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## Special Registration: Past and Present, Consequences and Remedies

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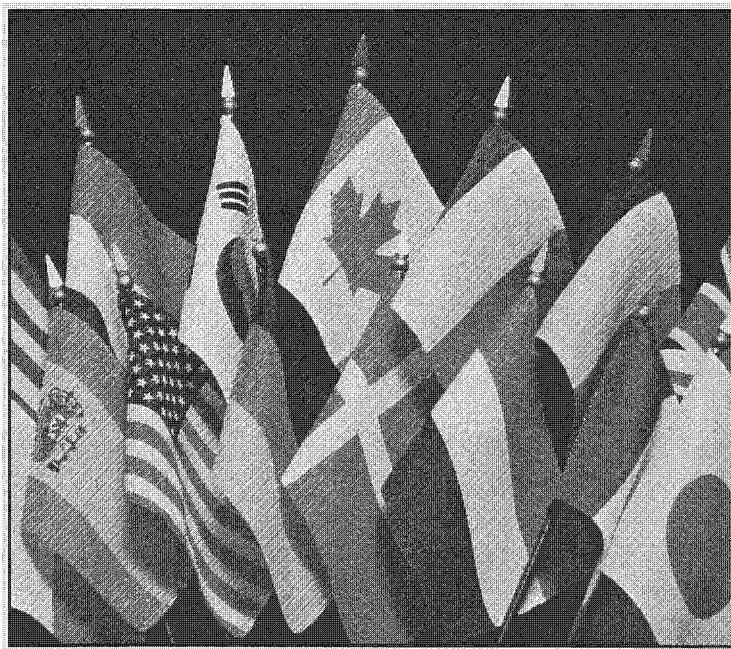
FEATURE: Special Registration

# SPECIAL REGISTRATION: PAST AND PRESENT, CONSEQUENCES AND REMEDIES

By Diana C. Bauerle\*

On June 6, 2002, the Attorney General announced the establishment of the National Security Entry-Exit Registration System (NSEERS), also known as Special Registration.<sup>1</sup> Indicating the unease the United States experienced in the wake of September 11, the Attorney General emphasized the need for a system to track foreign visitors in the U.S., comparable to the “rigorous registration systems” of many European nations. The system has three basic components: 1) fingerprinting and photographing at the points of entry; 2) periodic registration of certain foreign nationals and 3) exit controls to aid in the removal of foreign nationals who overstay their visas.

Though it began as a registration of foreign nationals arriving to and departing from the country, significant expansion of the system implemented the “call-in registration” system, as well as restricting the places that foreign nationals subject to registration are permitted to depart. NSEERS is not a new concept, however. Special Registration has a



history in the United States dating back at least as far as World War II.

## A HISTORY OF SPECIAL REGISTRATION

Title II, Chapter 7 of the Immigration and Nationality Act (INA) of 1952, Section 263, authorizes the Attorney General to prescribe special regulations and forms for the registration and fingerprinting of several classes of aliens, including “aliens of any other class not lawfully admitted to the United States for

permanent residence.”<sup>2</sup> Since 1952, certain foreign nationals applying for admission to the U.S. as nonimmigrants have been subject to fingerprinting and photographing at various times. During the 1990s and on into the 21<sup>st</sup> century, the Federal Register has periodically announced regi-

stration for foreign nationals of certain countries. On January 16, 1991, the Department of Justice required certain nonimmigrants bearing Iraqi or Kuwaiti travel documents, seeking entry into the U.S., to be registered and fingerprinted.<sup>3</sup> On December 23, 1993, registration of those carrying Iraqi or Kuwaiti travel documents ceased<sup>4</sup> and registration at all U.S. Ports of Entry of those bearing Iraqi or Sudanese travel documents, except those entering with A or G visas (certain foreign government officials),

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began.<sup>5</sup> Nonimmigrants bearing Iranian or Libyan travel documents were added to the list on September 5, 1996.<sup>6</sup> On July 21, 1998, four countries were designated for registration: Iran, Iraq, Libya and Sudan.<sup>7</sup>

The enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) in 1996 in response to the 1993 attack on the World Trade Center included a mandate of the establishment of an integrated entry and exit data system.<sup>8</sup> There were delays in the implementation of the system, however. The USA Patriot Act, signed into law on October 26, 2002, and the Enhanced Border Security and Visa Reform Act of 2002 contain Congress's reaffirmation of the mandate of IIRAIRA, requiring the Department of Justice to develop and implement an entry-exit tracking system by December 31, 2003.<sup>9</sup>

## SPECIAL REGISTRATION TODAY

Special Registration now consists of the registration of nonimmigrants from certain designated countries both upon entry and exit from the United States, as well as through a "call-in" registration process for those nonimmigrants already present in the U.S. prior to the enactment of the NSEERS registration program.<sup>10</sup> The registration of nonimmigrants at the Ports of Entry to the United States can be required regardless of nationality and gender, while the "call-in" registration is limited to males, ages 16 to 45, of those nationalities published by the Federal Register.

