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Submitted via www.regulations.gov

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Office of Information and Regulatory Affairs,
Office of Management and Budget,
725 17th Street NW, Washington, DC 20503;
Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

RE: RIN 1125-AA94 or EOIR Docket No. 18-0002, Public Comment Opposing Proposed Rules on Asylum, and Collection of Information OMB Control Number 1615-0067

On behalf of the Mississippi Center for Justice, I strongly urge the Department of Justice (DOJ) and Department of Homeland Security (DHS) to withdraw these proposed rules in their entirety. If implemented, these rules would violate the United States' duties under domestic and international law, flout the rule of law by attempting to gut due process protections and decades of well-established legal protections, and make a mockery of the United States' historical commitment to providing safety and protection to those fleeing persecution and torture worldwide. You have the duty to ensure that does not happen.

As a home-grown, public interest law firm, the Mississippi Center for Justice advances racial and economic justice through an approach that combines legal services with policy advocacy, community education and media outreach. The Center partners with national, regional and community organizations to develop and implement campaigns designed to create better futures for low-income Mississippians and communities of color in the areas of educational opportunity, financial security, healthcare, affordable housing, and immigration. Through a partnership with the Mississippi College School of Law, we host Mississippi's only law school immigration clinic, and together, we are Mississippi's only legal service provider that focuses on providing free asylum and appellate representation for Mississippi immigrants in need. I have seven years of experience teaching, practicing, and writing on asylum law on a state, regional, and nationwide basis, and have represented asylum seekers before the asylum offices, immigration courts, Board of Immigration Appeals, and Fifth, Ninth, and Eleventh Circuit Courts of Appeal. I have written on asylum issues in *The Hill* and the American Bar Association – International Law Section's *Year in Review*. I have attached a copy of my CV to this comment.

We strongly object to the abbreviated, 30-day comment period established in the Notice of Proposed Rulemaking.

As we will address below, the proposed regulations would destroy what remains of the US asylum system. These regulatory changes would rewrite the laws adopted by Congress and would be the most sweeping changes to asylum since the 1996 overhaul of the Immigration and Nationality Act, Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA). The NPRM is over 160 pages long with more than 60 of those pages being the proposed regulations themselves—including dense, technical language and sweeping new restrictions that have the power to send the most vulnerable back to their countries where they may face persecution, torture, or death. Any one of the sections of these proposed regulations, standing alone, would merit 60 days for the public to fully absorb the magnitude of the proposed changes, perform research on the existing rule and its interpretation, and respond thoughtfully. Instead, the agencies have allowed a mere 30 days to respond to multiple, unrelated changes to the asylum rules, issued in a single, mammoth document.

Under any circumstances, it would be a travesty for the government to restrict comment on changes that are this extensive in such a severe manner, but the challenges to respond to the NPRM now are magnified by the ongoing COVID-19 pandemic. COVID-19 continues to surge in Mississippi and in the United States as a whole, and many offices, including ours, are still operating remotely. Many community members may not be able to comment easily due to interruptions in work/remote work, COVID-related needs to care for family members, or their own illness.

For this procedural reason alone, we urge the Administration to rescind the Proposed Rule. If it wishes to reissue the proposed regulations, it should grant the public at least 60 days to have adequate time to provide comprehensive comments.

We strongly object to the substance of the Proposed Rule and urge the Administration to rescind it in its entirety.

Because these regulations are so far-reaching and the time permitted to file a comment is so short, we will focus our comment on a few areas in which our organization has a particular focus. However, the fact that we have not discussed a particular change to the law in no way means that we agree with it. We oppose these proposed regulations in their entirety and call upon the agencies to withdraw them all. Overall, the Proposed Rule would result in virtually all asylum applications¹ being denied, by removing due process protections, imposing new bars, heightening legal standards, changing established legal precedent, and creating sweeping categories of mandatory discretionary denials. In a best case scenario, the result of these changes would be to leave a higher percentage of those fleeing harm in a permanent state of limbo, if they are able to meet the higher legal standard to qualify for withholding of removal under INA §

1 This Comment's reference to “asylum seekers” and “asylum applications” also includes applicants and applications for protection under the Convention Against Torture (CAT).

241(b)(3). Since those who qualify for withholding of removal have no ability to petition for derivative beneficiaries, these rules would result in permanent family separations.

8 CFR § 1208.13 (e)—The Proposed Rule would deprive asylum seekers of their day in court.

One of the most troubling aspects of the Proposed Rule is the wide discretion it would give immigration judges to deny asylum seekers a full and meaningful hearing, including the right to testify on their own behalf. Section 8 CFR § 1208.13(e) would allow immigration judges to deny a hearing if they determine (on their initiative or at the request of a DHS attorney) that the application form does not adequately make a claim. This radical change would allow judges to “pretermite” asylum claims. Allowing judges to “pretermite” claims deprive asylum seekers of their due process and would represent an abrupt change from decades of precedent and practice before the immigration court. *See Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989) (“In the ordinary course, however, we consider the full examination of an applicant to be an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the asylum process itself.”).

This proposition is especially harmful when considered in conjunction with the consistent erosion of asylum protections over the past few years and the fact that many asylum seekers (including unaccompanied children) undergo this arduous process without a lawyer, do not speak English fluently, and have suffered unspeakable trauma. They may have to use unofficial translators with whom they fear sharing intimate details of their past or their present fears. Asylum seekers who are detained and do not speak English fluently may be unable to secure any assistance in filling out the application, especially given the dearth of affordable immigration legal resources in our area. In any event, asylum seekers are often not well-versed in the complexities of the U.S. asylum system and cannot be expected to lay out every element of their asylum claims in the application before arriving in court. Allowing immigration judges to deny asylum cases without even taking any testimony or looking beyond the asylum application would inevitably lead to meritorious cases being denied and vulnerable asylum seekers being returned to harm, including death. We oppose this proposed change in the strongest possible terms.

