

Lesson Plan Overview

Course	Asylum Officer Basic Training
Lesson	<i>Asylum Eligibility Part III: Nexus and the Five Protected Characteristics</i>
Field Performance Objective	Given a request for asylum to adjudicate, the asylum officer will be able to correctly apply the law to determine eligibility for asylum in the United States.
Interim (Training) Performance Objectives	<ol style="list-style-type: none"> 1. Identify factors to consider in evaluating the motive of the persecutor. 2. Identify factors to consider in determining whether persecution or feared persecution is on account of race. 3. Identify factors to consider in determining whether persecution or feared persecution is on account of religion. 4. Identify factors to consider in determining whether persecution or feared persecution is on account of nationality. 5. Identify factors to consider in determining whether persecution or feared persecution is on account of membership in a particular social group. 6. Identify factors to consider in determining whether persecution or feared persecution is on account of political opinion or imputed political opinion. 7. Identify factors to consider in distinguishing prosecution from persecution.
Student Materials/References	<p>Participant Workbook; UNHCR Handbook</p> <p>INS v. Elias-Zacarias, 502 U.S. 478, 112 S.Ct. 812 (1992)</p> <p>Fatin v. INS, 12 F.3d 1223 (3rd Cir. 1993)</p> <p>Matter of H-, 21 I & N Dec. #3276 (BIA 1996)</p> <p>Matter of S-P-, 21 I & N Dec. 486 (BIA 1996)</p>

- Background Reading**
1. Rees, Grover Joseph III. INS Office of General Counsel. [Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion -- Addendum](#), Memorandum to John Cummings, INS Office of International Affairs (Washington, DC: 4 March 1993), 3 p. (attached)
 2. Rees, Grover Joseph III. INS Office of General Counsel. [Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion](#), Memorandum to Jan Ting, INS Office of International Affairs (Washington, DC: 19 January 1993), 12 p. (attached)
 3. Virtue, Paul W. INS Office of General Counsel. [Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA](#), Memorandum to Kathleen Thompson, INS Office of International Affairs (Washington, DC: 9 December 1993), 7 p. (attached)
 4. Melville, Rosemary. INS Office of International Affairs. [Follow Up on Gender Guidelines Training](#), Memorandum to Asylum Office Directors, SAOs, AOs (Washington, DC: 7 July 1995), 8 p. (See, lesson, *Female Asylum Applicants and Gender-Related Claims*)
 5. Coven, Phyllis. INS Office of International Affairs. [Considerations For Asylum Officers Adjudicating Asylum Claims From Women \(Gender Guidelines\)](#), Memorandum to all INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995), 19 p. (See, lesson, *Female Asylum Applicants and Gender-Related Claims*)
 6. Martin, David A. INS Office of General Counsel. [Asylum Based on Coercive Family Planning Policies -- Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996](#), Memorandum to Management Team (Washington, DC: 21 October 1996), 6 p. (See, lesson, *Eligibility Part I: Definition of Refugee, Definition of Persecution, Eligibility Based on Past Persecution*)

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Presentation**I. INTRODUCTION**

The purpose of this lesson is to provide asylum officers with an understanding of the requirements needed to establish that persecution or feared persecution is "on account of" any of the five protected characteristics in the refugee definition. To properly determine whether persecution is on account of a protected characteristic, the asylum officer must have a firm understanding of 1) the "on account of" requirement, which involves the motive of the persecutor, and 2) the parameters of the five grounds for refugee status listed in the refugee definition.

II. "ON ACCOUNT OF" (NEXUS)**A. General Rule -- Persecutor's Motive is Critical**

To be eligible for asylum, the applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated, at least in part, to persecute the applicant because the applicant possesses or is believed to possess one or more of the protected characteristics in the refugee definition.

The protected characteristics in the refugee definition are also referred to as the "statutorily protected grounds," or the "protected grounds." The persecutor must be motivated, at least in part, by the applicant's possession or imputed possession of at least one of these characteristics in order to establish the required nexus (or connection) between the persecutor's motive and a protected ground.

B. Establishing Motive

Although the Supreme Court explained that, for an applicant to be found eligible for asylum, there must be "some" direct or circumstantial evidence of motive, the Court did not provide guidance on how much is "some" evidence. The BIA, however, has held that the applicant must provide facts upon which a reasonable person could believe that the persecution is, at least in part, on account of a protected ground. Below are important factors to consider when evaluating whether the applicant has met this standard.

References**Instructor Note #1****OH #1 - #2
Objectives**

OH #3 Nexus Principles
[*INS v. Elias-Zacarias*](#), 502
U.S. 478, 112 S.Ct. 812
(1992)

Instructor Note #2

[*INS v. Elias-Zacarias*](#), 502
U.S. 478, 112 S.Ct. 812
(1992); [*Matter of Fuentes*](#),
19 I & N Dec. 658, 662
(BIA 1988); [*Matter of S-P-*](#),
21 I & N Dec. 486 (BIA
1996)

1. Persecutor's perception of the applicant

The determinative factor in establishing a nexus between the harm or feared harm and a protected ground is that the persecutor must perceive the applicant to possess a protected characteristic.

For example, the fact that the persecutor has a political goal or represents a political entity is not sufficient in itself to establish persecution on account of political opinion. Rather, there must be evidence that the persecutor is motivated to persecute the applicant because **the applicant** possesses (or is believed to possess) a political opinion the persecutor seeks to overcome.

[*INS v. Elias-Zacarias*](#), 502 U.S. 478, 112 S.Ct. 812 (1992); *See also, Pedro Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000) [The evidence does] "not indicate that the Kanjobal Indians have been recruited because of their race, political opinion, or any other protected ground."

2. Exact motive need not be established

The BIA has explained that "an applicant does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor' where different reasons for actions are possible." However, the applicant must establish "facts on which a **reasonable person** would fear that the danger arises on account of" one of the five protected grounds.

[*Matter of Fuentes*](#), 19 I & N Dec. 658, 662 (BIA 1988); [*Matter of S-P-*](#), 21 I & N Dec. 486 (BIA 1996)

The Ninth Circuit, held that the applicant "need only 'produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or implied protected ground.'"

Gafoor v. INS, 231 F.3d 645 (9th Cir. 2000); citing *Borja v. INS*, 175 F.3d 732, 736 (9th Cir.1999); *see also, Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir.1995)

3. Mixed motives

The persecutor may be motivated by several reasons, some unrelated to a protected ground. There is no requirement that the persecutor be motivated **only** by a desire to overcome a protected characteristic in the applicant.

[*Matter of Fuentes*](#), 19 I&N Dec. 658, 662 (BIA 1988); [*Matter of S-P-*](#), 21 I&N Dec. 486 (BIA 1996); *Gafoor v. INS*, 231 F.3d. 645 (9th Cir. 2000); *Shoaferra v. INS*, 228 F.3d 1070, (9th Cir.2000); [*Singh v. Ilchert*](#), 63 F.3d 1501, 1509 (9th Cir. 1995)

The Second Circuit stated, in reasoning adopted by the

[*Osorio v. INS*](#), 18 F.3d 1017,

Ninth Circuit:

1028 (2nd Cir. 1994), cited by *Borja v. INS*, 175 F.3d 732, 735 (9th Cir. 1998)

"The plain meaning of the phrase 'persecution on account of the victim's political opinion,' does not mean persecution solely on account of the victim's opinion. "

- a. The conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of persecution."
- b. The fact that the persecutor is, in part, motivated by a desire to gain revenge on the applicant, does not preclude eligibility if the revenge is motivated partly by an imputed adverse political opinion.
- c. If the evidence indicates that the persecutor is motivated solely by a desire for economic gain, or vengeance, there is no nexus to a protected ground even if the applicant possesses a protected characteristic.

See e.g., *Osorio v. INS*, 18 F.3d 1017, 1028 (2nd Cir. 1994); and *Borja v. INS*, 175 F.3d 732, 735 (9th Cir. 1998)

Lim v. INS, 224 F.3d 929 (9th Cir. 2000) (Former policeman threatened by NPA after testifying against NPA leaders)

See e.g., *Cuevas v. INS* 43 F.3d 1167 (7th Cir. 1995); and *Kozulin v. INS*, 218 F.3d 1112 (9th Cir. 2000)

Examples:

- (i) A government agent may be motivated to harm a union leader for both economic reasons (labor disputes cost money) and political reasons (government views the union activists as politically subversive). The BIA's characterization (in *Osorio*) of the labor/management dispute as economic (while not erroneous) did not prevent a finding that the persecutor's motivation was political.
- (ii) A government may inflict harm on an applicant to gather intelligence and also to punish him or her for a real or perceived political opinion. The fact that one of the persecutor's motives is on account of political opinion is sufficient to establish that the harm or feared harm is on account of political opinion under the refugee definition.

Osorio v. INS, 18 F.3d 1017, 1028 (2nd Cir. 1994)

Matter of S-P-, 21 I & N Dec. 486 (BIA 1996)

See also, *Harpinder Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995); ("so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied,") and *Ratnam v. INS*, 154 F.3d 990, 996 (9th Cir. 1998)

Note: In the Ninth Circuit, "[i]f there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person...

Harpinder Singh v. Ilchert, 63 F.3d 1501, 1509 (9th Cir. 1995)

there arises a presumption that the motive for harassment is political." The presumption is *not* overcome by proof that one of the persecutor's motives is to gather information.

4. Initial motivation not determinative

There is no requirement that the persecutor's harmful contact with the applicant be initially motivated by the applicant's possession of a protected characteristic.

Tarubac v. INS, 182 F.3d 1114 (9th Cir. 1999)

Example: In *Tarubac*, the NPA initiated contact with the applicant to recruit her to their cause and to extort a "revolutionary tax" from her. The applicant refused to join the NPA or pay the tax. Note that at the point of her refusal to join or pay, the applicant could not have established that the harm or feared harm was on account of a protected ground.

Tarubac v. INS, 182 F.3d 1114 (9th Cir. 1999)

However, the applicant also told the NPA that she would not join or pay the tax *because* she did not like the communist system and because the NPA had no God. It was after she made statements identifying her opposition to the NPA's political viewpoint that the NPA threatened to kill her.