SPECIAL REGISTRATION  
UPON ADMISSION

The Immigration and Naturalization Service (INS) published the final rule for NSEERS registration, effective September 11, 2002, on August 12, 2002, with some changes to the proposed rule, including a restriction of the places from which foreign nationals subject to registration may depart and requiring the processing of registration to be done through existing INS databases.<sup>11</sup> Special

Registration applies only to certain targeted individuals among the 35 million nonimmigrant aliens who enter the U.S. annually. Those individuals include aliens from selected countries specified in future Federal Register notices and individual nonimmigrant aliens designated either by consular officer abroad or inspection officer at a Port Of Entry, based on information such officers believe indicates the need for close monitoring of that alien. The final rule requires targeted nonimmigrant aliens to provide detailed and frequent information to INS "to ensure that they comply with the conditions of their visas and admissions": 1) upon arrival in the U.S. at designated Port Of Entry; 2) in person at an INS Service office, between 30 and 40 days after date of arrival; 3) in person at an INS District office, within ten days of anniversary date of arrival, and every twelve months thereafter; 4) in writing, upon changes in address, employment, or school; and 5) upon departure from the U.S. at designated Port Of Entry.

The registration procedures include fingerprinting and photographs, to be taken at a designated Port Of Entry upon arrival in the U.S. (pursuant to pre-existing 8 USC 1302(a)). Those classes that the Attorney General may designate for special registration upon arrival in the U.S. are: 1) nonimmigrant aliens who are nationals or citizens of a country designated by the Attorney General, in consultation with the Secretary of State, by a Notice in the Federal Register; 2)

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*Since 1952, certain foreign nationals applying for admission to the U.S. as nonimmigrants have been subject to fingerprinting and photographing at various times.*

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nonimmigrant aliens who a consular officer or an inspecting officer has reason to believe are nationals of a designated country; and 3) nonimmigrant aliens who meet pre-existing criteria or who a consular officer or inspecting officer believe meet pre-existing criteria determined by the Secretary of State or Attorney General, to indicate that the aliens' presence in the U.S. warrants monitoring in the national security or law enforcement interests of the U.S.<sup>12</sup> Special registration only applies to individuals who are admitted to the U.S. in nonimmigrant classes, except for those admitted in diplomatic visa categories A or G, foreign nationals who are already permanent residents, aliens who entered the U.S. without inspection and those who were inspected and admitted on parole.<sup>13</sup>

On August 13, 2002, the Attorney General announced at a press conference that Syria was

added to the four countries designated for registration in 1998<sup>14</sup>, bringing the total to five—Iran, Iraq, Libya, Sudan, and Syria. The first registration Notice was published in the Federal Register on September 6, 2002, stating that all non-immigrant aliens, male and female, over the age of 14, who are nationals

or citizens of Iraq, Iran, Libya, Sudan or Syria, or who a consular officer or an inspecting officer has reason to believe are nationals of such countries and who are applying for admission in a nonimmigrant category other than A or G, shall be subject to the registration requirements of 8 CFR Sec. 264.1(f)(3), (5), (6), (8) and (9).<sup>15</sup> On September 5, 2002, a confidential memo sent by Johnny Williams, Executive Assoc. Commissioner in the Office of Field Operations at the INS, instructed Inspecting Officers at U.S. Ports Of Entry to designate for Special Registration “males between 16 and 45” who

the officer “has reason to believe are citizens or national (sic) of Pakistan, Saudi Arabia or Yemen,” and individuals, regardless of nationality, who have “made unexplained trips to Iran, Iraq, Libya, Sudan, Syria, North Korea, Cuba, Saudi Arabia, Afghanistan, Yemen, Egypt, Somalia, Pakistan, Indonesia, or Malaysia” may also be designated for Special Registration, at the discretion of the Inspecting Officer. As of January 15, 2003, a representative in the Department of Justice stated that natives and citizens of nearly 150 countries have been registered upon admission to the U.S.<sup>16</sup>