8 CFR § 208.1(c); 8 CFR § 1208.1(c)— The Proposed Rule will make it virtually impossible to prevail on a particular social group claim.

Moreover, the proposed rule would virtually eliminate asylum claims on the basis of an applicant's particular social group. Applicants for asylum and withholding of removal are legally required to demonstrate that the persecution they fear is on account of a protected characteristic: race, religion, nationality, membership in a particular social group (PSG), or political opinion. INA § 101(a)(42). Membership in a particular social group was designed to allow for flexibility in the refugee definition and capture those who do not fall within the other listed characteristics. “The term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.” United Nations High Commissioner on Refugees (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, May 7, 2002, <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html> (attached). Our office has represented a number of clients seeking protection based on their particular social groups, including clients living with physical disabilities and mental illness, married women, orphaned children, former military officers, and LGBTQ persons. Some of these clients are unaccompanied children.

These regulations would place new limitations on PSGs that are unsupported by caselaw and are unrelated to their cognizability. For example, their prohibition on claims that stem from “presence in a country with generalized violence or a high crime rate” seems to categorically ban most asylum seekers, particularly from Central America and Mexico, who may otherwise have strong claims. Another extremely troubling aspect of this proposed rule is its requirement that an asylum seeker state with exactness every PSG before the immigration judge or forever lose the opportunity to present it, even after receiving ineffective assistance of counsel, or no assistance at all.

An asylum seeker’s life should not be dependent on her ability to expertly craft arguments in the English language in a way that satisfies highly technical legal requirements upon which even our federal circuit courts cannot agree. But one thing that our law does make clear is that the asylum officer or immigration judge has a duty to help develop the record, especially in the case of *pro se* applicants. *Jacinto v. INS*, 208 F.3d 725 (9th Cir. 2000). Therefore, applying this proposed regulation to asylum seekers, including unrepresented ones, would not only be an unconscionable dereliction of this duty, but it would raise serious due process concerns.

8 CFR § 208.1(d); 8 CFR § 1208.1(d)—The Proposed Rule flouts long-established law and standards to redefine political opinion.

The Proposed Rule also impermissibly limits claims on the basis of an applicant's political opinion. According to the United Nations High Commissioner for Refugees, “the notion of political opinion needs to be understood *in a broad sense* to encompass 'any opinion on any matter in which the machinery of State, government, society, or policy may be engaged.'” UNHCR, Guidelines on International Protection No. 1: 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, 7 May 2002, <http://www.unhcr.org/refworld/docid/3d36f1c64.html>, para. 32 (emphasis added) (attached). In other words, the political opinion held or imputed need not be against the government. Several circuits, if not all, have adopted this broad view of political opinion, either expressly or implicitly. *See, e.g., Hernandez-Chacon v. Barr*, 948 F.3d 94 (2d Cir. 2020) (political opinion based on “resistance to the norm of female subordination to male dominance that pervades El Salvador”; *Alvarez-Lagos v. Barr*, 927 F.3d 236 (4th Cir. 2019) (imputed political opinion based on opposition to the Barrio 18 gang in Honduras); *Ruiz v. Gonzales*, 479 F.3d 762 (11th Cir. 2007) (opposition to the FARC in Colombia).

Yet the Proposed Rule flouts this long-established standards set by the UNHCR and our circuit courts, narrowing the definition of “political opinion” to include only claims based on “furtherance of a discrete cause related to political control of a state or a unit thereof.” Indeed, the Proposed Rule attempts to explicitly foreclose the possibility that an applicant's opposition to a terrorist group or gang organization can qualify as a political opinion, unless the asylum seeker’s “expressive behavior” is “related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state.”

This attempt to rewrite decades of asylum precedent not only undermines the rule of law, but it will also have devastating—and deadly—effects. It will deny protection to women holding feminist views that men do not have the right to rape them. It will return people to their deaths for daring to actively speak out against terrorist groups and gangs, even when these groups act as *de facto* states, and even when these groups actively threaten the security and well-being of the United States. Therefore, it cannot stand.

8 CFR § 208.18; 8 CFR § 1208.18— The Proposed Rule violates US treaty obligations under the Convention Against Torture (CAT).

Additionally, this Proposed Rule would also put protection under the Convention Against Torture (CAT) out of reach for the vast majority of individuals fleeing torture or the threat of torture in their countries of citizenship. Like the sweeping amendments to asylum and withholding of removal, the proposed changes to torture protections ignore the clear intent of CAT and, if implemented, would violate the United States' treaty obligations to protect victims of torture.

Under Article 3 of the Convention Against Torture, the United States will not “expel, return, or extradite” any person to another country “where substantial grounds for believing that he would be in danger of being subjected to torture.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18 Apr. 1988, art. 3, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1954) (hereinafter “CAT”). In order to comply with the CAT, the Department of Homeland Security adopted interim regulations, which define torture in the same way as Article I of the CAT:

any act by which severe pain or suffering, whether physical or mental, intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 208.18(a)(1).

Just like with asylum, the Proposed Rule attempts to eliminate all meaningful CAT protections by ignoring the clear intent of Congress and well-established circuit precedent. Here, it does so by redefining “public official” as someone who is acting “under color of law” and not a “rogue official” and creating a *mens rea* requirement for “acquiescence.” These proposed changes indicate an attempt by the agencies to return to its prior, and far narrower, “willful acceptance” interpretation of official acquiescence—one that both Congress and the vast majority of circuit courts have soundly rejected.

