

In such cases, your analysis is similar whether the applicant is a participant in an attempted *coup d'état* or an armed insurrection. If the harm rises to the level of persecution, then you must determine the motivation of the government in harming the applicant.¹⁰¹ If institutions exist to 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. A “duly established” government has the right to investigate suspected traitors.¹⁰²

In analyzing an applicant’s fear of prosecution for actions he or she took to overthrow the government, you should look at 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.¹⁰³

You must also consider the actions taken by the applicant in furtherance of the attempt to overthrow the government. Actions involving persecution or torture of others, severe harm to civilians, or terrorist activity may lead you to find that the applicant is barred or ineligible for protection. Note that this is a basis for denial that is separate from the question of whether the nexus requirement has been met.¹⁰⁴

9 COMMON NEXUS ISSUES

The following section provides guidance on a number of nexus issues that have been commonly encountered in the field.

9.1 Civil Strife

Fear of general civil strife or war, and incidental harm resulting from such violence, does not, by itself, establish eligibility for asylum or refugee status. Such incidental harm 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 or her presence.

However, the existence of civil strife or war in the applicant’s country does not preclude finding the applicant eligible for asylum or refugee status if the applicant is harmed or at

¹⁰¹ See *Chanco v. INS*, 82 F. 3d 298 (9th Cir. 1996); *Perkovic v. INS*, 33 F.3d 615 (6th Cir. 1994).

¹⁰² *Perlera-Escobar v. EOIR and INS*, 894 F.2d 1292, 1299 (11th Cir. 1990).

¹⁰³ *Chanco v. INS*, 82 F.3d at 302.

¹⁰⁴ See, e.g., *Abdoulaye v. Holder*, 721 F.3d 485, 490 (7th Cir. 2013) (upholding a determination that an applicant who had participated in an attempted coup against the military regime in Niger was barred from asylum for having engaged in terrorist activity). See also RAI0 Training Modules, *National Security, Grounds of Inadmissibility, and Discretion*.

risk for reasons related to a protected ground.¹⁰⁵ 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.¹⁰⁶ Indeed, persecution often occurs during civil war.

Example

Inter-clan violence in Somalia became common during a period of civil war. Harmful acts committed by members of one clan against another because of clan membership during that civil war are on account of the victims' membership in a particular social group. That a large number of people in Somalia might be at risk of clan violence is not relevant to the decision.¹⁰⁷

Conditions of political upheaval that affect the populace as a whole or in large part, may not be sufficient to establish an individual claim for asylum.¹⁰⁸ When an applicant claims harm from a rival political group, you must determine whether the persecutor was motivated to harm the applicant because of a protected ground.

9.1.1 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, you need a firm understanding of the applicant's specific situation and the nature of the civil strife.

- Specific threats

The significance of a specific threat against an applicant is not weakened because the applicant lives in a country where the lives and freedom of many people are threatened. To the contrary, such conditions may make the threat more serious or credible.¹⁰⁹

- Targeting of non-combatants

In any situation in which non-combatants are intentionally targeted, you 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

¹⁰⁵ See *Mendoza-Pablo v. Holder*, 667 F.3d 1308 (9th Cir. 2012).

¹⁰⁶ *Matter of H-*, 21 I&N Dec. 337, 343 (BIA 1996).

¹⁰⁷ *Id.*

¹⁰⁸ *Meghani v. INS*, 236 F.3d 843, 847 (7th Cir. 2001) (citing *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir.1995)); *Ali v. Ashcroft*, 366 F.3d 407 (6th Cir. 2004) (finding that a leader of the Jamaat party of Bangladesh who was detained by police as a result of his participation in violent conflicts with members of opposing political parties had not established persecution on account of his political opinion).

¹⁰⁹ *M.A. v. INS*, 899 F.2d 304, 315 (4th Cir. 1990); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1985).

characteristic. Cases that at first glance appear to be isolated incidents or random acts of violence during a period of civil strife may, upon further inquiry, become valid asylum or refugee claims. For example, in some situations, the civil strife in itself may be rooted in a protected ground, such as nationality or race.¹¹⁰ If so, the targeting of non-combatants on account of nationality or race would be “on account of” a protected ground.

Example

During the conflict in Iraq, fighting occurred between Sunni and Shi’a militias. The conflict was religious in nature, and militias targeted people of the other denomination. The applicant, a Sunni Muslim, lived in a predominantly Sunni neighborhood. During a battle between the two militias, she was shot when a stray bullet passed through the wall of her home. A witness told her and her family that it appeared the shot was fired by a Shi’a militia man. She would be able to satisfy the nexus requirement as the militia man was motivated to harm residents of the neighborhood on account of religion.

- Legitimate acts of war or violations of humanitarian law

You should consider whether the harm the applicant suffered or fears 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 an insurgent group) acts outside of the internationally recognized parameters of “legitimate” warfare.¹¹¹

- Specific treatment of the applicant

Though the experiences of others mistreated during a period of civil strife are relevant to an applicant’s claim, the applicant’s specific experience must be considered. For example, in *Ndom v. Ashcroft*, the Ninth Circuit overturned a decision by an immigration judge that two arrests of a Senegalese applicant living in the Casamance region of the country at the time of civil unrest were not on account of the applicant’s political opinion. The immigration judge had concluded that the applicant was “indiscriminately arrested” with others living in the town and thus was a “victim of civil and military strife.”¹¹²

In reversing this conclusion, the Ninth Circuit identified evidence showing that the applicant was targeted on account of his imputed political opinion. Though he was arrested during mass arrests in his town, the applicant was individually accused of supporting the Mouvement des forces démocratiques de Casamance (MFDC), a group

¹¹⁰ See, e.g., *Mendoza-Pablo v. Holder*, 667 F.3d 1308 (9th Cir. 2012) (applicant targeted because he was a member of an indigenous Mayan ethnic group).