### “CALL-IN” REGISTRATION

Foreign nationals already in the United States who had not been registered at entry became subject to registration at a

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local INS office beginning on November 15, 2002. Those individuals required to register and provide additional information to INS on or before December 16, 2002 were: 1) males born on or before November 15, 1986; 2) who are nationals or citizens of one of the five countries designated for Special

Registration (Iraq, Iran, Sudan, Libya and Syria); and 3) who entered the U.S. on or before September 10, 2002, and will remain in the US at least until December 16, 2002.<sup>17</sup>

A second group was added November 22, 2002. All males born on or before December 2, 1986, who had entered the U.S. on or before September 30, 2002, and who are citizens or nationals of an additional thirteen countries (Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates and Yemen) were ordered to report for registration by January 10,

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2003.<sup>18</sup>

Group 3 soon followed on December 16, 2002, and involved male nonimmigrants born on or before January 13, 1987, who are citizens or nationals of Armenia, Pakistan and Saudi Arabia and who entered on or before September 30, 2002 were required to register between January 13, 2003 and February 21, 2003.<sup>19</sup> Two days later, the government changed its mind and eliminated Armenia from the list by issuing a revised notice in the Federal Register.<sup>20</sup>

Finally, Group 4, male nationals and citizens of Bangladesh, Egypt, Indonesia, Jordan and Kuwait, born on or before February 24, 1987, and admitted as a nonimmigrant on or before September 30, 2002, must report for call-in registration between February 24, 2003 and March 28, 2003.<sup>21</sup> The same day, a second Federal Register notice gave a second

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*...each local office of the INS created its own questionnaires based on its own interpretation of the Attorney General's comments. There have been reports of requests for bank account and credit card numbers, library cards, and e-mail and web site addresses...*

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opportunity to register to Groups 1 and 2 between January 27, 2003 and February 7, 2003.<sup>22</sup> On February 19, 2003, the Federal Register published a notice granting an extension for Group 3 until March 21, 2003 and for Group 4 until April 25, 2003.<sup>23</sup>

Aliens from all groups are required to appear before an Immigration Officer on or before the final date, at one of the locations listed in the appendix to the Federal Register notice on November 6, 2002.<sup>24</sup> They must also submit a

change of address within ten days of such change, using Form AR-11 SR.<sup>25</sup> Like aliens registered upon entry to the United States, they must also appear within ten days of each anniversary of the date on which they were registered before an immigration officer at any of the locations designated in the Federal Register notice.

However, Special Registration requirements do not apply to Legal Permanent Residents (green card holders), aliens who entered without inspection, aliens who are on A or G visas (diplomatic visas), asylees or aliens who are nationals or citizens of Group 1 countries who have applied for asylum on or before November 6, 2002, aliens who are nationals or citizens of Group 2 countries who have applied for asylum on or before November 22, 2002, or aliens who are nationals or citizens of Group 3 and 4 countries for whom an asylum application remains pending on December 18, 2002. It is important to note that third country citizens, those aliens born in a country designated for Special Registration who have obtained citizenship in another country not designated for Special Registration, also must register. Thus a person who was born in Pakistan, and later naturalized in the United Kingdom, must still register because the regulations state "nationals or citizens." Furthermore, those third country citizens of certain countries that are visa exempt under the "Visa Waiver Pilot Program"<sup>26</sup> waive rights to and will be removed from the U.S. without a hearing, except for a hearing on a claim to political asylum.<sup>27</sup>

#### INFORMATION REGISTRANTS MUST PROVIDE

The Attorney General provided a rough idea of the nature of the information aliens would be required to furnish during the special registration interview. This includes "routine and readily available information,"<sup>28</sup> such as name, passport country of issuance and number, date of birth, country of birth, addresses and points of contact, intended activities in the U.S., as well as additional forms of photographic

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identification, proof of enrollment or employment, as applicable under the nonimmigrant visa category, proof of residence, etc.

However, no uniform questionnaire or line of inquiry was established nationwide. Rather, each local office of the INS created its own questionnaires based on its own interpretation of the Attorney General's comments.<sup>29</sup> There have been reports of requests for bank account and credit card numbers, library cards, and e-mail and web site addresses, which are not specifically enumerated in the list of the required information in the Federal Register of June 13, 2002.<sup>30</sup> To date, there has been no further communication regarding a definitive and uniformly used list of requirements that a registrant must comply with at his interview.