A. The Senate's CAT ratification resolution requires a broad interpretation of official acquiescence.

Importantly, when the United States signed and ratified the CAT, it did so “subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.” 8 C.F.R. 1208.18(a). Therefore, it is necessary to review the Senate resolution of ratification in order to properly interpret the treaty.

According to its 1990 ratification resolution, the United States Senate wished to “demonstrate clearly and unequivocally U.S. opposition to torture and U.S. determination to take steps to eradicate it” upon ratification of the Convention. S. Exec. Rep. 101–30, at 3. Fearing that prior conditions submitted by the Reagan administration “created the impression that the United States was not serious in its commitment to end torture worldwide,” the Senate continued that the

reservations, understandings, and declarations proposed by the Bush administration, which are incorporated in the resolution of advice and consent to ratification, are the product of a cooperative and successful negotiating process between the executive branch, this committee, and interested private groups. The committee has adopted these conditions with the understanding that they reflect a broad consensus and with the strong belief that they resolve any potential conflicts between the Convention and U.S. law.

Id. at 4.

The resolution’s fourth condition is particularly important in this case. In defining official “acquiescence,” it stated:

that the public official, ‘prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.’ The purpose of this condition is to make it clear that *both actual knowledge and ‘willful blindness’ fall within the definition of the term of ‘acquiescence’ in article 1.*”

Id. at 9 (emphasis added).

Later in the resolution, the Senate explained that this condition replaced the Reagan-era terminology of “knowledge” with “awareness” to “make it clearer that both actual knowledge and willful blindness fall within the meaning of acquiescence.” *Id.* at 36. As this legislative history makes clear, any standard that does *not* meaningfully include willful blindness directly contravenes Congress’ express intent.²

B. An overwhelming majority of circuit courts have flatly rejected prior agency attempts to narrow official acquiescence.

This Proposed Rule is not the agency's first attempt to narrow the definition of official acquiescence in violation of clear congressional intent. In fact, it appears to be an attempt to return to the agency's more restrictive “willful acceptance” standard, which, like the Proposed Rule, required *actual* knowledge, inserted a *mens rea* component on the part of officials, and prohibited claims in cases of “rogue” officials. The overwhelming majority of circuits have rejected this approach, finding that it impermissibly disregards cases of willful blindness. For this same reason, this Proposed Rule must fail.

In 2000, the Board and Attorney General rejected willful blindness for their own more restrictive “willful acceptance” standard in *Matter of S-V-* and *Matter of Y-L-, A-G-, R-S-R-*. 22 I. & N. Dec. 1306 (BIA 2000); 23 I. & N. Dec. 270 (A.G. 2002). In *Matter of S-V-*, the Board held:

To demonstrate “acquiescence” by Colombian Government officials, the respondent must do more than show that the officials are aware of the activity constituting torture but are powerless to stop it. He must demonstrate that Colombian officials are *willfully accepting* of the guerrillas' torturous activities. To interpret the term otherwise would be to misconstrue the meaning of “acquiescence,” the dictionary definition of which is “silent or passive assent.” The Oxford Universal Dictionary 17 (3d ed. 1955). Accordingly, we consider that a government's inability to control a group ought not lead to the conclusion that the government acquiesced to the group's activities.

22 I. & N. Dec. 1306, 1312 (BIA 2000) (emphasis added).

Two years later, the Attorney General reiterated the agency’s stance in *Matter of Y-L-, A-G-, R-S-R-*:

Violence committed by individuals over whom the government has no reasonable control does not implicate the treaty. *See In re S-V-*, Interim Decision 3430, at 9, 2000 WL 562836 (BIA 2000) (“To demonstrate ‘acquiescence’ by [foreign] Government officials, the respondent must do more than show that the officials are aware of the activity constituting torture but are powerless to stop it. He must

² As demonstrated below, the Proposed Rule preserves “willful blindness” in name only.

demonstrate that [the foreign] officials are willfully accepting of the . . . tortuous activities.”).

23 I. & N. Dec. 270, 280 (2002).

The distinction between willful acceptance and willful blindness is important, especially for this case. As described below, unlike willful acceptance, willful blindness may include torture by third parties “over whom the government has no reasonable control,” and in fact, may result *even when* the government is making efforts to prevent the torture and, in many circuits, *even when* the officer is acting in a rogue capacity. As a result, the new standards imposed by the Proposed Rule impermissibly foreclose many of the claims anticipated by Congress and the Convention Against Torture.

1. *The circuit courts have overwhelmingly rejected the actual knowledge and mens rea elements that the Proposed Rule requires for official acquiescence.*

Recognizing the Board’s and Attorney General’s grave errors in *Matter of S-V-* and *Matter of Y-L-*, eight federal circuits have expressly adopted the willful blindness standard in precedential decisions and two others have adopted it by reference, strongly rebuking the Board’s misplaced “willful acceptance” standard. In most of these cases, the reviewing courts carefully analyzed the text and legislative history of the Convention, finding that the Board’s requirements of official “consent or approval” and actual knowledge—echoed by this Proposed Rule—impermissibly excluded willful blindness. These circuits include:

- **Second Circuit**

Khouzam v. Ashcroft, 361 F.3d 161 (2d Cir. 2004), *as amended* (Apr. 12, 2004).