Even though the NPA had attempted to take money from the applicant and force her to assist them for reasons unrelated to a protected ground, the court found that the threat to kill her was triggered, in part, by the political and religious opinion that she articulated in her refusal.

5. No punitive or malignant intent required

The BIA has held that that a "punitive" or "malignant" intent is *not* required for harm to constitute persecution. The persecutor may believe that he or she is "helping" the applicant by attempting to overcome the protected characteristic. The persecutor must have committed an intentional action, or intend to commit an action that is seriously harmful to the applicant, regardless of whether the persecutor's intention is to harm or help the applicant.

[*Matter of Kasinga*](#), 21 I & N Dec. 357 (BIA 1996); *See* also, [*Pitcherskaia v. INS*](#), 118 F.3d 641 (9th Cir. 1997)

Note, however, that this does *not* mean that the persecutor's intent *cannot* be punitive in order for the inflicted harm to constitute persecution.

Examples:

- a. Applicant established required motive, by showing that forced female genital mutilation (FGM), as described in her case, was practiced “in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM.”

[*Matter of Kasinga*](#), 21 I & N Dec. 357 (BIA 1996)

Instructor Note #3

The required persecutory motive was established even though the FGM may have been practiced by the applicant’s tribe with “subjectively benign intent.”

- b. Applicant was detained, harassed, beaten, and forced to undergo psychiatric treatment because of her sexual orientation. The court found that the fact that the authorities’ intent was to “cure” the applicant, not “punish” her, was an improper basis to conclude that the applicant did not suffer persecution.

[*Pitcherskaia v. INS*](#), 118 F.3d 641 (9th Cir. 1997) (“The fact that a persecutor believes the harm he is inflicting is ‘good for’ his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution.”)

6. Evidence of motive

- a. direct evidence

Sometimes, an applicant is able to provide direct evidence of motive. For example, the persecutor may warn the applicant to stop all political activities or face arrest. This would be direct evidence of motive.

- b. circumstantial evidence

Generally, an applicant will not be able to provide direct evidence of motive, since persecutors usually do not announce their motives or explain their actions. However, motive may be established by circumstantial evidence.

[*INS v. Elias-Zacarias*](#), 502 U.S. 478, 112 S.Ct. 812 (1992)

Examples:

- (i) Close proximity in time of arrest to participation in an opposition party meeting may be circumstantial evidence of a connection between the arrest and the applicant's political opinion.

Instructor Note #4

Instructor Note #5

(ii) Country conditions reports may also provide circumstantial evidence of motive. For example, a reliable report may establish that the persecutor views as opponents individuals who are similarly situated to the applicant (e.g., human rights workers or members of cooperatives or unions, in certain countries).

Agbuya v. INS, 219 F.3d 962, (9th Cir. 1999)

(iii) In *Agbuya*, the NPA, a guerrilla group with ties to organized labor identified the applicant (a management official working for a company linked to the government) as anti-organized labor in previous disputes. When the NPA kidnapped applicant several years later, and demanded payment, the kidnapping was found to be on account of political opinion, even though the NPA made no reference to her perceived anti-labor opinion during the kidnapping.

c. duty to elicit information

Asylum applicants are not expected to understand the complexities of asylum law and may not realize that they are required to establish the motive of the persecutor. An applicant may not know what evidence would help establish the persecutor's motive.

See, Jacinto v. INS, 208 F.3d 725, 733-734 (9th Cir. 2000) ("Applicants for asylum often appear without counsel and may not possess the legal knowledge to fully appreciate which facts are relevant." IJs "are obligated to fully develop the record in [such] circumstances...")

Although the applicant bears the burden of proof to establish a nexus between the harm or feared harm and a protected ground, the asylum officer has an affirmative duty to elicit all information related to that nexus.

[8 C.F.R. § 208.9\(b\)](#). *See also, Matter of S-M-J*, Int. Dec. #3303 (BIA 1997) and lesson, [Asylum Eligibility Part IV, Burden of Proof and Evidence](#)

The UNHCR *Handbook* points out that the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the adjudicator. The role of the adjudicator is to "ensure that the applicant presents his case as fully as possible and with all available evidence."

[UNHCR Handbook, para.196](#)

C. Protected Characteristics

OH #4 Protected Grounds in Refugee Definition

1. Broad construction

The five protected characteristics should be construed broadly. Claims based on purely personal matters, such as personal vendettas do fall outside the protection of asylum law. This requirement should *not* be narrowly applied in order to preclude eligibility.

2. Duty to elicit information regarding all potential connections to protected characteristic

An asylum applicant may be unable to articulate a connection to a particular protected characteristic. He or she may state that the claim is based on one characteristic, while the facts indicate that there is an alternative connection to another characteristic, or that a connection to another characteristic may be more relevant to whether the applicant is a refugee. The asylum officer must determine which protected characteristic[s], if any, has a relation to the experiences of the applicant.

Example: If the applicant states that he or she fears harm on account of religion, but the facts of the case indicate that the persecutor was motivated by the applicant's political opinion, then the asylum officer must evaluate the claim based on political opinion, as well as religion.

3. Imputation of protected ground

Persecution inflicted on an applicant because the persecutor attributes to the applicant a characteristic connected to one of the five protected grounds in the refugee definition constitutes persecution "on account of" that characteristic regardless of whether the applicant possesses the characteristic.

Example: An individual who has relatives who belong to the B'hai religious sect is arrested and badly beaten by the police during a government crackdown on the B'hai movement. The harm she experienced would be on account of a characteristic, B'hai membership (religion) imputed to her because of her association with her

See, Rees, Grover Joseph III.
INS Office of General
Counsel. [*Legal Opinion:*](#)
[*Continued Viability of the*](#)
[*Doctrine of Imputed*](#)
[*Political Opinion.*](#)
Memorandum to Jan Ting,
Acting Director, Office of
International Affairs
(Washington, DC: 19
January 1993), 12 p.

This issue will be discussed in greater detail in the section below on political opinion, though the concept applies to all characteristics.

relatives, even though she does not belong to the sect herself.

III. RACE

A. Definition

"Race" should be understood in its widest context to include all kinds of ethnic groups that are "referred to as races in common usage." It may also entail membership in a specific social group of common descent. Race sometimes overlaps with nationality as a protected ground.

B. Considerations

1. Mere membership in a racial group

Mere membership in a racial group generally will not provide a basis for asylum, unless there is a pattern or practice of persecution against members of that racial group.

OH #5
Race & Nationality

[UNHCR Handbook, para. 68](#)
Instructor Note #6

See, [UNHCR Handbook, para. 70](#)

2. Discrimination

Claims based on race often involve discrimination. Discrimination generally is not persecution. However, severe discrimination or an accumulation of discriminatory acts may constitute persecution.

See, lesson, [Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution](#), section VI.D., *Discrimination and Harrassment*.

[UNHCR Handbook, para. 69](#)

Racial discrimination may also amount to persecution where "a person's human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregard of racial barriers is subject to serious consequences."

IV. NATIONALITY

A. Definition

For purposes of asylum eligibility, "nationality" includes membership in an ethnic or linguistic group in addition to citizenship. The broader definition of "nationality" contrasts with the meaning applicable to the first part of the refugee definition (that defines a refugee as someone outside his or her country of "nationality). "Nationality" in that context does simply mean "citizenship."

[UNHCR Handbook, para. 74](#)

Note that harm on account of nationality may also overlap with harm on account of race and/or religion.

For example: Consider a Quiche applicant from Guatemala. The characteristic of being Quiche may be perceived by the persecutor or feared persecutor as a racial characteristic, an ethnic characteristic (nationality), an immutable characteristic shared with other members of a distinct group (particular social group), a religious characteristic (some communities still practice indigenous religions), or a political characteristic (indigenous communities were often linked with guerrilla organizations). The important inquiry is whether the persecutor is motivated to harm the applicant on account of his or her being Quiche; if so, any one of the protected characteristics would likely apply.

B. Considerations

1. Conflicts between ethnic groups

When there is conflict between two or more national (ethnic, linguistic) groups in a country, persecution on account of nationality may overlap with persecution on account of political opinion, particularly where a political movement is identified with a specific nationality.

[UNHCR Handbook, para. 75](#)

Instructor Note #7

In some conflicts, members of an ethnic group may be at risk of harm even though they are not themselves directly involved in the conflict, because the persecutor or feared persecutor automatically associates them with the members of their ethnic group who are involved in a conflict.

When there is conflict between one or more "nationalities," asylum officers should take care not to assume that claims arising from the conflict are based solely on civil strife. Rather, the asylum officer must consider carefully the nature of the strife and determine whether the harm the applicant suffered or fears is connected to his or her nationality, or is harm that is incidental to armed conflict, irrespective of the applicant's nationality.

See, [Section VIII.G.](#), *Civil Strife*, below
See, [Matter of H](#), 21 I & N Dec. 337, Interim Dec. 3276 (BIA 1996)

2. Minorities and majorities

Claims based on persecution or feared persecution on

[UNHCR Handbook, para. 76](#)

account of nationality are often brought by individuals who belong to a national minority. However, there are situations in which individuals belonging to a national majority have reason to fear persecution by a dominant minority. For example, Hutu is the majority tribal group in Rwanda, while Tutsi, the minority group, controls the government. Both Hutus and Tutsis have presented valid claims for asylum.

C. Examples of claims based on nationality

In the former Soviet Union, “Jewish” was considered a nationality and marked as such on identification documents. Other examples of individuals who have been harmed on account of nationality include Armenians in Azerbaijan (overlaps with religion); Muslims, Croats, and Serbs in the former Yugoslavia (overlaps with religion); Tibetans in the People's Republic of China (also may overlap with religion).

Instructor Note #8

V. RELIGION

The *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* proclaim the right to freedom of religion. This includes the right to have or adopt a religion of one's choice; the freedom, either individually or in a community with others and in public or private, to manifest a religious belief in worship observance, practice, and teaching; and the right not to be subjected to coercion that would impair freedom to have or adopt a religion or belief of one's choice.