#### **CONSEQUENCES TO ALIENS WHO FAIL TO REGISTER OR PROVIDE CHANGE OF ADDRESS**

**A** willful failure to register or a fraudulent registration application can lead to a federal misdemeanor under INA Sec. 266(a), and a fine not to exceed \$1,000 and six months imprisonment. Once convicted under INA Sec. 266(a), an alien is removable from the United States under INA Sec. 237(a)(3)(B)(i). Furthermore, by failing to register, the alien has therefore failed to maintain his status and can be found removable also under INA Sec. 237(a)(1)(C)(i). If the alien willfully does not comply with the address-change requirements under INA Sec. 265, he will be removable under INA Sec. 237(a)(3)(A). Finally, those who fail to register or comply with registration requirements are inadmissible to the U.S. under INA Sec. 212(a)(3)(A)(ii).

#### **CONSEQUENCES FOR FAILURE TO MAINTAIN STATUS AND REMEDIES AVAILABLE TO SOME ALIENS**

**F**oreign nationals who have failed to maintain their nonimmigrant status since entry to the U.S. can be arrested and

detained at the time they report for Special Registration. This has created a difficult decision for many individuals who are aware of both the criminal and immigration consequences that can result from failure to register, yet hesitate to register because they will be detained for violation of status and placed under removal proceedings (formerly known as "deportation" proceedings). Many of these status violators are nonimmigrants that entered the country on nonimmigrant visas, such as a tourist or student visa, and simply did not leave by the date specified on their I-94 record of entry card. Such individuals are considered "out of status" and are not generally eligible to change to another nonimmigrant status or to adjust to permanent resident status.

Some individuals currently out of status, however, are beneficiaries of immigrant visa petitions filed by qualifying United States Citizen or Permanent Resident family members or employers. Such petitions do not, alone, bestow an immigration benefit. However, many of those who are beneficiaries of such petitions also qualify for a special provision in the immigration law known as 245(i), which relates to their ability to apply for adjustment of status to permanent residence by having such a petition filed before the sunset date of April 30, 2001.<sup>31</sup> Those individuals are waiting to become eligible to apply for permanent resident status; for example, waiting for a visa number to become available in their respective family-based category. Though out of status currently, once the preliminary stages of their permanent residency processing are completed, they will be able to adjust their status and become green card holders. The only thing that they need is time.

Special Registration has interrupted their wait and deprived them of the opportunity to become permanent residents by requiring them to report to the immigration service and prove that they are in a valid nonimmigrant status, or be removed from the U.S. Since they cannot prove that they are in a valid nonimmigrant status and since the approved petitions filed on their behalf

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do not alone grant any kind of immigrant benefit, the individuals from a country designated in the four groups will be arrested and placed into removal proceedings. The system of Special Registration appears to be completely contrary to the spirit of leniency established by the enactment of 245(i). Many people relied on the promise of being able to adjust status once their petitions were approved and a visa number became available. Many people chose to remain in the United States, out of status, because 245(i) meant they would still be able to adjust status to permanent residence.

However, the INS offices across the country once again did not have a uniform policy for who should be detained. The officers are expected to exercise prosecutorial discretion in their decisions, taking into consideration the following factors: immigration status, length of residence in the U.S., criminal history, humanitarian concerns, immigration history, likelihood of ultimately removing the alien, likelihood of achieving enforcement goal by other means, whether the alien is eligible or likely to become eligible for other relief, effect of action on future admissibility, current or past cooperation with law enforcement officials, honorable U.S. military service, community attention and resources available to INS.<sup>32</sup> The reports of how these factors are being weighed and which individuals are being subject to detention vary throughout the country, though the discretion has shown to be more favorable as time has progressed.<sup>33</sup>

For those individuals who are arrested and detained, they usually have to pay a bond, though once again the issue whether an alien is released on his own recognizance or given a minimum \$1,500 bond or higher varies from office to office. In most cases, an alien is issued a Notice to Appear in immigration court, stating the charges and reasons why he is removable from the United States.<sup>34</sup> At his first court date, known as a master calendar, the alien, now known as the respondent, must plead to the

charges and state the relief from removability that he is seeking. At this point, a respondent who is able to adjust status to permanent residence may do so in front of the immigration judge. The respondent may not be able to adjust status because either a visa is not yet available for him through a previously approved immigrant petition, or because no one ever filed a petition on his behalf.