From all of this we discern a clear expression of Congressional purpose. *In terms of state action, torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it.* Although the determinative sources here are the language of the CAT itself and the Senate’s understandings, we note that the CAT’s drafting history also supports our conclusion. In fact, the consent or approval requirement would have been more consistent with the text first proposed by Sweden in 1979, and it was the United States that proposed broadening this text to include acquiescence. *See* J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture* 41–42 (1988). The BIA and the Attorney General have erred in adding a requirement of official “consent or approval.” We therefore expressly disapprove of *Matter of Y-L-, A-G-, R-S-R-*, 23 I. & N. Dec. 270, 2002 WL 358818 (A.G.2002), insofar as it takes a contrary position.

361 F.3d at 171 (emphasis added).

- **Third Circuit**

Silva-Rengifo v. Att’y. Gen. of U.S., 473 F.3d 58 (3d Cir. 2007), *as amended* (Mar. 6, 2007).

The Board reasoned that Silva-Rengifo had not established that any torture he might be subjected to “would be meted out by the government or those acting with the consent or *actual* acquiescence of the government,” and that the Convention “does not extend to those who are harmed by groups the government is unable to control.” [...] We cannot accept the Board's conclusion that the acquiescence that must be established under the CAT requires actual knowledge of torturous activity as required in *Matter of S-V-*. Similarly, although a government's ability to control a particular group may be relevant to an inquiry into governmental acquiescence under the CAT, that inquiry does not turn on a government's “ability to control” persons or groups engaging in torturous activity. [...] The CAT does not require an alien to prove that the government in question approves of torture, or that it consents to it. Rather, as the court concluded in *Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir.2003), an alien can satisfy the burden established for CAT relief by producing sufficient evidence that the government in question is willfully blind to such activities. *See id.* (holding that Congress has made clear that the correct inquiry under the Convention is whether an applicant can show that public officials demonstrate “willful blindness” to the torture of their citizens by third parties). [...]

Any more restrictive reading of the CAT would be inconsistent with the fact that the Senate ratified the Convention only after attaching an understanding that *acquiescence does not require “actual knowledge.”* [...] Government participation in torture certainly suffices to establish acquiescence under the CAT, but it is not necessary. Evidence that officials turn a blind eye to certain groups' torturous conduct is no less probative of government acquiescence.

We thus reject the reasoning in *Matter of S-V-* and the rationale of the *en banc* Board in denying Silva-Rengifo's motion to reopen. In this regard we join our sister circuits. The “willful blindness” standard has been adopted by those courts of appeals that have addressed the legal standard for the “acquiescence” under the CAT. [...] We are persuaded both by the foregoing history of the Convention's implementing legislation, and the sound logic of our sister circuit courts of appeals, that the definition of “acquiescence” adopted in *Matter of S-V-* was the wrong legal standard to apply.

473 F.3d at 65, 70 (citations and quotations omitted)(emphasis added).

- **Fifth Circuit**

Hakim v. Holder, 628 F.3d 151 (5th Cir. 2010).

Accordingly, we agree with our sister circuits in finding that the standard articulated in *Matter of S-V-* does not include the willful blindness standard required for CAT protection. Requiring that government officials “willfully accept” torture is inconsistent with the Senate Committee on Foreign Relations statement that willful blindness satisfies the statutory standard.

628 F.3d at 156-57 (quotations omitted).

- **Sixth Circuit**

Amir v. Gonzales, 467 F.3d 921 (6th Cir. 2006).

We join the Ninth and Second Circuits in holding that *In Re S-V-* directly conflicts with Congress's clear intent to include “willful blindness” in the definition of acquiescence. [. . .] Although we have not previously had occasion expressly to disapprove the standard for acquiescence set forth in *S-V-* our holding in *Ali v. Reno* made clear that willful blindness falls within the definition of acquiescence. Today we explicitly hold that the IJ's reliance on *In Re S-V-* was manifestly contrary to the law.

467 F.3d at 927 (citations and quotations omitted).

- **Ninth Circuit**

Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003).

The Convention does not require, as the INS purports, the government to “knowingly acquiesce” to such torture. And contrary to the BIA's ruling, the Convention does not require that Zheng prove that Chinese government officials would be “willfully accepting of” the torture inflicted on Zheng by the smugglers. As explained below, Congress made its intent clear that actual knowledge, or willful acceptance, is not required for a government to “acquiesce” to the torture of its citizens. Rather, subject to the understanding contained in the Senate's ratification of the Convention, “[a]cquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.” 8 C.F.R. § 208.18(a)(7). We conclude that the BIA's interpretation of the term acquiescence to require that Zheng must prove that the government is “willfully accepting of” torture, instead of proving that public officials are aware of the torture, impermissibly narrows Congress' clear intent in implementing relief under the Convention Against Torture. [. . .] That awareness includes both actual knowledge and willful blindness.

Creating a standard more stringent than Congress clearly intended, the BIA held that to demonstrate acquiescence “the respondent must do more than show that the officials are aware of the activity constituting torture but are powerless to stop

it. He must demonstrate that the Colombian officials are willfully accepting of the guerillas' torturous activities.” Quoting the Oxford Universal Dictionary, the BIA stated “[t]o interpret the term [acquiescence] otherwise would be to misconstrue the meaning of acquiescence, the dictionary definition of which is silent or passive assent.”