[Universal Declaration of Human Rights](#) (Art. 18); [The International Covenant on Civil and Political Rights](#) (Art. 18)

In 1998 Congress passed the International Religious Freedom Act (IRFA), which expressed concern about religious freedom throughout the world and established an Annual Report on International Religious Freedom by the Department of State. IRFA requires that the Annual Report, together with other relevant documentation, shall serve as a resource for asylum officers in cases involving claims of persecution on the grounds of religion. Absence of reference by the Annual Report to conditions described by the alien shall not constitute the sole grounds for a denial of the alien's claim.

[Pub. L. 105-292 International Religious Freedom Act of 1998. Section 102\(b\)](#)

[Pub. L. 105-292 International Religious Freedom Act of 1998. Section 601](#)

A. General Forms of Religious Persecution

OH #6
Religious Persecution

Referring to international human rights law, the *UNHCR Handbook* explains that persecution on account of religion takes various forms, some of which may include:

[UNHCR Handbook, para. 72](#)

1. Prohibition of membership in a religious community
2. Prohibition of worship in private or in public
3. Prohibition of religious instruction
4. Serious measures of discrimination imposed on persons because they practice their religion or belong to a religious community

B. Conversion

In some countries, it may be illegal to convert from one religion to another, and the penalties may be severe. For example, in some Islamic countries, the conversion from Islam to another religion is considered apostasy (renunciation of faith), which may be punishable by death. Punishment for conversion in such cases may be considered persecution on account of religion, depending on the degree of the harm imposed.

See e.g., Bastanipour v. INS, 980 F.2d 1129 (7th Cir. 1992) (prosecution under law against apostasy found to be “on account of” religion)

C. Forced Compliance With Laws or Punishment for Violation of Laws

1. General issues to consider
 - a. Is the law neutral in intent?
 - b. Is the law neutrally or unequally enforced?
 - c. How does the persecutor view those who violate the law?
 - d. How does compliance with the law affect the applicant's own religious beliefs?
2. Laws of neutral intent that affect religious beliefs

OH #7
Forced Compliance with Laws or Punishment for Violation of Laws

A law with a neutral purpose may have a more harmful impact on a particular religious group than the general population. The fact that the impact of the law adversely affects a religious group does not mean that the harm endured by that group as a result of enforcement of the law is "on account of" religion for purposes of asylum law.

[Fisher v. INS](#), 79 F.3d 955 (9th Cir. 1996), vacating 61 F.3d 1366, superseding 37 F.3d 1371

Example: A curfew imposed during a period of civil

unrest could prevent individuals from attending evening religious services. Since the law was not intended to overcome a characteristic, but rather to protect public safety, no nexus to religion would be established.

Contrast a curfew of neutral intent with a law that specifically prohibits a particular religious sect from meeting. Such a law would not be neutral in intent and the harm that individual members of the sect experience when the law is enforced may be considered to be harm on account of religion.

3. Unequal enforcement of the law

Unequal enforcement of a law that appears neutral may be evidence of persecutory intent. For example, if a law that prohibits proselytizing is enforced only against members of one particular religion, that would be evidence that the persecutor's intent is to punish members of the particular religion because of their religious beliefs.

Instructor Note #9

4. Laws based on religious principles

Punishment for refusal to comply with religious norms or laws (such as dress codes or gender roles based on religious principles) may constitute persecution on account of religion.

Note: In some countries religious principles are inseparable from civil and criminal laws. In such countries harm on account of religion may overlap with harm on account of political opinion

The asylum officer should focus on whether the persecutor perceives the applicant as a simple law-breaker, or as someone who should be punished for possessing "improper" religious values. In many cases, the persecutor will view the applicant as both a law-breaker and an individual possessing "improper" religious values. If the motivation is even in part on account of the applicant's real or perceived religious values, that is sufficient to establish that the harm is on account of religion.

When a civil or criminal law is itself based on religious laws or principles in a country where there is little separation between church and state, the evaluation of the persecutor's intent may be complex. A thorough understanding of country conditions will help the asylum officer evaluate how the authorities view individuals who violate religious laws.

5. Forced compliance with religious laws or practices that are abhorrent to the applicant's own beliefs

The Third Circuit has indicated that forced compliance with laws that are fundamentally abhorrent to a person's deeply held religious convictions may constitute persecution.

Fatin v. INS, 12 F. 3d 1233 (3rd Cir. 1993)

Example: Being forced to renounce religious beliefs or to desecrate an object of religious importance might be persecution if the victim holds strong religious beliefs.

Note that the persecutor's motive would still need to be established.

6. Forced compliance with religious beliefs and practices as they relate to the proper role of a woman in society

7.

Example: Where a daughter's religious opinions are different than her father's concerning how she should dress and who she should associate with, and the father attempts to impose his religious opinion on his daughter through physical force, the serious harm that the daughter suffers is "persecution on account of religion." This is true even though the daughter and father both practice Islam. Asylum eligibility may be found based on domestic abuse resulting from this difference of religious opinion.

Matter of S-A-, Int. Dec. 3433 (BIA 2000)

Instructor Note #10

VI. MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

The determination as to whether the harm the applicant experienced or feared is on account of membership in a particular social group must include two parts:

1. Whether the applicant is a member of a particular social group.
2. Whether the persecutor or feared persecutor is motivated to harm the applicant on account of his or her membership in the particular social group.

Asylum officers must address both issues, separately, in all cases where the claim is based on membership in a particular social group.

Note that the two-part inquiry and determination is fundamentally the same for the other protected characteristics. The officer must inquire into whether the applicant possesses or is perceived to possess the characteristic and whether the persecutor or feared

persecutor is motivated to harm the applicant on account of that characteristic. Special emphasis is made in the particular social group section because the "possession of the characteristic" (membership in a particular social group) analysis is often confused with the "on account of" analysis in particular social group cases.

To inquire into whether the applicant is a member of a particular social group, the asylum officer should first determine whether there are any precedent decisions analyzing similar facts. Officers should rely on any such decisions. If there is no precedent decision on point, asylum officers should determine whether the applicant belongs to a group that fits within the definition of a particular social group.

A. Is the Applicant a Member of a Particular Social Group? Defining the Group

A particular social group generally comprises individuals who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience. Members either cannot change the immutable characteristic, or that characteristic is so fundamental to the member's identity that he or she should not be required to change it.

The Ninth Circuit has held that a "particular social group" is a group united by a voluntary association, including former voluntary association, or by an innate characteristic so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.

1. Voluntary association of group members is not a required component of a particular social group, but is a factor that may be considered in determining whether the group the applicant belongs to constitutes a particular social group.
2. Some examples of shared characteristics that cannot be changed include a common past experience, or gender, or skin color, or family membership.

Identifying a characteristic so fundamental to the identities of the applicant and other group members that they should not be required to change it can be difficult. The characteristic must be fundamental to the identity of the asylum applicant whose case is being evaluated.

- a. A characteristic that is fundamental to the identity

OH #8 Particular Social Group

[Matter of Acosta](#), 19 I&N Dec. 211, 233-34 (BIA 1985)

[Hernandez-Montiel v. INS](#), 225 F.3d 1084, 1093 (9th Cir. 2000); *See also*, [Sanchez-Trujillo v. INS](#), 801 F.2d 1571, 1575-1577 (9th Cir. 1986)

[Hernandez-Montiel](#) clarifying [Sanchez-Trujillo](#)

See, [Fatin v. INS](#), 12 F.3d 1223 (3rd Cir. 1993)

of one person, could be possessed by another but be far less important to his or her identity.

- b. Asylum officers should look at all relevant information, including the applicant's individual circumstances and country conditions, before making the determination.
3. The particular social group in which the applicant claims membership cannot be defined by the harm that the applicant experienced or fears. Circular reasoning should not be used to describe the group.

Example: An applicant was raped and battered by Salvadoran guerrillas. The harm she experienced was not on account of membership in a particular social group defined as "women who were raped or battered by Salvadoran guerrillas".

See, Gomez v. INS, 947 F.2d 660, 664 (2nd Cir. 1991)

Note though, that if women who were raped by guerrillas in country X were viewed distinctly by elements of society in that country, and ostracized or otherwise treated differently because of their past experience, they might then be considered members of a particular social group. The harm the women would fear from society (ostracism) is distinct from the past experience (rape) that defines the group.

4. A particular social group should not be defined so broadly as to make it difficult to distinguish group members from others in the society in which they live, nor so narrowly that what is defined does not constitute a meaningful grouping. A particular social group must be recognizable as a group.
5. *Matter of R-A-* and *Sanchez-Trujillo* are two cases that provided important instruction on how to define a particular social group. The weight of both decisions has been affected by recent developments in the law. Former Attorney General Reno vacated and remanded *R-A-* to the BIA, for "reconsideration following final publication of the proposed rule published at 65 Fed. Reg. 76588 (proposed Dec. 7, 2000)." As a result of the Attorney General's action, *R-A* is not binding and may not be relied upon or cited to as the basis of an asylum decision.

See, Sanchez-Trujillo v. INS, 801 F.2d 1571, 1575-1577 (9th Cir. 1986)

Matter of R-A-, Interim Decision #3403 (BIA, 1999), vacated by Attorney General January 19, 2001; *Sanchez-Trujillo v. INS*, 801 F.2d 1571; The proposed rule was published December 7, 2000 at 65 Federal Register 76588-76598. It is not binding but represents the agency's interpretation of the analytical framework that should be used to analyze claims based on membership in a particular social group.

Sanchez-Trujillo was clarified by *Hernandez-Montiel*, in a manner that creates consistency between the Ninth Circuit, the BIA and the other circuits. Both *R-A-* and *Sanchez-Trujillo* indicated factors that, while no longer required and not necessarily determinative, may be considered in deciding whether a particular social group exists. These factors are included in the proposed rule referred to by the Attorney General when she vacated *R-A-*. The first three are taken from *Sanchez-Trujillo*, the last three from *R-A-*.

See, Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000)

65 FR 76588 at 76598

- The members of the group are closely affiliated with each other;
- The members are driven by a common motive or interest;
- A voluntary associational relationship exists among the members;
- The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;
- Members view themselves as members of the group; and
- The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.

