a particular social group' within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention".

<sup>17</sup> See Summary Conclusions - Membership of a Particular Social Group, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, no. 4 ("Summary Conclusions – Membership of a Particular Social Group").

<sup>18</sup> See Summary Conclusions – Membership of a Particular Social Group, *ibid.*, no. 7.

<sup>19</sup> See Summary Conclusions - Membership of a Particular Social Group, *ibid.*, no. 6.



33. The image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies. Women are less likely than their male counterparts to engage in high profile political activity and are more often involved in 'low level' political activities that reflect dominant gender roles. For example, a woman may work in nursing sick rebel soldiers, in the recruitment of sympathisers, or in the preparation and dissemination of leaflets. Women are also frequently attributed with political opinions of their family or male relatives, and subjected to persecution because of the activities of their male relatives. While this may be analysed in the context of an imputed political opinion, it may also be analysed as being persecution for reasons of her membership of a particular social group, being her "family". These factors need to be taken into account in gender-related claims.
34. Equally important for gender-related claims is to recognise that a woman may not wish to engage in certain activities, such as providing meals to government soldiers, which may be interpreted by the persecutor(s) as holding a contrary political opinion.

### III. PROCEDURAL ISSUES<sup>20</sup>

35. Persons raising gender-related refugee claims, and survivors of torture or trauma in particular, require a supportive environment where they can be reassured of the confidentiality of their claim. Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community.<sup>21</sup>
36. Against this background, in order to ensure that gender-related claims, of women in particular, are properly considered in the refugee status determination process, the following measures should be borne in mind:
- i. Women asylum-seekers should be interviewed separately, without the presence of male family members, in order to ensure that they have an opportunity to present their case. It should be explained to them that they may have a valid claim in their own right.

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<sup>20</sup> This Part has benefited from the valuable guidance provided by various States and other actors, including the following guidelines: *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (Immigration and Naturalization Service, United States, 26 May 1995); *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (Department of Immigration and Humanitarian Affairs, Australia, July 1996) (hereinafter "Australian Guidelines on Gender Issues for Decision Makers"); *Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Immigration and Refugee Board, Canada, 13 November 1996); *Position on Asylum Seeking and Refugee Women*, (European Council on Refugees and Exiles, December 1997) (hereinafter "ECRE Position on Asylum Seeking and Refugee Women"); *Gender Guidelines for the Determination of Asylum Claims in the UK* (Refugee Women's Legal Group, July 1998) (hereinafter "Refugee Women's Group Gender Guidelines"); *Gender Guidelines for Asylum Determination* (National Consortium on Refugee Affairs, South Africa, 1999); *Asylum Gender Guidelines* (Immigration Appellate Authority, United Kingdom, November 2000); and *Gender-Based Persecution: Guidelines for the investigation and evaluation of the needs of women for protection* (Migration Board, Legal Practice Division, Sweden, 28 March 2001).

<sup>21</sup> See also *Sexual Violence Against Refugees: Guidelines on Prevention and Response* (UNHCR, Geneva, 1995) and *Prevention and Response to Sexual and Gender-Based Violence in Refugee Situations* (Report of Inter-Agency Lessons Learned Conference Proceedings, 27-29 March 2001, Geneva).