To interpret the term acquiescence as the BIA did, however, misconstrues and ignores the clear Congressional intent quoted by the BIA merely a paragraph above its restrictive holding. The BIA's interpretation and application of acquiescence impermissibly requires more than awareness and instead requires that a government be willfully accepting of a third party's torturous activities. There is nothing in the understandings to the Convention approved by the Senate, or the INS's regulations implementing the Convention, to suggest that anything more than awareness is required. Yet, the BIA ignored the Senate's clear intent and constructed its own interpretation of acquiescence, an interpretation that requires more than awareness, includes “willfully accepting of,” and seemingly excludes “willful blindness.” Under this narrowed interpretation of acquiescence, the BIA stated that “[t]he relevant inquiry under the Convention Against Torture ... is whether governmental authorities would ... ‘willfully accept’ atrocities committed against persons in the respondent's position.” *In re Y-L-, A-G, R-S-R-*, 23 I. & N. Dec. 270, 283, 2002 WL 358818 (BIA 2002). The correct inquiry as intended by the Senate is whether a respondent can show that public officials demonstrate willful blindness to the torture of their citizens by third parties, or as stated by the Fifth Circuit, whether public officials “would turn a blind eye to torture.”

332 F.3d at 1194-96 (citations and quotations omitted).

- **Tenth Circuit**

Cruz-Funez v. Gonzales, 406 F.3d 1187 (10th Cir. 2005).

Acquiescence of a public official requires that the public official, prior to the activity constituting the torture, have awareness of such activity and thereafter breach his or her legal responsibility to prevent such activity. However, Congress made its intent clear that actual knowledge, or willful acceptance, is not required for a government to acquiesce to the torture of its citizens. Rather, willful blindness suffices to prove acquiescence.

406 F.3d at 1192 (citations and quotations omitted).

See also Lopez-Soto v. Ashcroft, 383 F.3d 228 (4th Cir. 2004) and *Khrystotodorov v. Mukasey*, 551 F.3d 775 (8th Cir. 2008).

In addition to the circuits above, two other circuits, the First and the Seventh, adopted the willful blindness standard in published decisions by reference. See *Granada-Rubio v. Lynch*, 814 F.3d 35, 40 (1st Cir. 2016) (holding that appellant did not show that she faced torture “through the acquiescence or willful blindness of a public official”); *Rojas-Perez v. Holder*, 699 F.3d 74, 85 (1st Cir. 2012) (noting that *Matter of S-V-* was overruled by *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003)); *N.L.A. v. Holder*, 744 F.3d 425, 442 (7th Cir. 2014) (holding that evidence of some attempts by the Colombian government to prevent torture did not preclude a finding that Colombian officials were “willfully blind to the torturous acts of FARC”); *Mendoza-Sanchez v. Lynch*, 808 F.3d 1182, 1184–85 (7th Cir. 2015) (finding that the government presented “no evidence [...] that the Mexican government can protect the citizen from torture at the hands of local public officials or to which local public officials are willfully blind.”).

2. *In addition, several circuit courts have rejected interpretations of acquiescence that exclude “rogue officials”.*

Circuit courts have also rejected the Proposed Rule's assertion that the actions of “rogue officials” cannot constitute state acquiescence to torture.³ In *Mendoza-Sanchez*, the Seventh Circuit spoke to this issue directly, holding that “[i]t is *irrelevant* whether the police are ‘rogue’ (in the sense of not serving the interests of the Mexican government). A petitioner for deferral of removal under the Convention Against Torture need not prove that the Mexican government is complicit in the misconduct of its police officers.” 808 F.3d at 1185 (emphasis added).

Similarly, willful blindness does not require a uniform governmental policy of complicity, nor does evidence of government efforts to curb the torturous acts preclude a finding of acquiescence. The Second Circuit, for example, found that

[i]n short, it is not clear to this Court why the preventative efforts of some government actors should foreclose the possibility of government acquiescence, as a matter of law, under the CAT. Where a government contains officials that would be complicit in torture, and that government, on the whole, is admittedly incapable of actually preventing that torture, the fact that some officials take action to prevent the torture would seem neither inconsistent with a finding of government acquiescence nor necessarily responsive to the question of whether torture would be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Article 1, 1465 U.N.T.S. 85 (CAT); *see also* 8 C.F.R. § 208.18.

De La Rosa v. Holder, 598 F.3d 103, 110 (2d Cir. 2010).

³ On the day before submission of this Comment, the Attorney General issued an opinion in *Matter of O-F-A-S-*, also asserting that the acts of “rogue officials” cannot constitute acquiescence. 28 I&N Dec. 35 (A.G. 2020). This decision is also incorrect for the reasons expressed in this Comment.

At least two other circuits have reached the same conclusion. In *Silva-Rengifo*, the Third Circuit held that “[t]he CAT does not require an alien to prove that the government in question approves of torture, or that it consents to it.” 473 F.3d at 65. The Seventh Circuit agreed, finding in *N.L.A. v. Holder* that “[t]he fact that the Colombian government is, of late, engaged in more concerted and successful efforts to control the FARC, however, does not necessarily mean that it cannot also remain willfully blind to the torturous acts of the FARC.” 744 F.3d 425, 442 (7th Cir. 2014).

For these reasons, it is clear that the Proposed Rule's attempt to reintroduce a “willful acceptance” approach to torture claims flouts the intent and spirit of the Convention Against Torture, the will of Congress, and the rule of the courts. By establishing an impossible standard for torture victims seeking protection, this Proposed Rule will undoubtedly cause the United States to violate its treaty obligations by sending those fleeing torture back to unspeakable harm.

Conclusion

These proposed rules in their entirety—not just those sections highlighted in this comment—would radically upend the U.S. asylum system, flouting US asylum and torture protections as well as decades of thoughtful and carefully reasoned precedent. It is hard to imagine an asylum seeker or CAT applicant who would *not* be denied protection under these proposed rules. Perhaps that the intent. We therefore call upon the Administration to withdraw this Proposed Rule in its entirety, and to uphold the United States' long commitment protecting those fleeing persecution and torture worldwide.