¹¹¹ See RAO Training Module, *International Human Rights Law*.

¹¹² *Ndom v. Ashcroft*, 384 F.3d 743, 750 (9th Cir. 2004), *superseded by statute on other grounds as recognized in Parussimova v. Mukasey*, 533 F.3d 1128 (9th Cir. 2008).

seeking independence for Casamance, and was ordered to sign a confession form stating that he participated in a “rebellious manifestation.” The court found that this evidence compelled the conclusion that the applicant had been targeted on account of his political opinion.¹¹³

9.2 Conscription by Military

A government has a sovereign right to conscript its citizens and maintain a military.¹¹⁴ Laws pertaining to required military service ordinarily are not intended to punish individuals on account of any of the protected grounds, but rather to form and maintain a military. Punishment for refusing to serve, without evidence of a nexus to a protected ground, is not persecution, but prosecution for refusing to obey the law.¹¹⁵

Draft evasion and desertion from the military are not always motivated by a person’s religion, political opinion, or other protected characteristic. There are a variety of reasons why an individual might refuse to perform military service.¹¹⁶

Even when the avoidance of military service is motivated by an applicant’s religion or political opinion, the government may not be motivated to harm the applicant on account of the protected ground.¹¹⁷ 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.

- **Disproportionate punishment**

To make a claim based on desertion or draft evasion, the applicant must establish a nexus to a protected characteristic by demonstrating that he or she was or would be subject to disproportionate punishment for military desertion or draft evasion because of an actual or imputed protected characteristic. Disproportionate punishment in this context can be used to describe situations where the penalty for draft evasions for desertion is out of proportion with international norms or where the penalty is out of proportion with that experienced by others who do not share an applicant’s protected characteristic.

If an applicant may be subject to disproportionate punishment on account of a protected characteristic he or she actually possesses or is believed to possess because of his or her

¹¹³ *Id.* at 755.

¹¹⁴ *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); see also *Islami v. Gonzales*, 412 F.3d 391, 397 (2d Cir. 2005).

¹¹⁵ See *Matter of A-G-*, 19 I&N Dec. 502, 507 (BIA 1987).

¹¹⁶ *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).

¹¹⁷ *Milat v. Holder*, 755 F.3d 354, 363 (5th Cir. 2014); *Zehayte v. Gonzales*, 453 F.3d 1182 (9th Cir. 2006).

refusal to serve or to perform an action during service, the applicant may be able to establish a nexus between this punishment and a protected ground.¹¹⁸

- **Refusal to serve in a military or commit an action that is condemned by the international community as contrary to basic rules of human conduct**

UNHCR guidance states that when an individual is punished for refusing to participate in a military action that is condemned by the international community, the punishment could be regarded as persecution.¹¹⁹ U.S. courts have interpreted “military action” as encompassing both a specific military action that would be internationally condemned, and a refusal to serve in a military unit or army that engages in internationally condemned activities.¹²⁰ Further, the phrase “condemned by the international community as contrary to basic rules of human conduct” has been interpreted to mean that such condemnation must at a minimum come from “recognized international governmental bodies.”¹²¹

U.S. law requires you to determine whether the evidence shows that the persecutor is motivated by the applicant’s opposition to the condemned acts.¹²² The Fifth Circuit emphasized the need for evidence of the persecutor’s motivation in *Gomez-Mejia*. The applicant in that case never revealed his opposition to the Nicaraguan military’s actions and presented no evidence that the military imputed an opposition viewpoint to him. Therefore, any punishment he faced as a result of desertion was not on account of a protected ground.¹²³ In contrast, the Ninth Circuit has held that an applicant who was punished after he openly voiced his opposition to internationally condemned actions was persecuted on account of his political opinion.¹²⁴

The First Circuit upheld an immigration judge’s requirement that an applicant demonstrate that he or she would not be permitted to complete the required service by performing an alternate non-combat role, rather than serving in the military.¹²⁵ In this case, the First Circuit concluded that “the record clearly establishes that the Algerian military is a military whose acts are condemned by the international community.”¹²⁶ The

¹¹⁸ *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); *Mekhoukh v. Ashcroft*, 358 F.3d 118, 126 (1st Cir. 2004); *UNHCR Handbook*, para. 169.

¹¹⁹ *UNHCR Handbook*, para. 171.

¹²⁰ *Moisilovic v. INS* 156 F.3d 743, 748 (7th Cir. 1998); *M.A. v. INS*, 899 F.2d 304, 321 (4th Cir. 1990).

¹²¹ *M.A. v. INS*, 899 F.2d 304 (4th Cir. 1990).

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¹²⁵ *Mekhoukh v. Ashcroft*, 358 F.3d 118, 127 (1st Cir. 2004).

¹²⁶ *Id.*

court rejected the applicant's argument that it would have been futile to ask for alternate service because he failed to make any inquiry or provide a justification for his failure.¹²⁷

9.2.1 Conscientious Objectors

Military service is generally not considered persecution. Some individuals, for reasons of religion or conscience refuse to serve in the military, but such refusal does not result in a *per se* determination that these individuals are eligible for refugee or asylum status.¹²⁸ At least one court has found an applicant eligible for asylum because he was from a country that barred adherents of his religion from conscientious objector status but granted it to adherents of other religions.¹²⁹ Another court, in *dicta*, noted that conscientious objection might be a form of protected activity that would qualify an individual for asylum but rejected the claim on other grounds.¹³⁰ Also, as noted above, refusal to participate in specific acts contrary to international standards governing human conduct may, in some cases, provide eligibility for asylum or refugee status.