- ii. It is essential that women are given information about the status determination process, access to it, as well as legal advice, in a manner and language that she understands.
- iii. Claimants should be informed of the choice to have interviewers and interpreters of the same sex as themselves,<sup>22</sup> and they should be provided automatically for women claimants. Interviewers and interpreters should also be aware of and responsive to any cultural or religious sensitivities or personal factors such as age and level of education.
- iv. An open and reassuring environment is often crucial to establishing trust between the interviewer and the claimant, and should help the full disclosure of sometimes sensitive and personal information. The interview room should be arranged in such a way as to encourage discussion, promote confidentiality and to lessen any possibility of perceived power imbalances.
- v. The interviewer should take the time to introduce him/herself and the interpreter to the claimant, explain clearly the roles of each person, and the exact purpose of the interview.<sup>23</sup> The claimant should be assured that his/her claim will be treated in the strictest confidence, and information provided by the claimant will not be provided to members of his/her family. Importantly, the interviewer should explain that he/she is not a trauma counselor.
- vi. The interviewer should remain neutral, compassionate and objective during the interview, and should avoid body language or gestures that may be perceived as intimidating or culturally insensitive or inappropriate. The interviewer should allow the claimant to present his/her claim with minimal interruption.
- vii. Both 'open-ended' and specific questions which may help to reveal gender issues relevant to a refugee claim should be incorporated into all asylum interviews. Women who have been involved in indirect political activity or to whom political opinion has been attributed, for example, often do not provide relevant information in interviews due to the male-oriented nature of the questioning. Female claimants may also fail to relate questions that are about 'torture' to the types of harm which they fear (such as rape, sexual abuse, female genital mutilation, 'honour killings', forced marriage, etc.).
- viii. Particularly for victims of sexual violence or other forms of trauma, second and subsequent interviews may be needed in order to establish trust and to obtain all necessary information. In this regard, interviewers should be responsive to the trauma and emotion of claimants and should stop an interview where the claimant is becoming emotionally distressed.
- ix. Where it is envisaged that a particular case may give rise to a gender-related claim, adequate preparation is needed, which will also allow a relationship of confidence and trust with the claimant to be developed, as well as allowing the interviewer to ask the right questions and deal with any problems that may arise during an interview.
- x. Country of origin information should be collected that has relevance in women's claims, such as the position of women before the law, the political rights of

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<sup>22</sup> See also Executive Committee Conclusion No. 64, Refugee Women and International Protection, 1990, (a) (iii): Provide, wherever necessary, skilled female interviewers in procedures for the determination of refugee status and ensure appropriate access by women asylum-seekers to such procedures, even when accompanied by male family members.

<sup>23</sup> *ibid.*, para.3.19.

women, the social and economic rights of women, the cultural and social mores of the country and consequences for non-adherence, the prevalence of such harmful traditional practices, the incidence and forms of reported violence against women, the protection available to them, any penalties imposed on those who perpetrate the violence, and the risks that a woman might face on her return to her country of origin after making a claim for refugee status.

- xi. The type and level of emotion displayed during the recounting of her experiences should not affect a woman's credibility. Interviewers and decision-makers should understand that cultural differences and trauma play an important and complex role in determining behaviour. For some cases, it may be appropriate to seek objective psychological or medical evidence. It is unnecessary to establish the precise details of the act of rape or sexual assault itself, but events leading up to, and after, the act, the surrounding circumstances and details (such as, use of guns, any words or phrases spoken by the perpetrators, type of assault, where it occurred and how, details of the perpetrators (e.g. soldiers, civilians) etc.) as well as the motivation of the perpetrator may be required. In some circumstances it should be noted that a woman may not be aware of the reasons for her abuse.
- xii. Mechanisms for referral to psycho-social counseling and other support services should be made available where necessary. Best practice recommends that trained psycho-social counselors be available to assist the claimant before and after the interview.

#### **Evidentiary Matters**

- 37. No documentary proof as such is required in order for the authorities to recognise a refugee claim, however, information on practices in the country of origin may support a particular case. It is important to recognise that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution. Alternative forms of information might assist, such as the testimonies of other women similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research.

#### **IV. METHODS OF IMPLEMENTATION**

- 38. Depending on the respective legal traditions, there have been two general approaches taken by States to ensure a gender-sensitive application of refugee law and in particular of the refugee definition. Some States have incorporated legal interpretative guidance and/or procedural safeguards within legislation itself, while others have preferred to develop policy and legal guidelines on the same for decision-makers. UNHCR encourages States who have not already done so to ensure a gender-sensitive application of refugee law and procedures, and stands ready to assist States in this regard.