Very sincerely yours,



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Mississippi Center for Justice, Jackson, MS

Immigration Campaign Director, August 2019-present

Manages agency's growing immigration law program on a full-time basis; successfully represents immigrants seeking asylum/withholding of removal/protection under the Convention Against Torture before the immigration courts, asylum offices, Board of Immigration Appeals, and federal circuit courts of appeal; advocates for greater legal protections for asylum seekers through op-eds, speaking engagements, and federal amicus briefs; conducts community outreach/education sessions on immigration issues throughout Mississippi; directs large-scale legal representation project following the August 2019 ICE raids in Mississippi.

Senior Attorney/Test Coordinator, Biloxi/Jackson, MS, August 2018-August 2019

Founded agency's immigration law program; coordinated agency's fair housing testing program; prepared claims of housing discrimination under the Fair Housing Act, Americans with Disabilities Act, and other related laws before the U.S. Department of Housing and Urban Development and federal courts.

Mississippi College School of Law, Jackson, MS

Adjunct Professor – Immigration Clinic and Immigration Law, January 2016-present

Founded/directs only law school immigration clinic in the state of Mississippi; directs and supervises student practitioners to represent immigrant clients before the local immigration courts, New Orleans Asylum Office, Board of Immigration Appeals, and federal appellate courts; teaches Immigration Law course.

Catholic Charities – Diocese of Jackson, Jackson, MS

Program Director, Migrant Support Center, August 2015-August 2018

Directed non-profit immigration legal program; represented clients in removal proceedings; prepared and filed applications with USCIS, EOIR, U.S. Department of State, and appeals with the Board of Immigration Appeals and federal circuit courts; conducted outreach events throughout the Diocese; built, coordinated, and mentored network of *pro bono* attorneys.

Catholic Charities – Diocese of Baton Rouge, Baton Rouge, LA

Managing Attorney, March 2015-July 2015

Managed a non-profit immigration legal program; represented clients in removal proceedings, including bond hearings; prepared and filed applications with USCIS and the U.S. Department of State; conducted "know your rights" presentations and screenings at the LaSalle Detention Center (Jena, LA) as part of the Department of Justice's Legal Orientation Program (LOP); organized Continuing Legal Education programs on bonds.

The Law Offices of Amelia S. McGowan, PLLC, Vicksburg, MS

Attorney, January 2014-July 2015

Represented clients on a variety of immigration law issues, including employment-based visa petitions for international students, family-based petitions, removal defense, and asylum petitions; drafted, negotiated, and enforced contracts and international non-compete agreements for commercial law clients; conducted legal research and drafted memoranda and briefs on state and immigration law issues; presented bilingual educational seminars on a variety of immigration and commercial law issues throughout the state.

American Civil Liberties Union of Mississippi, Jackson, MS

Staff Attorney, October 2011-December 2013

Litigated cases involving a number of constitutional issues, including the First, Fourth, and Fourteenth Amendments to the U.S. Constitution in the Southern District of Mississippi; investigated Eighth Amendment violations at a state prison; represented students in youth court hearings; conducted “know your rights” presentations addressing a number of legal issues.

Catholic Charities – Diocese of Baton Rouge, Jena, LA

Independent Contractor Immigration Attorney, January 2011 – September 2011

Offered “Know Your Rights” presentations in Spanish and English to immigration detainees at the LaSalle Detention Center in Jena, LA, as part of the Executive Office of Immigration Review - Legal Orientation Program; conducted individual intakes to determine possible avenues of immigration relief.

EDUCATION

Tulane Law School, J.D., (Jan.) 2010

- Pro Bono recognition for over 60 hours of volunteer legal service in immigration law
- Tulane Public Interest Law Foundation and Equal Justice Works summer fellowships
- Research Assistant, Professor Oliver Houck
- Tulane Inn of Court
- Partial tuition scholarship

Tulane University, M.A. Latin American Studies, 2009

- U.S. Department of Education Foreign Language and Area Studies Fellowship
- Richard E. Greenleaf Award for best graduate paper in the Social Sciences written by a Latin American Studies graduate student

The University of Southern Mississippi, B.A., *summa cum laude*, 2006

- Thesis: An Unlikely Cold Warrior: The Latin American Institute at Mississippi Southern College
- Phi Kappa Phi Silver Bowl Award for highest university GPA over the greatest number of credit hours
- Most Outstanding Senior awards in History, International Studies, and Spanish
- President, Phi Alpha Theta History Honors Society
- Secretary, Indian Students Association
- Intern and volunteer, English Language Institute (English as a Second Language program)
- Vietnam study abroad program; Panama cultural exchange
- Presidential Scholarship

LANGUAGES

Fluent in Spanish and English, working knowledge of Brazilian Portuguese

BAR ADMISSION

All Mississippi courts; Fifth, Ninth, and Eleventh Circuit Courts of Appeal; U.S. Supreme Court

MEMBERSHIPS

Capital Area Bar Association, Lions Clubs International – Metro Jackson Chapter, Mississippi Bar Access to Justice Committee, Mississippi Bar Unauthorized Practice of Law Committee

PUBLICATIONS

“Denying Protections for Asylum Seekers Denies them Opportunities to Seek Safety,” *The Hill* 19 Dec. 2018, available at <https://thehill.com/opinion/immigration/422133-denying-protections-for-asylum-seekers-denies-them-opportunities-to-see>.

“A Well-Founded Fear: Using History and Memory to Support Asylum Seekers,” *American Bar Association Year in Review (Immigration)* – 2017.

American Immigration Lawyers’ Association, “Immigration Attorney Puts History Knowledge to Good Use,” *VOICE*, Jan. 2015.