U.S. asylum and refugee law regarding conscientious objection diverges from guidance in the *UNHCR Handbook*, which 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.¹³¹ U.S. law requires evidence that the persecutor is motivated to harm the applicant on account of a protected ground. You must always follow U.S. law, even where it differs from *UNHCR Handbook* guidance.

9.2.2 Assignments to Life-threatening Duties

The Seventh Circuit has held that individuals who are assigned to life-threatening duties on account of a protected characteristic may establish persecution on account of that protected trait.

In *Begzatowski v. Ashcroft*, the court found that an ethnic Albanian conscripted into the Yugoslav military who was deprived of bathing facilities, denied adequate military training, experienced physical abuse by the Serbian officers, and was sent to the front lines of battle without bullets or a shovel, suffered persecution on account of his ethnicity. The court reasoned that because the applicant was singled out to "provide a

¹²⁷ *Id.*

¹²⁸ *Matter of Canas*, 19 I&N Dec. 697 (BIA 1988); *Canas-Segovia v INS*, 970 F.2d 599 (9th Cir. 1992).

¹²⁹ *Ilchuk v. Att'y Gen. of the U.S.*, 434 F.3d 618, 626 (3d Cir. 2006) ("[I]f members of some religions may avoid service without penalty based on conscientious objection, but adherents of other religions are denied the exemption outright, resulting imprisonment is on account of religion, not failure to serve").

¹³⁰ *Najafi v. INS*, 104 F.3d 943, 947 (7th Cir. 1997)

¹³¹ *UNHCR Handbook*, paras. 170, 172.

human shield for Serbian soldiers,” he was subjected to treatment distinct from the dangerous conditions affecting an entire nation during a time of war.¹³²

9.3 Recruitment by Insurgent Groups

Forced recruitment by insurgent groups and harm for refusing to join or cooperate with insurgents do not, *per se*, satisfy the requirement that the applicant show the harm feared or experienced is on account of a protected ground.¹³³

Insurgents may recruit for reasons unrelated to a protected ground, such as the need to increase their ranks or because they believe an individual possesses certain knowledge or expertise.¹³⁴ Individuals may refuse to cooperate with insurgents for a variety of reasons unrelated to a protected ground (e.g., the fear of reprisal or the need to remain home to work on the farm). Therefore, there must be some additional evidence, aside from the recruitment effort, to establish a connection to a protected ground.

9.4 Considerations in Conscription and Recruitment Cases

- Duty to elicit information

While forcible recruitment and threats or harm for refusal to cooperate do not in themselves satisfy the nexus requirement, you must elicit information from the applicant to determine whether any additional evidence connects the persecutor’s actions to any of the protected grounds.

- Consider the entire record for evidence of a nexus

Consider the content of the threats and any statements the applicant made when refusing to cooperate, including relevant country of origin information.

Even if an applicant does not express an opinion to the guerrillas when refusing to cooperate, other evidence may connect the threats or harm to a protected ground. Such evidence may include:

- Accusations by the guerrillas that the applicant sympathizes with the government
- Prior utterances against the guerrillas or military

¹³² *Begzatowski v. Ashcroft*, 278 F.3d 665, 670 (7th Cir. 2000). See also *Miljkovic v. Ashcroft*, 376 F.3d 754, 756 (7th Cir. 2004) (finding that an ethnic Croatian applicant who fled Yugoslavia because he was drafted to perform hazardous duties could be a victim of persecution even though he fled prior to being forced into service).

¹³³ *INS v. Elias-Zacarias*, 502 U.S. 478 (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); *Habtemicael v. Ashcroft*, 370 F.3d 774 (8th Cir. 2004).

¹³⁴ *INS v. Elias-Zacarias*, 502 U.S. 478 (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).

- Activities in support of an opposing force
- A family member's association with an opposing force¹³⁵

You must consider all the facts in evaluating the government's or guerrillas' perception of the applicant's refusal to assist them.

Example

While beating a K'iche' (Quiché) man after he had refused to join them, the Guatemalan military accused him of being a guerrilla and demanded information about his "guerrilla friends." The Ninth Circuit found that the statements of the military together with country of origin information documenting the Guatemalan military belief that indigenous people were pro-guerrilla, was sufficient evidence to support a finding that the harm occurred on account of the applicant's (imputed) political opinion.¹³⁶

- Country of origin information

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

9.5 Extortion

In some cases, extortion may form the basis for a valid asylum or refugee claim if evidence connects the threats or harm to one of the protected grounds.¹³⁷ However, when the persecutor is motivated solely by a desire to obtain money, the applicant will not satisfy the nexus requirement. You must consider why the persecutor chose to extort the applicant. Such cases may also be mixed-motive cases, where the persecutor is motivated both by a protected ground and a desire to obtain money. If you are adjudicating an asylum claim, remember that the protected ground must be "at least one central reason for persecuting the applicant."¹³⁸ In refugee processing, you must determine if "a reasonable person would fear that the danger arises on account of" one of the five grounds.¹³⁹

¹³⁵ See *Rivas-Martinez v. INS*, 997 F.2d 1143 (5th Cir. 1993).

¹³⁶ *Chanchavac v. INS*, 207 F.3d 584 (9th Cir. 2000).

¹³⁷ *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); *Tapiero de Orejuela*, 423 F.3d 666, 673 (7th Cir. 2005).

¹³⁸ INA § 208(b)(1)(B)(i).