B. Is the Harm "on Account of" the Applicant's Particular Social Group Membership?

1. To inquire into whether an applicant has been persecuted or has a well-founded fear of persecution *on account of* his or her membership in a particular social group, the asylum officer must elicit and consider all evidence, direct and circumstantial, providing information about the motivation of the persecutor.
2. At least one of the persecutor's motives in harming or seeking to harm the applicant must be connected to a group defining characteristic that the applicant and other group members share.

Note: For a more complete discussion of "on account of" *See, Section II* of this lesson. The "on account of" inquiry is similar, and is controlled by *Elias-Zacarias*, regardless of which protected characteristic is being considered.

C. Precedent Decisions (Specific groups)

OH #10 Specific Groups

Provided below are some examples of precedent decisions that have identified certain groups that may constitute particular social groups, and certain groups that, based on the facts of the case, do not constitute particular social groups. The examples are not meant to be an exhaustive list. Since this area of law is evolving rapidly, it is important to be informed about current cases and regulatory changes.

1. Family membership

It has been said that a group of family members constitutes the “prototypical example” of a particular social group.

Sanchez-Trujillo, 801 F.2d at 1576; *See also*, *Matter of Acosta*, 19 I&N 210, 232 (BIA 1985)

The First Circuit found that a nuclear family constituted a particular social group. The court found that a link could be established between the harm the applicant experienced and his family membership, and that therefore the harm experienced was persecution on account of the applicant's membership in a particular social group (his family).

Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993); *See also*, *Iliev v. INS*, 127 F.3d 638, 642 (7th Cir. 1997) (recognizing that family could constitute a particular social group); *But see*, *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (finding that family membership does not constitute a particular social group when involving extended family)

2. Clan membership

A clan is an extended family group that has been found to be a particular social group. The BIA held that membership in a Somali subclan may form the basis of a particular social group. The INS Office of General Counsel issued a legal opinion that a Somali clan may constitute a particular social group. Although extended family groups may not always be recognized as particular social groups, a clan is a discrete group, whose members are linked by custom and culture. Clan members also are usually identifiable as members of their clan.

Matter of H-, 21 I & N Dec. 337 (BIA 1996). *See*, Virtue, Paul W. INS Office of General Counsel. *Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA*, Memorandum to Kathleen Thompson, Director, Refugee Branch, OIA (Washington, DC: 9 December 1993), 7 p.

3. Opponents of a cultural or societal norm.

The Second Circuit and the BIA both held that

Abankwah v. INS, 185 F.3d 18 (2nd Cir. 1999); *Matter of Kasinga*, 21 I & N Dec. 357 (BIA 1996) Concurring opinion by Board member

individuals who oppose the cultural norm female genital mutilation can form a particular social group. Note that in *Kasinga*, the concurring opinions emphasize the importance of the applicant's status as a woman who had not experienced the procedure and de-emphasize the importance of her opposition to the practice. Evidence of perceived opposition to a cultural or societal norm could also be the basis for a finding that the harm or feared harm is "on account of" political opinion.

Filippu, joined by Heilman, and Concurring decision by Board member Rosenberg.

4. Gender

a. The BIA

The BIA has indicated that gender alone may form the basis for a particular social group.

Refer to lesson, *Female Asylum Applicants and Gender-Related Claims*, Section VII., *Legal Analysis – Nexus*

[*Matter of Acosta*](#), 19 I&N Dec. 211 (BIA 1985)

The Board specifically held that gender, in conjunction with other characteristics, may form the basis of a particular social group. The BIA found eligible for asylum a woman who feared persecution on account of her membership in the particular social group defined as “young women of the Tchamba-Kunsuntu Tribe who have not had female genital mutilation, as practiced by that tribe, and who oppose the practice.”

[*Matter of Kasinga*](#), 21 I & N Dec. 357 (BIA 1996)
As indicated above, the concurring opinions in *Kasinga* indicate that the applicant's status as an uncircumcized female, not her opposition to FGM, is the key shared characteristic.

b. federal circuit court of appeals decisions

(i) The Second Circuit found that the class of women who were previously raped and battered by Salvadoran guerrillas did not form the basis of a particular social group. Applicant failed to produce evidence that members of the group in which she claimed membership share characteristics, other than gender and youth, such that potential persecutors could identify them.

Gomez v. INS, 947 F.2d 660, 664 (2nd Cir. 1991)

(ii) The Third Circuit stated that gender alone may form the basis of a particular social group. The Third Circuit also found that sub-groups of women, such as women who refuse to conform to gender-specific laws, may form the basis of a particular social group.

[*Fatin v. INS*](#), 12 F.3d 1233 (3rd Cir. 1993). Note that the applicant still has to show that there is a reasonable possibility of suffering persecution *on account of* her membership in the particular social group.

(iii) The Eighth Circuit found the category of

Safaie v. INS, 25 F.3d 636 (8th Cir. 1994)

Iranian women to be too broad, because not all Iranian women have a well-founded fear of persecution. (Note that the court appears to confuse the analysis of what constitutes a particular social group with the risk of persecution.)

- (iv) The Ninth Circuit, considering the class of “young, urban working class males of military age who have never served in the military or otherwise expressed support for the government,” indicated that gender cannot form the basis of a particular social group.

Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986)

5. Sexual orientation

Persecution on account of sexual orientation constitutes persecution on account of membership in a particular social group. The BIA found a homosexual male in Cuba persecuted on account of his homosexuality to have been persecuted on account of membership in a particular social group.

Matter of Toboso-Alfonso, 20 I & N Dec. 819 (BIA 1990) (designated by the Attorney General as a precedent decision on June 16, 1994)

The Ninth Circuit held that gay men with female sexual identities in Mexico constitute a particular social group. The applicant's female identity is immutable because it is an inherent characteristic.

Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000)

6. Unions

In *Matter of Acosta*, a case that involved a member of a Salvadoran taxi cooperative, the BIA considered a social group with the defining characteristics of “being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages.” The BIA found that neither characteristic was immutable, because the members of the group could either change jobs or cooperate in work stoppages. However, the BIA did not address whether union membership is a characteristic an individual should not be required to change.

Matter of Acosta, 19 I&N Dec. 211, 234 (BIA 1985)

In *Carranza*, the First Circuit found that an individual who had established a fear on account of his union activities was eligible for asylum, although it made no specific finding on particular social group.

Carranza-Hernandez v. INS, 12 F.3d 4, (2nd Cir. 1993). The INS did not raise the particular social group issue in appeal before BIA.

The Fifth Circuit, while not specifically holding on the

Zamora-Morel v. INS, 905

issue, indicates in *Zamora* that a trade union may constitute a particular social group. The court held that the applicant was not persecuted and did not have a well-founded fear *on account of* his membership in the union, analyzing the case as if the union was a particular social group.

F.2d 833 (5th Cir. 1990)

7. Students and professionals

- a. Groups of students have been found not to be members of a particular social group. These holdings do not preclude a finding that a specific, identifiable, group of students could constitute a particular social group.
- b. The First Circuit recognized that persons associated with the former government, members of a tribe, and educated or professional individuals could be members of a social group.
- c. The Seventh Circuit held that parents of Burmese students may constitute a particular social group.

Matter of Martinez-Romero, 18 I&N Dec. 75 (BIA 1981) [Note circular reasoning] *See also, Civil v. INS*, 140 F.3d 52 (1st Cir. 1998) (social group of pro-Aristide young students overboard and not specifically targeted).

Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985)

Lwin v. INS, 144 F. 3d 505 (7th Cir. 1998)

8. Ancestry

The BIA found that “Filipino with Chinese ancestry” could define a particular social group, because of the immutability of the characteristic.

Matter of V-T-S, Int. Dec. # 3308 (BIA 1997)

9. Age

Membership in a particular age group has been considered along with other factors and found not to constitute membership in a particular social group. The cases addressing age have generally involved young, urban males who feared either conscription by the military or forcible recruitment by guerrillas.

Matter of Vigil, 19 I&N Dec. 572 (BIA 1988); [Sanchez-Trujillo v. INS](#), 801 F.2d 1571 (9th Cir. 1986); *Matter of Sanchez and Escobar*, 19 I. & N. Dec. 276 (BIA 1985) *See also, Civil v. INS*, 140 F.3d 52 (1st Cir. 1998)

Note that, in such cases, the persecutor generally is not trying to overcome the young men’s youth and gender (or to punish them for their youth and gender). Rather their age group makes them desirable combatants. The issue appears to be more a failure to establish the requisite motive (“on account of”), than failure to establish membership in a particular social group.

10. Military/police membership

a. The BIA

The BIA listed *former* military leadership as an immutable characteristic that may form the basis for a particular social group. Similarly, while holding that the dangers arising from the nature of employment as a policeman in an area of domestic unrest do not support a claim, the Board indicated that *former* service in the national police was an immutable characteristic that, in some circumstances, could form the basis for a particular social group.

Matter of Acosta, 19 I&N Dec. 211 (BIA 1985);
Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988)

b. the Ninth Circuit

The Ninth Circuit also has held that the general risk associated with military or police service do not provide a basis of eligibility. The Ninth Circuit, as does the BIA, recognizes a distinction between service and *former* service. Additionally, an applicant may establish eligibility if he or she can show that the persecutor is motivated by a specific shared characteristic. The following passage from *Cruz-Navarro*, is instructive:

Cruz-Navarro v. INS, 232 F.3d 1024,1029 (9th Cir. 2000); *Velarde v. INS*, 140 F.3d 1305 (9th Cir.1998) (Former bodyguard of daughters of Peruvian President threatened by Shining Path. Threats referred to specific acts the applicant engaged in); *See, also, Duarte de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) (suffering while in military on account of applicant's race, not participation in military)

Fuentes, therefore, does not flatly preclude "police officers and soldiers from establishing claims of persecution or fear of persecution." [citing *Velarde* at 1311] Rather, *Fuentes* suggests that persecution resulting from membership in the police or military is insufficient, by itself, to establish persecution on account of membership in a particular social group or political opinion.