“Denying Religious Freedom and Safety,” *Jackson Free Press*, 30 July 2014.

CLEs/ PRESENTATIONS

“Immigrant Detention in Louisiana, Mississippi, and Alabama, and the COVID-19 Pandemic,” webinar presenter, Center for Migration Studies of New York (May 2020)

“Representing Clients in Immigration Court,” organizer and presenter, Lee County Justice Center (in conjunction with the Mississippi Bar's Access to Justice Commission (February 2020)

“Debrief on Mississippi Raid: Lessons Learned and Improving Responses,” webinar presenter, Catholic Legal Immigration Network, Inc. (CLINIC) (January 2020)

“A Primer on Asylum and Representing Asylum Clients in Immigration Court,” organizer and presenter, Bradley Arant Boult Cummings LLP (January 2020)

“Beyond the Border: Immigration Law in Mississippi,” organizer and presenter, Mississippi College School of Law (June 2019)

“Asylum Particular Social Groups Post-*Matter of A-B-*,” panelist, American Immigration Lawyers’ Association Mid-South Convention (November 2018)

“Overview of Asylum and SIJS,” organizer and presenter, Bradley Arant Boult Cummings LLP (in-house CLE) (May 2018)

“Immigration Law Update,” presenter, University of Mississippi School of Law Mississippi Law Update (May 2018)

“Lessons Learned From Experience: Tips From Seasoned Practitioners,” presenter, Sixth Annual Appellate Practice Section CLE, Mississippi Supreme Court (May 2018)

“Immigration Options in Changing Times,” organizer and presenter, Mississippi Bar (December 2017)

“Finding Your Niche: Merging Your Passion with Your Law Practice,” presenter, Capital Area Bar Association (November 2017)

“*Plyler* and Beyond: Education and Immigration,” presenter, Mississippi College School of Law (September 2017)

“Kids Seeking Safety II: The Nuts and Bolts of Children’s Immigration Issues,” organizer and presenter, Forman Watkins LLP (July 2017)

“Kids Seeking Safety: An Intro. into Children’s Immigration Issues,” organizer and presenter, Mississippi Supreme Court (April 2017)

“All About Bonds,” organizer and presenter, Louisiana Bar Association (July 2015)

“The ABCs of U Visas,” presenter, Louisiana Bar Association (June 2015)

“Immigration 101,” presenter, Mississippi College School of Law (July 2012)

**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**

UNHCR issues these Guidelines pursuant to its mandate, as contained in *the Statute of the Office of the United Nations High Commissioner for Refugees*, and Article 35 of the *1951 Convention relating to the Status of Refugees and/or 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 supersede IOM/132/1989 – FOM/110/1989 Membership of a Particular Social Group (UNHCR, Geneva, 12 December 1989), 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 determinations in the field.

**“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**

I. INTRODUCTION

1. “Membership of a particular social group” is one of the five grounds enumerated in Article 1A(2) of the 1951 *Convention relating to the Status of Refugees* (“1951 Convention”). It is the ground with the least clarity and it is not defined by the 1951 Convention itself. It is being invoked with increasing frequency in refugee status determinations, with States having recognised women, families, tribes, occupational groups, and homosexuals, as constituting a particular social group for the purposes of the 1951 Convention. The evolution of this ground has advanced the understanding of the refugee definition as a whole. These Guidelines provide legal interpretative guidance on assessing claims which assert that a claimant has a well-founded fear of being persecuted for reasons of his or her membership of a particular social group.
2. While the ground needs delimiting—that is, it cannot be interpreted to render the other four Convention grounds superfluous—a proper interpretation must be consistent with the object and purpose of the Convention.¹ Consistent with the language of the Convention, this category cannot be interpreted as a “catch all” that applies to all persons fearing persecution. Thus, to preserve the structure and integrity of the Convention’s definition of a refugee, a social group cannot be defined *exclusively* by the fact that it is targeted for persecution (although, as discussed below, persecution may be a relevant element in determining the visibility of a particular social group).
3. There is no “closed list” of what groups may constitute a “particular social group” within the meaning of Article 1A(2). The Convention includes no specific list of social groups, nor does the ratifying history reflect a view that there is a set of identified groups that might qualify under this ground. Rather, the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.
4. The Convention grounds are not mutually exclusive. An applicant may be eligible for refugee status under more than one of the grounds identified in Article 1A(2).² For example, a claimant may allege that she is at risk of persecution because of her refusal to wear traditional clothing. Depending on the particular circumstances of the society, she may be able to establish a claim based on political opinion (if her conduct is viewed by the State as a political statement that it seeks to suppress), religion (if her conduct is based on a religious conviction opposed by the State) or membership in a particular social group.

II. SUBSTANTIVE ANALYSIS

A. Summary of State Practice

5. Judicial decisions, regulations, policies, and practices have utilized varying interpretations of what constitutes a social group within the meaning of the 1951 Convention. Two approaches have dominated decision-making in common law jurisdictions.
6. The first, the “protected characteristics” approach (sometimes referred to as an “immutability” approach), examines whether a group is united by an immutable

¹ See Summary Conclusions – Membership of a Particular Social Group, Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001, no.2 (“Summary Conclusions – Membership of a Particular Social Group”).

² See UNHCR’s *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), paragraphs 66-67, 77; and see also Summary Conclusions – Membership of a Particular Social Group, no.3.

characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status). Human rights norms may help to identify characteristics deemed so fundamental to human dignity that one ought not to be compelled to forego them. A decision-maker adopting this approach would examine whether the asserted group is defined: (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. Applying this approach, courts and administrative bodies in a number of jurisdictions have concluded that women, homosexuals, and families, for example, can constitute a particular social group within the meaning of Article 1A(2).