¹³⁹ *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988). See also *In re S-P-*, 21 I&N Dec. 486 (BIA 1996).

Evidence that the extortionist is a political entity or 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 protected belief or characteristic.¹⁴⁰

Where the extortionist has branded the applicant a political opponent, the applicant may establish that she has been targeted on account of her political opinion, despite the likelihood that the extortionist also is interested in the applicant's wealth.¹⁴¹ The Ninth Circuit held an applicant was persecuted on account of his political opinion where the extortion was instigated by the government, and the applicant belonged to an anti-government party.¹⁴²

9.6 Coercive Population Control Policies

On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act,¹⁴³ 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.¹⁴⁴

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.¹⁴⁵

¹⁴⁰ See *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

¹⁴¹ *De Brenner v. Ashcroft*, 388 F.3d 629, 637 (8th Cir. 2004); *Tapiero de Orejuela*, 423 F.3d 666, 672 (7th Cir. 2005).

¹⁴² *Yazitchian v. INS*, 207 F.3d 1164 (9th Cir. 2000).

¹⁴³ *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. 104-208, Section 601, 110 Stat. 3009 (Sept. 30, 1996); *Matter of X-P-T-*, 21 I&N Dec. 634 (BIA 1996) (recognizing a change in the law and granting asylum to an applicant who was forcibly sterilized); see generally David A. Martin, INS Office of General Counsel, Memorandum to Management Team, et al., *Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, HQCOU 120/11.33-P, 6 (Oct. 21, 1996).

¹⁴⁴ *INA § 101(a)(42)*.

¹⁴⁵ See *Matter of X-P-T-*, 21 I&N Dec. 634 (BIA 1996); *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989); *Matter of G-*, 20 I&N Dec. 764 (BIA 1993).

Claims based on this amended definition of refugee typically arise only in asylum claims. They have not, to date, arisen in the refugee resettlement context. For a more detailed discussion of this type of claim, see ASM Supplement – Coercive Population Control.

9.6.1 Nexus to a Protected Characteristic

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 that the harm (either the forced abortion or sterilization itself, or harm for other resistance to 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.¹⁴⁶

9.6.2 “Other Resistance”

In *Matter of S-L-L*, the BIA indicated that “other resistance” may take many forms and cover a wide range of circumstances. Resistance can include

- expressions of general opposition;
- attempts to interfere with enforcement of government policy in particular cases; or
- other overt forms of resistance to the requirements of the family planning law.¹⁴⁷

Forms of “other resistance” could include removing an IUD or failing to attend a mandatory gynecological appointment.¹⁴⁸ Additionally, refusing to abort a pregnancy and subsequently having a child out of wedlock in violation of Chinese law has also been found to be “other resistance” to a coercive population control program.¹⁴⁹

In *Cao v. Gonzales*, the Third Circuit found that writing an article critical of population-control practices and exposing the practice of infanticide constitutes “other resistance” to a coercive population-control program. An applicant engaged in such activities could establish eligibility for asylum based on harm resulting from that resistance, even if the applicant was not personally subjected to forced abortion or sterilization.¹⁵⁰ The Ninth

¹⁴⁶ See David A. Martin, INS Office of General Counsel, Memorandum to Management Team, et al., Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, HQCOU 120/11.33-P, 6 (Oct. 21, 1996).

¹⁴⁷ *Matter of S-L-L*, 24 I&N Dec. 1, 11-12 (BIA 2006) (holding that the applicant’s efforts in seeking waivers of the age restrictions were not indicative of resistance but rather were indicative of a desire to comply with the coercive population control program), *overruled on other grounds*, *Matter of J-S-*, 24 I&N Dec. 520, 521 (BIA 2008).

¹⁴⁸ *Matter of M-F-W- & L-G-*, 24 I&N Dec. 633, 638 (BIA 2008). See also *Lin v. Ashcroft*, 385 F.3d 748, 757 (7th Cir. 2004); *Feng Chai Yang v. U.S. Att’y Gen.*, 418 F.3d 1198, 1205 (11th Cir. 2005).

¹⁴⁹ *Fei Mei Cheng v. Att’y Gen. of the U.S.*, 623 F.3d 175, 191 (3d Cir. 2010). See also *Nai Yuan Jiang v. Holder*, 611 F.3d 1086 (9th Cir. 2010) (cohabiting and conceiving a child in defiance of Chinese law prohibiting underage marriage and marrying in a traditional ceremony fall within the court’s interpretation of “other resistance”).

¹⁵⁰ *Cao v. Gonzales*, 407 F.3d 146, 153 (3d Cir. 2005).

Circuit has held that hardships, including economic deprivation and denial of access to education, suffered by a child as a result of her parents' resistance to a population-control program were on account of an imputation of the parents' resistance to the child.¹⁵¹

The BIA held, however, that impregnating a girlfriend or fiancée or seeking permission to marry or have children outside age limits did not constitute "resistance" under the facts of the case.¹⁵² At least one court has held, however, that similar conduct was "other resistance."¹⁵³ In *Shi Liang Lin*, the Second Circuit held that a spouse or partner needs to demonstrate "past persecution or a fear of future persecution for 'resistance' that is directly related to his or her own opposition to a coercive family planning policy."¹⁵⁴ The court also held that where an applicant has not demonstrated resistance to coercive family-control policies, but his spouse or partner has, he or she may be able to demonstrate that his partner's resistance has been or will be imputed to him.¹⁵⁵

9.7 Crime and Personal Disputes

Applicants who fear harm by criminals or harm related to personal disputes often have difficulties establishing a nexus.¹⁵⁶ If the persecutor is motivated solely by a desire for economic gain, or purely personal vengeance, there is no nexus to a protected ground.¹⁵⁷ For example, an applicant who fears that the victim of a car accident that he or she caused might retaliate would be unlikely to satisfy the nexus requirement. Similarly, an applicant who fears high levels of robbery in his or her country would be unlikely to establish a nexus.