11. Drug traffickers

An applicant was convicted of trafficking in drugs in the United States and faced removal to Iran. He claimed a well-founded fear because the Iranian government executes individuals who traffic in illegal drugs. The Seventh Circuit stated:

Whatever its precise scope, the term "particular

Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir.

social groups" surely was not intended for the protection of members of the criminal class in this country, merely upon a showing that a foreign country deals with them even more harshly than we do. We suppose there might be an exception for some class of minor or technical offenders in the U.S. who were singled out for savage punishment in their native land, but a drug felon sentenced to thirty years in this country (though Bastanipour's sentence was later reduced to fifteen years) cannot be viewed in that light.

1992)

Instructor Note #13 PE2

VII. POLITICAL OPINION

A. Definition

Expression of a "political opinion" should not be viewed only in the narrow sense of participation in a political party or the political process. As one expert explained, the meaning of "political opinion" in the refugee definition "should be understood in the broad sense, to incorporate, within substantive limitations now developing generally in the field of human rights, any opinion on any matter in which the machinery of state, government and police may be engaged."

Expression of a political opinion may take various forms, and there are many types of opinions or views that may fall within the broad category of "political." Depending on the case, some examples of expression of political opinions outside the traditional political process may include:

1. Expression of feminist beliefs
2. Exposure of government human rights abuses
3. Activities to protect or establish the right to association (such as union membership), workers rights, or other civil liberties
4. Participation in certain student groups
5. Participation in community improvement organizations or cooperatives, or movements for land reform.
6. Refusal to follow orders to commit human rights abuses.

OH #11
Political Opinion -- General Principles

Guy Goodwin-Gill. *The Refugee in International Law* (Oxford: Clarendon Press, 1983), p.30.

Instructor Note #14

Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993)

Osorio v. INS, 18 F.3d 1017 (2nd Cir. 1993); *Bernal-Garcia v. INS*, 852 F.2d 144 (5th Cir. 1988)

Osorio v. INS, 18 F.3d 1017 (2nd Cir. 1993)

See, e.g., Zamora-Morel v. INS, 905 F.2d 833 (5th Cir. 1990); *Vera-Valera v. INS*; 147 F.3d 1036 (9th Cir. 1998)

See e.g., Barraza Rivera v.

INS, 913 F. 2d 1443 (9th Cir. 1990)

7. Whistleblowing or otherwise exposing government corruption.

Grava v. INS 205 F.3d 1177 (9th Cir. 2000); *See also*, *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1245 (9th Cir.1999); cf. *Marquez v. INS*, 105 F.3d 374, 381 (7th Cir.1997)

Note: Informing the government about individuals involved in illegal activities does not necessarily constitute a basis for eligibility. However, doing so in a political context may be. For example, providing the government with information about a guerrilla group, where the guerrilla group would see informing as an expression of opposition to it was the basis of a well-founded fear of persecution on account of political opinion (imputed).

Briones v. INS, 175 F.3d 727 (9th Cir. 1999) (en banc)

B. Opinion Must Be Applicant's, or One Attributed to Applicant

Persecution on account of political opinion means persecution on account of the *applicant's* political opinion, or one attributed to the applicant, not the persecutor's opinion.

INS v. Elias-Zacarias, 502 U.S. 478; 112 S.Ct. 812 (1992)

The fact that the persecutor is motivated by political goals or represents a political entity does not in itself establish that the persecution is on account of political opinion. The persecutor must be motivated by the applicant's opinion or perceived opinion.

C. Neutrality

1. The BIA

Although the BIA has not granted asylum or withholding based on an applicant's conscious decision to remain neutral during periods of controversy, the Board has analyzed claims under the principle that, in some cases, neutrality may form a political opinion.

See, Matter of Vigil, 19 I&N Dec. 572 (BIA 1988); and *Matter of Maldonado-Cruz*, 19 I&N Dec. 509, 516 (BIA 1988); *Novoa-Umania v. INS*, 896 F.2d 1 (1st Cir. 1990)(indicating BIA used neutrality analysis)

2. Federal Circuit Courts of Appeals

The First and Ninth Circuits have held that neutrality may constitute a political opinion. The Eighth Circuit

Umanzor-Alvarado v. INS, 896 F.2d 14 (1st Cir. 1990); *Arriaga-Barrientos v. U.S. I.N.S.*, 937 F.2d 411 (9th Cir.

has indicated that neutrality might, in some cases, form a political opinion.

1991); *Lopez-Zeron v. INS*, 8 F.3d 636 (8th Cir. 1993)

3. Hazardous neutrality

The Ninth Circuit follows the doctrine of "hazardous neutrality." Remaining neutral in an environment where neutrality brings hazards from the government, or from uncontrolled anti-government forces, is an expression of political opinion.

Rivera-Moreno v. INS, 213 F.3d 481 (9th Cir. 2000); *Sangha v. INS*, 103 F.3d 1482, 1488 (9th Cir.1997); *Arriaga-Barrientos v. INS*, 937 F.2d 411, 413-414 (9th Cir.1991); *Ramos-Vasquez v. INS*, 57 F.3d 857, 863 (9th Cir.1995) (applicant deserts rather than illegally shoot deserters.)

For example, the failure to favor either side in a civil war may be perceived as opposition by participants from both sides of the conflict.

Political neutrality may include the absence of any political opinion. Neutrality can be established by pronouncement or action[s].

4. Perception of applicant's neutrality

The critical issue is how the persecutor views the applicant's neutrality and whether the persecutor seeks to overcome it. If the applicant has not articulated or otherwise affirmatively expressed his or her neutrality, then the persecutor may not be aware of it.

Ramos-Vasquez v. INS, 57 F.3d 857 (9th Cir.1995); *Arriaga-Barrientos v. U.S.I.N.S.*, 937 F.2d 411, 414 (9th Cir. 1991)

Often during conflict, in the point of view of the feared persecutor, there can be no neutrality. In the persecutor's eyes, "either you are with us or against us." The persecutor may *impute* an opposition political opinion to anybody who is neutral.

D. Imputed Political Opinion

Persecution "on account of political opinion" includes persecution because of a political opinion that has been attributed to an applicant, even if the applicant does not actually possess that opinion. Again the determinative issue is how the persecutor views the applicant. Some factors to consider include:

See, Rees, Grover Joseph III. INS Office of General Counsel. [Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion](#), Memorandum to Jan Ting, Acting Director, Office of International Affairs (Washington, DC: 19 January 1993), 12 p.

1. Whether the applicant has taken any actions that the persecutor would view as expressions of political opinion, even if the applicant did not intend them as such

OH #12 Imputed Political Opinion – Factors to Consider

Example: The de-facto government in Haiti during the exile of President Aristide associated members of neighborhood improvement committees with President Aristide. In the eyes of the military and their supporters, sweeping a street or participating in a literacy campaign indicated support for the exiled President.

Instructor Note #15

2. Statements made by the persecutor that may provide evidence of the persecutor's view of the applicant or individuals similarly situated to the applicant
3. The persecutor's treatment of individuals similarly situated to the applicant
4. Country conditions reports

An understanding of the overall political situation in the applicant's country can provide context for the persecutor's actions.

5. The severity of any punishment the applicant has received

Circumstantial evidence of persecutory intent has "most commonly consisted of punishment so severe as to seem obviously directed at real or perceived enemies rather than at ordinary lawbreakers."

See, Rees, Grover Joseph III.
INS Office of General Counsel. [Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion.](#)
Memorandum to Jan Ting, Acting Director, Office of International Affairs (Wash., DC: 19 January 1993), 12 p.

6. Whether the persecutor has reasons unrelated to the applicant's political opinion to exert its authority against the applicant (e.g., a legitimate criminal investigation in which the applicant has been implicated)

Example: The Ninth Circuit has held that it is reasonable to presume that harm inflicted by the government is on account of political opinion when there is no evidence of criminal or other legitimate investigative motive.

Instructor Note #16

[Matter of S-P-](#), 21 I & N Dec. 486 (BIA 1996)

[Hernandez-Ortiz v. INS](#), 777 F.2d 509 (9th Cir. 1985);
[Singh v. Ilchert](#), 63 F.3d 1501 (9th Cir. 1995)

E. Attempts to Overthrow a Government

General Rules

1. Prosecution for an attempt to overthrow a government may constitute persecution on account of political opinion if there are no legitimate political means in place to change the government.

Chanco v. INS, 82 F.3d 298 (9th Cir. 1995); *Matter of Izatula*, 20 I&N Dec. 149 (BIA 1990); *Perlera-Escobar v. EOIR and INS*, 894 F.2d 1292 (11th Cir. 1990); *Dwomoh v. Sava*, 696 F. Supp. 970 (S.D.N.Y.

1988)

2. Harm and threats that may incidentally result from behavior meant to achieve the overthrow of the existing government are not on account of political opinion.

Perlra-Escobar v. EOIR and INS, 894 F.2d 1292 (11th Cir. 1990); citing *Matter of Rodriguez-Majano*, 19 I&N 811, (BIA 1988)

Considerations

1. The inquiry and analysis are similar whether the applicant is a participant in an attempted coup d'etat or an armed insurrection. The focus is first on the motivation of the feared government in prosecuting the applicant, and then on whether the actions of the applicant bar him or her from protection. If institutions are in place that provide peaceful means to change the government, prosecution of an individual who attempts to violently overthrow the government will not usually be found to be persecution, if the law, and the enforcement of that law are neutral in intent. A "duly established" government has the right to investigate its suspected enemies.

See *Chanco v. INS*, 82 F. 3d 298 (9th Cir. 1996); *Perkovic v. INS*; 33 F.3d 615 (6th Cir. 1994)

Perlra-Escobar v. E.O.I.R. and INS; 894 F.2d 1292, 1297-1299 (11th Cir. 1990)

2. If the government prosecutes those who attempt to overthrow it in a manner that is unusually severe or unequally harsh to individuals who share the same protected characteristic, the applicant may demonstrate that he or she was persecuted on account of a protected ground, even if some institutions for peaceful change exist.
3. In analyzing fear of prosecution for actions taken to overthrow the government the asylum officer should look to the legitimacy of the law being enforced. When a government does not recognize the international human right to peacefully protest, punishment for a politically motivated act against it may not constitute a legitimate exercise of authority.
4. The asylum officer must also consider the actions taken by the applicant in furtherance of the attempt to overthrow the government. If those actions involved persecution or torture of others, severe harm to civilians, or terrorist activity, they may warrant a mandatory or discretionary denial.