7. The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large. This has been referred to as the “social perception” approach. Again, women, families and homosexuals have been recognized under this analysis as particular social groups, depending on the circumstances of the society in which they exist.
8. In civil law jurisdictions, the particular social group ground is generally less well developed. Most decision-makers place more emphasis on whether or not a risk of persecution exists than on the standard for defining a particular social group. Nonetheless, both the protected characteristics and the social perception approaches have received mention.
9. Analyses under the two approaches may frequently converge. This is so because groups whose members are targeted based on a common immutable or fundamental characteristic are also often perceived as a social group in their societies. But at times the approaches may reach different results. For example, the social perception standard might recognize as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity—such as, perhaps, occupation or social class.

B. UNHCR’s Definition

10. Given the varying approaches, and the protection gaps which can result, UNHCR believes that the two approaches ought to be reconciled.
11. The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches:

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.

12. This definition includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. 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 to men.³

³ For more information on gender-related claims, see UNHCR’s *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* (HCR/GIP/02/01, 10 May 2002), as well as Summary

13. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart.

The role of persecution

14. As noted above, a particular social group cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted. Nonetheless, persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society.⁴ To use an example from a widely cited decision, “[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.”⁵

No requirement of cohesiveness

15. 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.”⁶ The relevant inquiry is whether there is a common element that group members share. This is similar to the analysis adopted for the other Convention grounds, where there is no requirement that members of a religion or holders of a political opinion associate together, or belong to a “cohesive” group. Thus women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic.
16. In addition, mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.⁷

Not all members of the group must be at risk of being persecuted

17. An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group.⁸ As with the other grounds, it is not necessary to establish that all persons in the political party or ethnic group have been singled out for persecution. Certain members of the group may not be at risk if, for example, they hide their shared characteristic, they are not known to the persecutors, or they cooperate with the persecutor.

Relevance of size

Conclusions of the Expert Roundtable on Gender-Related Persecution, San Remo, 6-8 September 2001, no.5.

⁴ See Summary Conclusions – Membership of a Particular Social Group, no.6.

⁵ McHugh, J., in *Applicant A v. Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225, 264, 142 ALR 331.

⁶ See Summary Conclusions – Membership of a Particular Social Group, no.4.

⁷ See UNHCR’s Handbook, paragraph79.

⁸ See Summary Conclusions – Membership of a Particular Social Group, no.7.

18. The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2). This is true as well for cases arising under the other Convention grounds. For example, States may seek to suppress religious or political ideologies that are widely shared among members of a particular society—perhaps even by a majority of the population; the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.
19. Cases in a number of jurisdictions have recognized “women” as a particular social group. This does not mean that all women in the society qualify for refugee status. A claimant must still demonstrate a well-founded fear of being persecuted based on her membership in the particular social group, not be within one of the exclusion grounds, and meet other relevant criteria.

Non-State actors and the causal link (“for reasons of”)

20. Cases asserting refugee status based on membership of a particular social group frequently involve claimants who face risks of harm at the hands of non-State actors, and which have involved an analysis of the causal link. For example, homosexuals may be victims of violence from private groups; women may risk abuse from their husbands or partners. Under the Convention a person must have a well-founded fear of being persecuted and that fear of being persecuted must be based on one (or more) of the Convention grounds. There is no requirement that the persecutor be a State actor. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.⁹
21. Normally, an applicant will allege that the person inflicting or threatening the harm is acting for one of the reasons identified in the Convention. So, if a non-State actor inflicts or threatens persecution based on a Convention ground and the State is unwilling or unable to protect the claimant, then the causal link has been established. That is, the harm is being visited upon the victim for reasons of a Convention ground.
22. There may also arise situations where a claimant may be unable to show that the harm inflicted or threatened by the non-State actor is related to one of the five grounds. For example, in the situation of domestic abuse, a wife may not always be able to establish that her husband is abusing her based on her membership in a social group, political opinion or other Convention ground. Nonetheless, if the State is unwilling to extend protection based on one of the five grounds, then she may be able to establish a valid claim for refugee status: the harm visited upon her by her husband is based on the State’s unwillingness to protect her for reasons of a Convention ground.
23. This reasoning may be summarized as follows. The causal link may be satisfied: (1) where there is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) 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 a Convention reason.

⁹ See UNHCR’s *Handbook*, paragraph 65.

**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.¹
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.

¹ 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,² 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.³
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

² 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.

³ 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.⁴ 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,⁵ 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.⁶ 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.⁷

⁴ See UNHCR's Handbook, paragraph 51.

⁵ See below at paragraph 18.

⁶ 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.

⁷ 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 persecution⁸

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

⁸ 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.⁹

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.¹⁰

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.¹¹

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.

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

¹⁰ See UNHCR’s *Handbook*, paragraph 65.

¹¹ 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.¹² 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”.¹³ 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 Group¹⁴

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-

¹² See UNHCR’s *Handbook*, paragraph 68.

¹³ See UNHCR’s *Handbook*, paragraph 74.

¹⁴ 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.¹⁵ Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries.¹⁶ 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,¹⁷ or that every member of the group is at risk of persecution.¹⁸ 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.¹⁹

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.

¹⁵ See Summary Conclusions – Gender-Related Persecution, no. 5.

¹⁶ 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".

¹⁷ 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").

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

¹⁹ 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 ISSUES²⁰

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.²¹
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.

²⁰ 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).

²¹ 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,²² 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.²³ 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

²² 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.

²³ *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.

- x. 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.