Applicants who, at first glance, appear to have fear of crime or flee because of a personal dispute, may upon further inquiry prove to have a valid basis for their asylum or refugee claims.¹⁵⁸ For example, a woman who feared that she would be the victim of an honor killing at the hands of her brother was eligible for protection and was not the victim of a personal dispute.¹⁵⁹

¹⁵¹ *Xue Yun Zhang v. Gonzales*, 408 F.3d 1239, 1246 (9th Cir. 2005).

¹⁵² *Matter of S-L-L-*, 24 I&N Dec. at 11-12.

¹⁵³ *Nai Yuan Jiang v. Holder*, 611 F.3d 1086 (9th Cir. 2010)

¹⁵⁴ *Shi Liang Lin v. United States Dep't. of Justice*, 494 F.3d 296, 313 (2d Cir. 2007) (en banc).

¹⁵⁵ *Id.* See also *Xu Ming Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (en banc).

¹⁵⁶ See *Cruz-Funez v. Gonzales*, 406 F.3d 1187 (10th Cir. 2005) (finding that applicants who feared an unscrupulous private creditor connected to the allegedly corrupt Honduran government did not fear harm on account of membership in a particular social group, especially where the applicants' debt was settled by a court, which ordered them to pay their creditor back).

¹⁵⁷ See e.g., *Cuevas v. INS*, 43 F.3d 1167 (7th Cir. 1995); *Kozulin v. INS*, 218 F.3d 1112 (9th Cir. 2000).

¹⁵⁸ See *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011).

¹⁵⁹ *Id.* at 656.

The persecutor may have more than one motive for threatening or harming the applicant. One motive may be a protected belief or characteristic that the applicant possesses or that the persecutor imputes to the applicant and one may be a personal or criminal reason. The persecutor's additional personal or criminal reason does not render the claim invalid.

Personal relationship with persecutor

Having a personal relationship with the persecutor does not, in itself, mean the applicant cannot satisfy the nexus requirement.¹⁶⁰ In many cases, the persecutor is a spouse or other family member.

When the persecutor and the applicant have a personal relationship, the persecutor might target the applicant because of a belief or trait that is not immediately obvious to the adjudicator. You should carefully consider whether the applicant is in fact being targeted because of a belief or trait that might define a social group.¹⁶¹ Characteristics to consider include the applicant's social status based on his or her position within a domestic relationship, a physical trait, a voluntary association, past experience, beliefs about religion and cultural practices, and cultural identity.

9.8 Minorities and Majorities

Claims based on persecution or feared persecution on account of nationality are often brought by individuals who belong to a national minority.¹⁶² However, in some situations, individuals belonging to a national majority have reason to fear persecution by a minority.¹⁶³

Examples

- Hutu is the majority ethnic group in Rwanda, while Tutsi, the minority group, controls the government. Both Hutus and Tutsis have presented valid claims for asylum and refugee status.
- In Iraq, Shi'a Muslims comprise about 60 percent of the population while Sunni Muslims comprise about 37 percent. Both Shi'a and Sunni Muslims from Iraq have presented valid claims for asylum and refugee status.

10 CONCLUSION

¹⁶⁰ See, e.g., *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011); *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000).

¹⁶¹ For more information, see RAIO Training Module, *Nexus – Particular Social Group*.

¹⁶² *UNHCR Handbook*, para. 76.

¹⁶³ *Id.*

You must determine whether or not persecution or feared persecution is “on account of” one or more of the five protected grounds in the refugee definition: race, religion, nationality, membership in a particular social group, or political opinion.

To properly determine whether persecution is on account of a protected ground, the officer must understand 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.

While the burden of proof is on the applicant to prove a nexus to a protected ground, you must elicit sufficient information from the applicant about any possible connection to protected grounds so that you are able to make a determination.

11 SUMMARY

11.1 General Principles Regarding Nexus

11.1.1 Nexus

To be eligible for asylum or refugee status, 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.

11.1.2 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. The applicant’s possession or imputed possession of a protected characteristic must be part of the motivation for persecuting the applicant. Motive may be established by either direct or circumstantial evidence.

11.1.3 Exact Motive Need Not Be Established

The applicant does not bear the burden of establishing the exact motive of the persecutor. If you are adjudicating asylum applications under INA § 208, you must determine whether the applicant’s actual or imputed possession of one of the five protected grounds is at least one central reason motivating the persecutor. If you are processing refugee applications overseas under INA § 207, you must determine that a *reasonable person* would fear that the danger arises on account of the applicant’s actual or imputed 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 or change a protected belief or characteristic.

11.1.4 Motive need NOT be Punitive

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

11.1.5 Imputed Ground

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

11.2 Protected Grounds [with Particular Social Group Omitted]

11.2.1 Race

"Race" includes all kinds of ethnic groups and may also entail membership in a specific social group of common descent. Serious harm imposed for disregard of racial barriers may also constitute persecution on account of race.

11.2.2 Nationality

"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, membership in a particular social group, 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 the persecutor associates them with the members of their ethnic group who are involved in a conflict.

11.2.3 Religion

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.

11.2.4 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, workers' rights, and other human and civil rights. The persecutor's association 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.

11.3 Common Nexus Issues

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

PRACTICAL EXERCISES

Note: Practical Exercises will be added at a later time.