Chanco v. INS, 82 F.3d 298, 302 (9th Cir. 1996)

Grounds for mandatory and discretionary denials will be discussed in lesson, [Mandatory Bars to Asylum and Discretion](#).

Example: The US Supreme Court looked at whether violent actions taken as part of an effort to overthrow the government of Guatemala were the basis of eligibility or

Aguirre-Aguirre v. INS, 119 S.Ct. 1439 (USSct 1999); See also, lesson, [Mandatory](#)

disqualification as a particularly serious crime. The court adopted the BIA test of balancing whether the criminal nature of the action outweighed the political gain sought.

Where the actions included harming civilians, burning buses and destroying property, the criminal nature of the action outweighed the political end sought.

[Bars to Asylum and Discretion.](#)

Instructor Note #17 PE3

VIII. COMMON NEXUS ISSUES

The following issues have arisen in many cases. Generally, the cases cited indicate that, regardless of the context in which the applicant's fear develops, there must be direct or circumstantial evidence that indicates the persecutor or feared persecutor is motivated by a protected characteristic that the applicant possesses or is imputed to possess. Therefore, in situations arising from avoidance of military service, forced recruitment by guerillas, service in the police or military, wide-spread civil strife or personal disputes, there must be more specific evidence related to the persecutor's motivation to harm the applicant than simply the conflictive circumstance, to establish eligibility. Cases involving Coercive Family Planning issues do not require such evidence, because Congress, in statute, has determined that evidence of the harm or risk of harm establishes motivation. Some of the nuances of common nexus issues are described below.

A. Conscription, Military Service

1. Draft evasion and desertion from the military, are not always political acts. There are a variety of reasons why an individual might refuse to perform military service that are not political.
2. It follows that a government will not always perceive draft evasion or desertion as a political act. Punishment for draft evasion or desertion, without some evidence that the government's motivation in punishing the evader or deserter is connected to something other than the act of evasion or desertion, generally is not persecution on account of any of the protected grounds.
3. A government has a sovereign right to conscript its citizens or nationals and maintain a military for the purpose of self-defense. Laws pertaining to required military service ordinarily are not intended to punish individuals on account of any of the protected grounds,

OH #13

Conscription and Military Service

[UNHCR Handbook, para. 167](#); *Nguyen v. Reno*, 211 F.3d 692 (1st Cir 2000) *Castillo v. INS*, 951 F.2d 1117 (9th Cir. 1991); [M.A. v. INS](#), 899 F.2d 305, 312 (4th Cir. 1990); [Canas-Segovia v. INS](#) 970 F.2d 599, 601 (9th Cir. 1992)

Matter of Vigil, 19 I&N Dec. 572, 578 (BIA 1988); *Nguyen v. Reno*, 211 F.3d 692 (1st Cir 2000); citing *Foroglou v. INS*, 170 F.3d 68, 71 (1st Cir. 1998)

but rather to form and maintain military forces for purposes of national security. Punishment for refusing to serve, without evidence of the additional motivation described above, is not persecution on account of religious or political opinion, but prosecution for refusing to obey the law.

4. It is difficult, but not impossible, for a claimant to make a case based on desertion or draft evasion. The applicant may establish a nexus to a protected characteristic by demonstrating that he or she:
 - Was selected for military service because he or she possesses or is perceived to possess, a protected characteristic; or
 - Was subject to disproportionate punishment because of a possessed, protected characteristic.

5. Disproportionate punishment
 - a. "Disproportionate" means out of proportion with what is normal. The term can be used to describe situations where the penalty for draft evasion or desertion is out of proportion with international norms (unduly harsh), or where the penalty is out of proportion with that experienced by others who do not share an applicant's protected characteristic.

Webster's II New Riverside Dictionary, Riverside Publishing Co. (Houghton Mifflin Company 1994)

 - b. If there is evidence that an applicant may be subject to disproportionate punishment because of his or her refusal to serve, or to perform an action during service, the disproportionate punishment may be evidence that the applicant was harmed or targeted on account of a protected characteristic.

Matter of Vigil, 19 I&N Dec. 572 (BIA 1988); *Vujisic v. INS*, 224 F.3d 578, (7th Cir.2000) [M.A. v. INS](#), 899 F.2d 305 (4th Cir. 1990); [UNHCR Handbook](#), para. 169

 - c. An applicant does not have to establish possession of a protected characteristic, but must establish that the persecutor perceives him or her to possess the characteristic. Disproportionate punishment may be evidence that the persecutor perceives the applicant to possess a characteristic the persecutor desires to overcome. For example, evidence that those persons who refuse to comply with conscription policy are exposed to severe danger, including torture and extrajudicial execution, may indicate

[Canas-Segovia v. INS](#), 902 F.2d 717, 729 (9th Cir.1990) (vacated for other reasons, on remand, 970 F.2d 599 (9th Cir. 1992))

that the persecutor perceives a neutral applicant to possess an opposition political opinion.

6. Refusal to serve in a military or commit an action that is condemned by the international community
 - a. UNHCR guidance indicates that when an individual refuses to participate in a military action that is condemned by the international community, any punishment for such refusal could in itself be seen as persecution. [UNHCR Handbook, para. 171](#)
 - b. US courts have interpreted "military action" to apply both to those who refuse to perform a specific military action that would be internationally condemned, and to those who refuse to serve in a military unit or army that engages in internationally condemned activities. *Mojsilovic v. INS* 156 F.3d 743 (7th Cir. 1998); *M. A. v. INS*, 858 F.2d 210, 214-215.
 - c. US law does require the asylum adjudicator to determine whether there is evidence that the feared persecutor is motivated to act by the applicant's opposition to the condemned acts
 - (i) The Fifth Circuit emphasized the need for evidence of the persecutor's motivation in *Gomez-Mejia*. The applicant never revealed his opposition to the actions taken by the Nicaraguan military and there was no evidence that such an opposition viewpoint was imputed to him; therefore any punishment he faced as a result of desertion was not on account of a protected characteristic. *Gomez-Mejia v. INS*, 56 F.3d. 700, 703 (5th Cir. 1995)
 - (ii) The Ninth Circuit held that an applicant who openly voiced his opposition to internationally condemned actions and was punished because of his refusal to carry out those actions was persecuted on account of the applicant's opposition political opinion. *Barraza Rivera v. I.N.S.*, 913 F.2d 1443 (9th Cir.1990)
 - (iii) The BIA held that punishment (for desertion) must emanate from a protected characteristic. *Matter of A-G-*, 19 I. & N. Dec. 502 (BIA 1987), *aff'd*, 899 F.2d 304 (4th Cir.1990)
 - d. The Seventh Circuit adopted paragraph 171 of the *UNHCR Handbook* and indicated that, "when an

alien does not wish to be associated with a military that engages in universally condemned acts of violence, 'the only relevant factor is the likelihood that the alien will be punished.'"

citing *M.A. v. INS*, 858 F.2d 210, 214-215 (4th Cir. 1988)

(i) The Seventh Circuit did not find that the record indicated Mojsilovic's reasons for evading military service were to avoid serving in a universally condemned army. Even assuming that his reasons were as stated, the court concluded that there was little evidence that he would suffer punishment as a consequence of the evasion. He was found to be ineligible for asylum.

(ii) The Seventh Circuit did find a Slovenian applicant eligible for asylum when he deserted from the Yugoslav military because he did not want to participate in ethnic cleansing against people of his own ethnicity. The court found that the ethnic cleansing was condemned by the international community, and the applicant faced disproportionately serious harm because he deserted.

Vujisic v. INS, 224 F.3d 578, 581 (7th Cir. 2000)

e. The BIA and the Fourth Circuit held that the condemnation of the military must come from recognized international governmental bodies, not private organizations or the news media. Such reasoning does not appear to be shared by the other circuits.

Matter of A-G-, 19 I&N Dec. 502, 506 (BIA 1987); *M.A. v. INS*, 899 F.2d 305, 312 (4th Cir. 1990)

f. In two cases where the applicants refused to participate in specific acts ordered by the military, the courts focused on whether the specific acts the applicants sought to avoid were contrary to international norms governing human conduct (as opposed to whether the military itself had been condemned).

Barraza Rivera v. INS, 913 F.2d 1443 (9th Cir. 1990) (applicant ordered by military officer to participate in paid killing of two men); *Ramos-Vasquez v. INS*, 57 F.3d 857 (9th Cir. 1995) (applicant deserted Honduran military to avoid having to execute a deserter)

(i) In those Ninth Circuit cases, punishment for refusal to participate in specific illegal killings required by military service was found to constitute persecution.

- (ii) It should be noted that when punishment comes as a direct result of a refusal to perform an action, the evidence of cause and effect is much more specific than when punishment is the result of general refusal to serve, without indication of a statement about the reasons for the refusal.

7. Conscientious objection

- a. Conscientious objection to military service in general is insufficient to establish eligibility for asylum. However, as noted above, refusal to participate in specific acts contrary to international standards governing human conduct may, in some cases, provide eligibility for asylum.
- b. United States asylum law regarding conscientious objection diverges from guidance in the *UNHCR Handbook*. The *Handbook* indicates that refusal to perform military service may be the sole basis for a claim to refugee status if the refusal is due to valid reasons of conscience. U.S. law requires evidence of the persecutor's motivation. Where U.S. law differs from *UNHCR Handbook* guidance, the asylum officer must follow U.S. law.

Matter of Canas, 19 I&N Dec. 697 (BIA 1988); [Canas-Segovia v INS](#), 970 F.2d 599 (9th Cir. 1992). See also, [INS v. Elias-Zacarias](#), 502 U.S. 478, 112 S.Ct. 812 (1992)

Instructor Note #18

[UNHCR Handbook, paras 170, 172](#)

B. Recruitment by Guerrilla Forces

1. General rule

Forced recruitment by guerrillas and harm for refusing to join or cooperate with guerrilla forces do not, *per se*, constitute persecution on account of any of the protected grounds.