There are other avenues of relief the respondent may seek. Cancellation of removal is available to those respondents who can 1) show they have been physically present in the U.S. for a continuous period of not less than ten years, 2) demonstrate they have been a person of good moral character for ten years, 3) prove they have not been convicted of an offense under INA Sections 212(a), 237(a)(2) or 237 (a)(3), and 4) establish that removal would result in exceptional and extremely unusual hardship to a spouse, parent or child who is a U.S. Citizen or Legal Permanent Resident.<sup>35</sup>

If the respondent is not eligible for cancellation of removal, or any other form of relief provided for in the Immigration and Nationality Act, he may be eligible for voluntary departure.<sup>36</sup> The immigration judge may grant up to 120 days to a person who agrees to depart the U.S. at his own expense.<sup>37</sup> The respondent must meet certain requirements to receive voluntary departure, including never having been convicted of a crime. If the respondent does not qualify even for voluntary departure, he will be subject to removal from the U.S. and will have to wait at least five years (20 years in the case of aliens with certain criminal convictions) before he can reapply for admission to the U.S.<sup>38</sup>

## CONCLUSION

**S**pecial Registration is an enormous undertaking by the U.S. government, both in terms of the monetary and labor costs, as well as the coordination needed to continue

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# WHERE IS THE PROTECTION?:

## A FAILED RESPONSE TO GENDER-BASED PERSECUTION

By Elissa Steglich\*

I sat across from A., a middle-aged woman from a country in the Middle East, unsure of what she would say next and unsure of what I would say if I were in her position. She had come to the United States with her husband and children some time ago. It was not her choice to come, but rather the election of her husband, who had controlled her every move since they were married. I am sure that she was curious as to what life would be like here, although I never asked. Perhaps she thought it would give her an out – provide her with a context whereby she could work away from the severe physical abuse and emotional mistreatment she had suffered all her life and watched her children suffer as well. If she had sought an escape, she had found it. The safety net she had probably presumed was airtight, was in fact, weak and filled with holes.

The decision I had asked her to make was an impossible one. Would she file for the uncertain protection of political asylum in order to possibly avoid the detention of her son who was being ordered by the U.S. government to report for special registration?<sup>1</sup> In seeking asylum, she would place herself in the hands of Attorney General John Ashcroft who has sent clear signals that A. is not a person he wishes to protect. She would also risk deportation to a country where her husband's family awaits to punish her. They have threatened her numerous times in no uncertain terms. According to them, her courage in asking the United States for protection for herself and her children is a dishonor to the family and an unforgivable act of defiance and independence.

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By not acting, however, she would risk the detention of her son in the special registration process. Unfortunately, she is currently in a shelter with no friends and no access to the thousands of dollars it may take to obtain the release of her son. Either choice would risk lives, and potentially return her and her children to the abuse away from which she had finally stepped.

Two new developments in immigration law placed A. in these complicated circumstances. The first is the new special registration requirement for males 16 years old and older from certain Middle Eastern and African nations who arrived in the United States as nonimmigrants and who

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*Reports indicate that the Department of Justice plans to reverse the policy of protecting women fleeing gender-related violence in their home countries.*

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will be remaining past a date fixed by the government. Conceived as a strategy to guard against terrorism within our borders, the Special Registration program has resulted in the detention of hundreds of individuals, many of whom have been waiting years for the Immigration and Naturalization Service (INS) (now known as the Bureau of Citizenship and Immigration Services of the Department of Homeland Security (DHS)) to process their visa and legal residency paperwork.<sup>2</sup> In order to avoid the registration, many individuals affected have chosen to move to Canada. The mass migration, however, has failed to attract Canada's favor. Many heading



## FEATURE: Gender-Based Persecution

north are being turned back and placed in detention facing charges of immigration violations that can result in deportation.<sup>3</sup> Where immigration relief may be available, individuals subject to special registration are forced to make life-altering decisions in a very short period of time, often within days.

The second development is even more troubling and threatens to leave individuals fleeing gender-based persecution such as domestic violence, honor killings, rape as a weapon of war, human trafficking and sexual slavery completely unprotected. Implementing the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention) and the 1967 Protocol to the Refugee Convention, U.S. law

provides asylum to individuals fleeing from or fearing persecution based on their race, nationality, religion, political opinion or membership in a particular social group in their country of origin. As gender-based persecution became more recognized, a small but increasing number of

petitions for asylum based on this form of violence has appeared before the INS/DHS and the Immigration Courts. Often, the applicants have fled situations of extreme violence and brutality; these mostly women and children have nowhere else to turn, and the denial of protection here can be a sentence of death.