Practical Exercise # 1

- **Title:**
- **Student Materials:**

OTHER MATERIALS

There are no Other Materials for this module.

SUPPLEMENT A – REFUGEE AFFAIRS DIVISION

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

- 1.
- 2.

ADDITIONAL RESOURCES

- 1.
- 2.

SUPPLEMENTS

RAD Supplement - Motivation

NOTE:

The Immigration and Nationality Act (INA) is the governing statute for asylum and refugee adjudications. INA § 207 is the statutory provision for refugee admissions, and 8 C.F.R. Part 207 contains the corresponding regulations. INA § 208 is the statutory provision for asylum adjudications and 8 C.F.R. Part 208 contains the corresponding regulations.

The REAL ID Act of 2005 amended INA § 208 but did not amend INA § 207. Therefore, any changes the REAL ID Act made to asylum law do not apply in the overseas refugee processing context. The principal change the REAL ID Act makes to the law surrounding nexus is the requirement that asylum applicants establish that one of the five protected grounds was, or would be, at least one central reason in motivating the persecutor. Refugee officers should disregard the word “central” when they see it in this context and should refrain from making it part of their analysis. In the refugee processing context, you must determine whether a reasonable person would fear that the danger arises on account of one of the five grounds.

SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

- 1.
- 2.

ADDITIONAL RESOURCES

1. Joseph E. Langlois, USCIS Asylum Division. Updates to Asylum Officer Basic Training Course Modules as a Result of Amendments to the INA Enacted by the REAL ID Act of May 11, 2005, *Memorandum to Asylum Office Directors, et al* (Washington, DC: 11 May 2006), 8 p.
2. Memorandum from David A. Martin, INS Office of General Counsel, to Management Team, et al., Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, (21 Oct. 1996) (HQCOU 120/11.33-P).
3. UNHCR, Note on Refugee Claims Based on Coercive Family Planning Laws or Policies (Aug. 2005).

SUPPLEMENTS

ASM Supplement - Coercive Population Control

General Overview

In 1996, Congress amended the refugee definition to allow for claims based upon certain types of harm related to coercive population control programs.¹⁶⁴ Under the amended INA:

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.¹⁶⁵

According to the BIA, the amended refugee definition created four new and specific classes or categories of refugees:¹⁶⁶

- persons who have been forced to abort a pregnancy;
- persons who have been forced to undergo involuntary sterilization;¹⁶⁷
- persons who have been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program; and
- persons who have a well-founded fear that they will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance.

Forced abortion and forced sterilization (the first two categories above) constitute persecution on account of political opinion within the meaning of the refugee definition. Individuals who have not physically undergone forced abortion or sterilization procedures may qualify for refugee status under the third category above, if they show persecution for failure or refusal to undergo these procedures, or persecution inflicted because of other resistance to a coercive population control program. A well-founded fear of forced abortion, sterilization, or other persecution for failing or refusing to undergo such a procedure, or for resisting a coercive

¹⁶⁴ See David A. Martin, INS Office of General Counsel, Memorandum to Management Team, et al., *Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, HQCOU 120/11.33-P (Oct. 21, 1996).

¹⁶⁵ INA § 101(a)(42).

¹⁶⁶ *Matter of J-S-*, 24 I&N Dec 520 (AG 2008).

¹⁶⁷ See *Matter of X-P-T-*, 21 I&N Dec 634 (BIA 1996) (recognizing change in law and granting asylum to applicant who was forcibly sterilized).

population control program, may provide a basis for refugee status under the fourth category above.

Element of “force”

In order for an abortion or sterilization procedure to constitute persecution, the applicant must establish that he or she was “forced” to undergo the procedure. In *Matter of T-Z*,¹⁶⁸ the BIA held that a procedure is “forced” within the meaning of the INA when:

- a reasonable person would objectively view the threats for refusing the procedure to be genuine, and
- the threatened harm, if carried out, would rise to the level of persecution.

The applicant does not have to demonstrate physical harm or threats of physical harm because “persecution” is not limited to physical harm or threats of physical harm. However, the applicant must demonstrate that the harm he or she feared, if carried out, would rise to the level of persecution.¹⁶⁹

Threats of economic harm, for example, could suffice, “so long as the threats, if carried out, would be of sufficient severity that they amount to past persecution.”¹⁷⁰ However, not all threats involving economic sanctions will rise to the level of persecution. The harm must involve:

- the deliberate imposition of *severe* economic disadvantage; or
- the deprivation of liberty, food, housing, employment or other essentials of life.

However, “pressure” or persuasion applied to submit to a course of action not preferred is not “force” unless the harm suffered or feared rises to the level of persecution. Thus, for example, economic harm that would not rise to the level of persecution would constitute pressure but would not make an abortion “forced.” In *Yuqing Zhu v. Gonzales*,¹⁷¹ a case involving an unmarried woman who underwent

¹⁶⁸ *Matter of T-Z*, 24 I&N Dec. 163, 168 (BIA 2007) (considering whether undergoing two abortions because of the threat of job loss established that the procedures were forced).

¹⁶⁹ *Id.* at 170-72. See also *Matter of M-F-W- & L-G-*, 24 I&N Dec. 633, 636-40 (BIA 2008) (holding that the insertion or removal of an IUD in a routine medical procedure does not rise to the level of persecution, unless aggravating circumstances exist, because unlike sterilization and abortion, the insertion of an IUD is not a permanent measure).