To establish eligibility for asylum, there must be some evidence that the forcible recruitment, related harm, or threats are motivated by a desire to overcome a protected characteristic possessed (or believed to be possessed) by the applicant.

OH #14 – Recruitment by Guerrilla Forces

[INS v. Elias-Zacarias](#), 502 U.S. 478, 112 S.Ct. 812 (1992); [Matter of C-A-L](#), 21 I&N Dec. 754 (BIA 1997); *Miranda v. INS*, 139 F.3d 624 (8th Cir. 1998); *Pedro Mateo v. INS*, 224 F.3d 1147 (9th Cir. 2000)

2. Explanation

Guerrilla forces may recruit for reasons unrelated to any protected ground, such as the need to increase their ranks or because they believe an individual possesses certain knowledge or expertise. Individuals may refuse to cooperate with guerrilla forces for a variety of reasons unrelated to any protected ground (e.g., the fear of government reprisal, or the need to remain home to work on the farm). Therefore there must be some additional evidence, aside from the recruitment effort and/or refusal, to establish a connection to a protected ground.

INS v. Elias-Zacarias, 502 U.S. 478, 112 S.Ct. 812 (1992); *Matter of C-A-L-* 21 I&N Dec. 754 (BIA 1997) (applicant testified that guerrillas contacted him to obtain information and to attempt to recruit him due to his expertise as an artillery specialist).

3. Considerations

a. duty to elicit information

While forcible recruitment and threats or harm for refusal to cooperate do not in themselves provide a basis for asylum, the asylum officer must elicit information from the applicant to determine whether there is any additional evidence connecting the persecutor's actions to any of the protected grounds. The entire circumstances must be considered.

Instructor Note #19

b. consider entire circumstances

Consider the content of the threats and any statements the applicant made when refusing to cooperate.

(i) Even if an applicant does not divulge an opinion to the guerrillas or military when refusing to cooperate, there may be other evidence that connects the threats or harm to a protected ground.

(ii) Other evidence connecting the threats to a protected ground could include prior utterances against the guerrillas or military, activities in support of the opposing force or a family member's association with the opposing force. All the facts must be considered in evaluating the recruiter's perception of the applicant's refusal to assist them.

See, Rivas-Martinez v. INS, 997 F.2d 1143 (5th Cir. 1993)

Example: While beating a Quiche applicant after he had refused to join them, the Guatemalan military accused the applicant of being a guerrilla and demanded information about his "guerrilla friends." The Ninth Circuit found that the statements of the military, together with country conditions evidence that the Guatemalan military viewed indigenous people as pro-guerrilla, was sufficient evidence to support a finding that the harm occurred on account of (imputed) political opinion.

Chanchavac v. INS, 207 F.3d 584 (9th Cir. 2000)

c. Country conditions

In many conflicts, the warring parties may view refusal to cooperate as opposition. Therefore country conditions information may be useful in evaluating how a guerrilla group views those who refuse to cooperate with its cause.

C. Combatants and Dangers Arising From Duties as Government Officials

OH #15 – Combatants and Government Officials

1. General rule

Dangers arising from military or civil service without additional evidence of specific motivation do not provide a basis for asylum eligibility.

2. Explanation

In *Matter of Fuentes*, the BIA held that "dangers faced by policemen as a result of that status alone are not ones faced on account of" any of the protected grounds. The BIA reasoned that policemen in a conflictive area embody the authority of the state, and in such circumstances, the dangers they face "are no more related to their personal characteristics or political beliefs than are the dangers faced by military combatants."

Matter of Fuentes, 19 I&N Dec. 658, 661 (BIA 1988)

3. Exceptions

a. The Ninth Circuit has carved out some exceptions to the general rule. A prosecutor in Colombia feared members of the opposition political party

Reyes-Guerrero v. INS, 192 F.3d 1241, 1245 (9th Cir. 1999)

after he prosecuted them for corruption. The prosecutor was found to have established a nexus between the feared persecution and his political opinion.

- b. A former government official who exposed corruption of other government officials in the Philippines established that the feared harm was on account of a political opinion imputed to him because of the government corruption he exposed.

Grava v. INS 205 F.3d 1177
(9th Cir. 2000)

- c. A high ranking military official was persecuted by his soldiers because of his race and (imputed) political opinion when the harm occurred after a dramatic change in the treatment of ethnic Indians in Fiji.

Gafoor v. INS, 231 F.3d 645
(9th Cir. 2000)

4. Ex-combatants and former government service

Former combatants and former officials are not treated the same as current combatants and officials.

- a. current policemen distinguished from former policemen

[*Matter of Fuentes*](#), 19 I&N
Dec. 658 (BIA 1988)

In *Matter of Fuentes*, the BIA distinguished the applicant's status as a policemen from the status of **former** policeman. The BIA indicated that harm on account of one's status as former policeman might provide a basis for eligibility, although the issue was not before it.

- b. guerrillas may impute political opinion to ex-soldier

The Ninth Circuit held that when an ex-soldier has resumed life as a civilian it is reasonable to conclude that guerrilla threats against him are on account of political opinion, since the guerrillas would identify the individual with the government he served.

Montecino v. INS, 915 F.3d
518 (9th Cir. 1990)

- c. must consider entire circumstances

There may be evidence of motivating factors unrelated to the applicant's political opinion or identification with the government, such as retribution for abuses committed by the ex-soldier,

or furtherance of a personal vendetta. The entire circumstances of the case must be considered.

D. Extortion

1. Extortion combined with threats of physical harm may form the basis for a valid asylum claim, if there is some evidence connecting the threats or harm to one of the protected grounds.
2. The mere fact that the extortioner is a political entity or has a political agenda (i.e., is extorting money to support a political cause) is not sufficient to establish the requisite nexus. The applicant must show that the persecutor is motivated by the applicant's opinion or perceived opinion.
3. Credible evidence that the extortion came at the instance of a government entity, where the applicant belonged to an anti-government party, led to a finding that the extortion was persecution on account of political opinion.

OH #16 – Extortion

[Desir v. Ilchert](#), 840 F.2d 723 (9th Cir. 1988)
(government-sponsored extortion found to be “on account” of victim’s political opinion, because people who resisted extortion were marked as subversives);

See, [INS v. Elias-Zacarias](#), 502 U.S. 478, 112 S.Ct. 812 (1992)

[Yazitchian v. INS](#), 207 F.3d 1164 (9th Cir. 2000)

E. Coercive Population Control Policies

1. Statutory provisions

On September 30, 1996, the President enacted into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which added the following sentence to the statutory definition of refugee:

“For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.”

OH #17 – Coercive Family Planning

[Illegal Immigration Reform and Immigrant Responsibility Act of 1996](#), Pub. L. 104-208, 110 Stat. 3009 (September 30, 1996), Section 601

[INA § 101\(a\)\(42\)](#)

The amendment effectively overruled previous BIA precedent decisions in which the BIA concluded that imposition of national population control policies (including forced sterilization and abortion) did not in itself constitute persecution on account of a protected characteristic in the refugee definition. The BIA has since ruled that an alien whose spouse was forced to undergo an abortion or sterilization procedure can establish past persecution on account of political opinion.

Matter of Chang, 20 I&N Dec. 38 (BIA 1989) and *Matter of G-*, 20 I&N Dec. 764 (BIA 1993); *See, Matter of C-Y-Z-*, Int Dec. 3319 (BIA 1997)

2. Nexus

The applicant is not required to demonstrate that the population control program was being selectively applied to him or her on account of a protected ground. The statute requires the harm (either the forced abortion or sterilization itself, or harm for resisting a coercive population control program) be considered to be on account of political opinion. The applicant still must meet the other elements in the refugee definition to establish eligibility (harm amounting to persecution, reasonable possibility of persecution, etc.).

See, Martin, David A. Office of General Counsel. [Asylum Based on Coercive Family Planning Policies -- Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996](#). Memorandum to Management Team (Washington, DC: 21 October 1996), 6 p.

F. Personal Problems

OH #18 Personal Problems

1. Definition

A personal problem is one that arises from a dispute or crime unrelated to any of the five protected grounds. For example, fear of retribution from a victim of a car accident for which the applicant was responsible would be a personal problem.

Since a personal problem, by definition is not connected to a protected ground, a personal problem does not provide the basis for asylum eligibility.

2. Considerations

- a. what appears to be a personal problem may evolve into valid asylum claim

If a connection between the persecutor's motivation and a protected characteristic he or she perceives the applicant to possess is established, the fact that the threat or harm originated from a personal problem does not render the claim invalid.

Blanco-Lopez v. INS, 858 F.2d 531 (9th Cir. 1988)

Example: A woman who was abused by a sergeant for what may be considered personal reasons established eligibility for asylum because the sergeant threatened that, if she reported his abuse, he would tell the authorities that she was a subversive (which she was not).

[Lazo-Majano v. INS](#), 813 F.2d 1432 (9th Cir. 1987)

- b. personal relationship with persecutor

The fact that an applicant has a personal relationship with the persecutor will not, in itself, defeat the claim. For example, the persecutor may be a spouse or other family member.

If a nexus is established in such cases, the issues that often arise are

These issues are discussed in lesson, [Asylum Eligibility Part II, Well-Founded Fear](#).

- (i) whether the government is unable or unwilling to protect the victim from the persecutor; and
- (ii) Whether the threat of harm exists nationwide, or if it would be unreasonable for the applicant to relocate within the country.

OH #19 Civil Strife

G. Civil Strife

1. General Rule

Fear of general civil strife or war and incidental harm resulting from such violence does not, by itself, establish eligibility for asylum. However, the existence of civil strife or war in the applicant's country does not preclude a finding of eligibility for asylum, if the applicant is harmed or at risk for reasons related to a protected ground.