In the late 1990s, a woman from Guatemala who had endured disturbing levels of domestic abuse appealed to an Immigration Judge for safe haven. While in Guatemala, her husband beat her repeatedly, threatened to kill her, and kicked her so hard that he caused a miscarriage. She sought police assistance time and again, but her calls were never heeded.

With the Guatemalan government unable to support and protect her, Rodi Alvarado made

her way to the United States. The Immigration Judge who heard her case granted her asylum. The Board of Immigration Appeals (BIA), the administrative court with jurisdiction to hear appeals from the Immigration Courts, reversed the decision, stripping Ms. Alvarado of relief. This decision, *Matter of R. A.*, was denounced by advocates throughout the world as being overly restrictive and incorrect in its interpretation of asylum law as applied to gender-related cases. In one of her final acts as Attorney General, Janet Reno vacated the BIA's decision in January 2001 and ordered the BIA to reconsider the decision in the case in light of proposed regulations on these types of cases. The regulations, which Reno's Justice Department had authored to

provide clear guidelines on how to consider gender-based asylum claims, were never finalized. As a result, Rodi Alvarado's case is still pending.

This past February, as the Department of Homeland Security assumed control over most immigration responsibilities, Attorney

General Ashcroft confirmed that he had recertified *Matter of R.A.* to himself and that his office was in the process of drafting new regulations covering gender-based cases. Reports indicate that the Department of Justice plans to reverse the policy of protecting women fleeing gender-related violence in their home countries. While not yet issued, the new regulations may well curtail the ability of women and children to obtain asylum protection in the United States from where they have fled and fear return based on the range of gender-based abuses, including domestic violence.

Under the current U.S. law on asylum protection, in accordance with international standards, cases of gender-related violence, and particularly domestic violence, have been

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***The persecution itself must have been motivated by a desire to act out against the individual due to her race, religion, nationality, political opinion or membership in a particular social group.***

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## FEATURE: Gender-Based Persecution

evaluated similar to other asylum claims. First, the individual must establish that she has a “well-founded fear” of persecution, which may be presumed from having experienced past persecution. In addition, the fear must be shown to be both objectively and subjectively reasonable. The persecution itself must have been motivated by a desire to act out against the individual due to her race, religion, nationality, political opinion or membership in a particular social group. The “social group” must be cognizable, but can be defined by gender and/or age. Most domestic violence-based asylum claims have been argued under a social group theory, comprised of women involved with spouses who believe in male dominance, women victims/survivors of domestic abuse, or women who reject notions of male dominance. Cases have also been litigated under theories of political opinion or imputed political opinion, where the women have sought services or police protection in their home countries and been further abused as a result.

The position of the Department of Justice on this issue would be a tragic departure from guarantees provided for in the Refugee

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***“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.”***

***– UNHCR gender guidelines***

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Convention and Protocol and specifically recognized by the United Nations High Commissioner for Refugees (UNHCR) and the governments of Canada, the United Kingdom, Australia and New Zealand. UNHCR’s guidance on refugee protection based on gender-related persecution is clear: that it is important “to ensure

that proper consideration is given to women claimants in refugee status determination procedures and that the range of gender-related claims are recognized as such.”<sup>4</sup> Further,

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 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.<sup>5</sup>

Importantly, the Refugee Convention and Protocol provides protection not only to those individuals fleeing from or fearing State-sponsored violence on account of the five enumerated grounds, but also to those fleeing from a private agent of persecution against whom the government cannot, or will not, properly protect the individual. U.S. law is likewise clear on this point, considering asylum petitions where the persecutor is someone that the government is “unable or unwilling to control.”<sup>6</sup> As the UNHCR gender guidelines highlight,

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. ... The fact that a law has been enacted to prohibit or denounce certain persecutory practices will therefore not in itself be sufficient to determine that the individual’s claim to refugee status is not valid.<sup>7</sup>

In most cases of gender-related violence, the persecutor will be a private individual – the spouse or family member of the individual seeking protection. It is critical, therefore, that the law reflects and responds to the nature of that persecution. Rodi Alvarez was denied

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