¹⁷⁰ *Matter of T-Z*, 24 I&N Dec. at 169-70 (rejecting *Lidan Ding v. Ashcroft*, 387 F.3d 1131, 1139 (9th Cir. 2004) and *Wang v. Ashcroft*, 341 F.3d 1015 (9th Cir. 2003) in so far as those decisions suggest that economic harm that does not rise to the level of persecution could establish that an abortion was “forced”).

¹⁷¹ *Yuqing Zhu v. Gonzales*, 493 F.3d 588 (5th Cir. 2007).

an abortion before the authorities discovered that she was pregnant, the Fifth Circuit adopted the *Matter of T-Z-* standard for determining whether an abortion was “forced,” but reversed the BIA’s finding that the applicant’s abortion was not forced. The applicant underwent an abortion because she believed that the law required abortion, and she feared: (1) a later physically compelled abortion; (2) loss of her job, benefits and housing; (3) imprisonment; (4) sterilization; (5) that her child would not be recognized as a Chinese citizen; and (6) her child would be denied services. The court held that the applicant’s “abortion was indeed forced, as a reasonable person in Zhu’s position ‘would objectively view the threats for refusing the abortion to be genuine,’ and that harm, ‘if carried out, would rise to the level of persecution.’”¹⁷² Specifically, the threat of a later physically compelled abortion or forcible sterilization rose to the level of persecution. The fact that the applicant’s boyfriend wanted her to undergo an abortion did not keep the abortion from having been “compelled” by the government.

In *Xiu Fen Xia v. Mukasey*, the Second Circuit held that an applicant’s abortion was not forced, under the interpretation set forth in *Matter of T-Z-*. Fearing sterilization, a “really heavy fine,” arrest, forced abortion, and arrest of her family members, the married applicant from Zhejiang Province obtained an abortion from a private hospital before government authorities knew of her pregnancy. The court held that “force” requires evidence as to the pressure actually exerted on a particular petitioner. Here, no government official was aware of Xia’s pregnancy, and therefore no government official forced her to terminate her pregnancy or threatened her with other harm. Additionally, the court held that even if she would face some harm when her pregnancy was discovered, the applicant did not show that she risked anything more than modest fees or fines, which would not be severe enough to rise to the level of persecution.¹⁷³ The Ninth Circuit has held, and the BIA recognizes, that an applicant seeking to prove that he or she was subjected to a coercive population control program “need not demonstrate that he [or she] was physically restrained during a ‘forced’ procedure. Rather, ‘forced’ is a much broader concept, which includes compelling, obliging, or constraining by mental, moral, or circumstantial means, in addition to physical restraint.”¹⁷⁴

¹⁷² *Id.* at 590.

¹⁷³ *Xiu Fen Xia v. Mukasey*, 510 F.3d 162 (2d Cir. 2007).

¹⁷⁴ *Lidan Ding v. Ashcroft*, 387 F.3d 1131, 1139 (9th Cir. 2004) (finding that an applicant who was forced from her home into a van, taken to a hospital, pulled off the floor by two officials when she refused to get up, forced onto a hospital bed, and watched over by two officials underwent a “forced” abortion, despite the fact that she was not physically restrained during the procedure). See also *Zi Zhi Tang v. Gonzales*, 489 F.3d 987 (9th Cir. 2007) (Abortion was “forced” even though applicant and wife did not express opposition to or attempt to avoid the procedure, where the gynecological test was mandatory, performed by wife’s employer on whom she was economically dependent, the employer’s policy required that the abortion take place, the employer actually took her to have the procedure performed, and the procedure was “barbarically” performed without the benefit of anesthetics).

Eligibility of Spouses and Partners of Persons Who Have Been Physically Subjected to a Forced Abortion or Forced Sterilization Procedure

• **No *Per Se* Spousal Eligibility**

In 2008, the Attorney General ruled that individuals who have not physically undergone a forced abortion or sterilization procedure, such as spouses of persons forced to undergo these procedures, are no longer *per se* entitled to refugee status.¹⁷⁵

The Attorney General reasoned in *Matter of J-S-*, as did the Second Circuit in *Shi Liang Lin*, that the statutory text is limited to the person who was forced to undergo the involuntary procedure. Accordingly, the unambiguous meaning of these clauses is that *per se* refugee protection is to be afforded only to the person forced to undergo the procedure. Spouses or other partners of individuals who have been physically subjected to a procedure may be able to qualify for asylum on a case-by-case basis, but may not benefit from a presumption of eligibility. Although the Attorney General noted “that application of coercive population control procedures may constitute ‘obtrusive government interference into a married couple’s decisions regarding children and family’ that may ‘have a profound impact on both parties to the marriage,’” the Attorney General found no basis to afford automatic eligibility to the spouse who was not physically subjected to a forced procedure.¹⁷⁶ The Attorney General’s decision in *Matter of J-S-* vacated the BIA’s earlier decisions in *Matter of C-Y-Z-* and *Matter of S-L-L-*, in so far as those decisions held that an applicant whose spouse was forced to undergo an abortion or sterilization procedure was *per se* eligible for asylum on the basis of past persecution on account of political opinion.¹⁷⁷

• **Eligibility of Other Family Members**

Even before the Attorney General’s decision in *Matter of J-S-*, circuit courts had found that *per se* asylum eligibility did not extend to family members, including parents, parents-in-law, and children of individuals subject to coercive population control measures.¹⁷⁸ These individuals may be able to qualify for asylum on a case-by-case basis, considering the factors set forth below.

¹⁷⁵ See *Matter of J-S-*, 24 I&N Dec. 520 (AG 2008) (overruling BIA’s *per se* rule of spousal eligibility); *Shi Liang Lin v. USDOJ*, 494 F.3d 296 (2d Cir. 2007) (en banc) (same).