[Matter of Fuentes](#), 19 I&N Dec. 658 (BIA 1988); [Matter of Rodriguez-Majano](#), 19 I&N Dec. 811 (BIA 1988); [UNHCR Handbook, para. 164](#); [Rostomian v. INS](#), 210 F.3d 1088 (9th Cir. 2000)

2. Presence of civil strife does not preclude eligibility

The BIA has found that widespread chaos and violence caused by civil strife and the type of individualized harm that constitutes persecution on one of the five protected grounds are not mutually exclusive. Persecution often occurs during civil war.

[Matter of Villalta](#), 20 I&N Dec. 142 (BIA 1990);

Example: Interclan violence in Somalia may fall within

[Matter of H-](#), 21 I &N Dec. 337, (BIA 1996)

the general category of civil strife, but harmful acts committed by members of one clan against another because of clan membership is persecutory. The number of people who might be at risk of clan violence in Somalia is not relevant to the decision.

3. Incidental Harm

Incidental harm resulting from the violence of civil strife or war is not persecution, because it is not directed at the applicant on account of a protected ground. The applicant may be caught in the middle of crossfire or other violence that would occur regardless of his presence.

4. Considerations

To evaluate whether the harm suffered or feared is incidental to strife or whether it was or might be directed at the applicant on account of one of the protected grounds, the asylum officer will need a firm understanding of the applicant's specific situation and the nature of the civil strife.

- a. fact that threat occurs during civil war does not in itself weaken the claim

The significance of a specific threat against an applicant is not weakened by the fact that the applicant lives in a country where the lives and freedom of a large number of people are threatened. To the contrary, that fact may make the threat more serious or credible.

M.A. v. INS, 899 F.2d 304, 315 (4th Cir. 1990); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1985)

- b. consider whether non-combatants are targeted

In any situation in which non-combatants are intentionally targeted, the asylum officer should try to ascertain why non-combatants are targeted, whether the non-combatants share a protected characteristic in the refugee definition, and whether the applicant also possesses that characteristic.

Instructor Note #20

For example, in some situations, the civil strife in itself may be rooted in a protected ground, such as nationality or race. In such situations, the targeting of non-combatants on account of nationality or race

would be considered “on account of” a protected ground.

- c. “legitimate” acts of war vs. violations of humanitarian law

The asylum officer should consider whether the harm or feared harm is a result of a “legitimate” act of war, or a violation of humanitarian law. Even if the applicant is a combatant, he or she may be subject to persecution if the opponent (either government or revolutionary/guerrilla group) acts outside of the internationally recognized parameters of “legitimate” warfare.

See, lesson, [International Human Rights Law](#)

H. Prosecution vs. Persecution

1. General rule

Prosecution for a common law offense is not persecution.

OH #20 – Prosecution vs. Persecution

2. Explanation

A government has a right to investigate and punish individuals for violations of legitimate laws.

Matter of A-G-, 19 I&N Dec. 502 (BIA 1987); [UNHCR Handbook, para. 56](#)

3. Exceptions

- a. prosecution that is used as a *pretext* to persecute an individual on account of any of the five protected grounds

Punishment that is unduly harsh given the nature of the offense committed may be evidence of pretext.

Matter of A-G-, 19 I&N Dec. 502 (BIA 1987); *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996); [UNHCR Handbook, para. 57-59](#)

- b. harsher punishment than others who do not possess protected characteristic

If the applicant is subjected to harsher punishment than others who do not share a protected characteristic that he or she possesses or is perceived to possess, the harsher punishment may be on account of that protected characteristic.

- c. prosecution of a possessed protected characteristic

See e.g., *Chang v. INS*, 119 F.3d 1055 (3rd Cir. 1997); *Perkovic v INS*, 33 F.3d 615 (6th Cir. 1994) (holding that

Examples: Prosecution for the crime of attending

religious services could constitute persecution on account of religion. Prosecution under a statute aimed at the expressive conduct of political dissidents may constitute persecution on account of political opinion.

prosecution for violation of laws against expressing political opinions hostile to the government or engaging in political activity outside of country constitutes persecution on account of political opinion).

d. prosecution for a political crime

(i) The adjudicator must determine whether an individual was prosecuted for a political opinion or for politically motivated acts that violate the law. The adjudicator should consider the nature and motive of the act and the nature of the law on which the prosecution is based.

Matter of Izatula, 20 I&N Dec. 149 (BIA 1990)

(ii) In a country where there is no legitimate method of peaceful government reform, punishment for violent rebellion can form the basis for a valid asylum claim.

See, [section VII.E.](#), *Attempts to Overthrow a Government*, above.

e. Prosecution for violation of departure laws

(i) The fact that a country may punish an applicant for violating departure laws does not, without more, establish eligibility for asylum. This is because a government has legitimate authority to establish and enforce laws governing departure from the country.

Matter of Sibrun, 18 I&N Dec. 354 (BIA 1983); *Nazaraghaie v. INS*, 102 F.3d 460 (10th Cir. 1996)

(ii) However, punishment for violation of travel laws might be used as a pretext to persecute the individual on account of one of the protected grounds. Evidence that the punishment is used as a pretext for persecution may include punishment disproportionate to the crime and/or country reports that the country in question views individuals who violate departure laws as traitors or subversives.

See, *Rodriguez-Roman v. INS*, 98 F.3d 416 (9th Cir. 1996) (“a state which severely punishes unlawful departure views persons who illegally leave as disloyal and subversive and seeks to punish them accordingly.”); *Chang v. INS*, 119 F.3d 1055 (3rd Cir. 1997)

4. General considerations

As noted above, disproportionate punishment may be evidence that prosecution is being used as a pretext to harm someone on account of a protected characteristic. When evaluating claims involving investigation for alleged criminal conduct, it is important to consider the circumstances of the arrest and the treatment of the applicant while in detention. The fact that an applicant does not receive the due process expected in the U.S. does not establish that the investigation or prosecution is pretextual. However, the fact that a detainee is deprived of basic due process rights or is harmed while detained may be evidence of pretext.

The BIA has provided the following guidance to be considered in identifying motive in this context:

- a. indications in the particular case that the abuse was directed toward modifying or punishing opinion rather than conduct, e.g., statement or actions by the perpetrators or abuse out of proportion to nonpolitical ends
- b. treatment of others in the population who might be confronted by government agents in similar circumstances
- c. conformity to procedures for criminal prosecution or military law including developing international norms regarding the law of war
- d. the extent to which anti-terrorism laws are defined and applied to suppress political opinion as well as illegal conduct (e.g., an act may broadly prohibit “disruptive” activities and be applied to peaceful as well as violent expressions of views)
- e. the extent to which suspected political opponents are subjected to arbitrary arrest, detention, and abuse

Matter of S-P-, 21 I & N
Dec. 486 (BIA 1996)

Instructor Note #21

IX. SUMMARY

A. General Principles Regarding Nexus

OH # 21
Summary A; 1,2

1. Nexus

To be eligible for asylum, the applicant must establish that the persecutor harmed or seeks to harm the applicant because the *applicant* possesses, or is believed to possess, one or more of the protected grounds.

2. Motive of the persecutor

The motive of the persecutor is determinative in evaluating whether a nexus to one of the protected grounds has been established. Motive may be established by either direct or circumstantial evidence.

3. Exact motive need not be established

OH #22
Summary A, 3, 4

The applicant does not bear the burden of establishing the exact motive of the persecutor, but must establish that a *reasonable person* would fear that the danger arises on account of the applicant's possession of a characteristic connected to one of the protected grounds in the refugee definition.

The persecutor may be motivated by several factors; there is no requirement that the persecutor be motivated only by a desire to overcome a protected characteristic.

4. Motive need NOT be punitive

There is no requirement that the persecutor's motive be punitive, although it may be punitive.

5. Imputed characteristic

OH #23
Summary A,5

Persecution inflicted upon an individual because the persecutor attributes to the individual one of the protected characteristics constitutes persecution on account of that characteristic.

B. Five Protected Characteristics

1. Race

OH #24
Summary B,1

"Race" includes all kinds of ethnic groups and may also entail membership in a specific social group of common descent. Discrimination on account of race generally will not amount to persecution. However, severe discrimination, an accumulation of discriminatory acts, and discrimination that seriously affects an individual's dignity because of a person's race, may constitute persecution on account of race.

Serious harm imposed for disregard of racial barriers may also constitute persecution on account of race.

2. Religion

OH #25
Summary B,2

Some forms of persecution on account of religion may include actions that seriously impede an individual's ability to practice his or her religion; serious harm for conversion from one religion to another; punishment for violating religious-based laws; and forced compliance with religious laws that are abhorrent to an applicant's own beliefs.

3. Nationality

OH #26
Summary B,3

"Nationality" as a protected ground refers to membership in an ethnic or linguistic group as well as country of citizenship. Persecution on account of nationality often overlaps with persecution on account of other protected grounds, such as race and political opinion.

In some ethnically-based conflicts, members of an ethnic group may be at risk of harm, even though they are not themselves directly involved in the conflict, because they are automatically associated with the members of their ethnic group who are involved in a conflict.

4. Social group

OH #27
Summary B,4

A particular social group is a group of persons who share characteristics such as similar background, habits, or social standards. The shared characteristic must be either

immutable or so fundamental to the individual's conscience or identity that the individual should not be required to change it.

5. Political opinion

"Political opinion" should not be interpreted narrowly to include only participation in a political party or the political process. It should be interpreted broadly, and may include opinions regarding women's rights, worker rights, and other human and civil rights.

OH #28
Summary B,5

The fact that the persecutor is associated with a political entity does not establish that the harm or feared harm is on account of political opinion. Persecution on account of political opinion means persecution on account of the *applicant's* opinion or one that has been attributed to the applicant.

Forced abortion or forced sterilization, persecution for refusal to undergo such procedures, and persecution for resistance to population control policies, by law are considered to be persecution on account of political opinion. Coercive family planning cases do not require specific evidence of motivation.

C. Common Nexus Issues

Generally, US law requires specific evidence, either direct or circumstantial, that the persecutor is motivated by a protected characteristic that the applicant possesses or is perceived to possess. Evidence that the applicant is in a conflictive situation is generally not specific enough to establish nexus. Asylum officers are responsible for eliciting evidence surrounding the circumstances of the applicant's claim to determine if such specific evidence exists.

OH #29 Summary C