¹⁷⁶ *Matter of J-S-*, 24 I&N Dec. at 541 (AG 2008). See also Definition of Resistance section, below.

¹⁷⁷ *Matter of J-S-*, 24 I&N Dec. 520 (AG 2008).

¹⁷⁸ See *Tao Jiang v. Gonzales*, 500 F.3d 137 (2d Cir. 2007) (child); *Ai Feng Yuan v. USDOJ*, 416 F.3d 192 (2d Cir. 2005) (parents and parents-in-law); *Chen v. USDOJ*, 417 F.3d 303 (2d Cir. 2005) (per curiam) (child); *Wang v. Gonzales*, 405 F.3d 134 (3d Cir. 2005) (child); *Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005) (child).

• **Case-by-Case Consideration of Eligibility Based on Resistance to Coercive Population Control**

In order to determine whether an applicant who has not physically undergone a forced abortion or sterilization procedure can demonstrate eligibility for asylum, you must conduct a case-by-case assessment of the relevant factors.¹⁷⁹ The applicant must show that he or she meets the following three elements:

- failed or refused to undergo an abortion or sterilization procedure, or resisted a coercive population control program;
- suffered harm, or has a well-founded fear of suffering harm, rising to the level of persecution;
- the persecution was inflicted, or he or she has a well-founded fear that it would be inflicted, for resistance to the coercive population control program or for failure or refusal to undergo the procedure.¹⁸⁰

Definition of “Resistance” in the Context of Coercive Population Control

In *Matter of S-L-L-* the BIA indicated that “resistance” may take many forms and cover a wide range of circumstances.¹⁸¹ Resistance can include, for example:

- expressions of general opposition
- attempts to interfere with enforcement of government policy in particular cases
- other overt forms of resistance to the requirements of the family planning law

The BIA held, however, that merely impregnating a girlfriend or fiancée or seeking permission to marry or have children outside age limits does not constitute “resistance” under the refugee definition.¹⁸²

In *Matter of M-F-W- & L-G-*, the BIA stated that removal of an intrauterine device or failure to attend a mandatory gynecological appointment could constitute other resistance to family planning policies. “[S]uch acts, while arguably not comprising

¹⁷⁹ *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997), vacated in part by *Matter of J-S-*, 24 I&N Dec. 520 (AG 2008); *Matter of S-L-L-*, 24 I&N Dec. 1, 6 (BIA 2006) (same). See also *Lin v. U.S. Att’y Gen.*, 555 F.3d 1310, 1315-16 (11th Cir. 2009) (“unmarried partnersdo not automatically qualify for protection under the forced abortion and sterilization provisions”).

¹⁸⁰ See *Matter of J-S-*, 24 I&N Dec. 520 (AG 2008); *Shi Liang Lin v. USDOJ*, 494 F.3d 296 (2d Cir. 2007) (en banc). For additional information, see section, *Definition of Resistance in the Context of Coercive Population Control*, below

¹⁸¹ *Matter of S-L-L-*, 24 I&N Dec. at 10-11.

¹⁸² *Id.* at 11-12. See also *Zhang v. Ashcroft*, 395 F.3d 531 (5th Cir. 2004).

active or forceful opposition to China's family planning policy, would certainly thwart the goals of the plan and be viewed with disfavor by Chinese officials implementing the plan."¹⁸³ The Board warned, however, that the harm must rise to the level of persecution, and the applicant must establish that the harm was inflicted on account of her "resistance" to the family planning policies, not just as part of a routine procedure.

In *Xu Ming Li v. Ashcroft*, the Ninth Circuit held that the applicant demonstrated both vocal and physical resistance to a coercive population control program. The applicant "vocally resisted the marriage-age restriction when she told the village official that she wanted 'freedom for being in love' and when she publicly announced her decision to marry even after a license was refused. She also resisted the one-child policy when she told the official she intended 'to have many babies,' that she did 'not believe in the policy' limiting family size, and that she did not want him to 'interfere.' Second, she resisted physically by kicking and struggling when forced to undergo a gynecological examination."¹⁸⁴

Harm Rising to the Level of Persecution

Individuals who offered "other resistance" to a coercive population control program must demonstrate that they suffered harm, or have a well-founded fear of suffering harm, rising to the level of persecution.

- **Physical Harm/Restraint**

In *Yi Qiang Yang v. Gonzales*, the Eleventh Circuit upheld the BIA's finding that the harm – a brief physical altercation with family planning officials, a summons to a local security office, and an ongoing interest in the applicant by family planning authorities – suffered by an applicant whose wife was subsequently forced to abort her pregnancy, did not rise to the level of persecution.¹⁸⁵

- **Psychological Harm**

In *Matter of J-S-*, the Attorney General recognized that the application of coercive population control policies may have a profound impact on both parties to the marriage. When judging the psychological harm to an unmarried applicant based on a forced abortion or sterilization procedure performed on a partner, DHS has identified relevant factors, including:¹⁸⁶

¹⁸³ *Matter of M-F-W- & L-G-*, 24 I&N Dec. 633, 638 (BIA 2008).

¹⁸⁴ *Li v. Ashcroft*, 356 F.3d 1153, 1160 (9th Cir. 2004) (en banc). See also *Lin v. Gonzales*, 472 F.3d 1131 (9th Cir. 2007).

¹⁸⁵ *Yang v. U.S. Att'y Gen.*, 494 F.3d 1311 (11th Cir. 2007).

¹⁸⁶ *Matter of S-L-L-*, 24 I&N Dec. at 10-11 (citing to factors identified in DHS briefing to the BIA in the case).

- whether the couple has children together
- the length of cohabitation
- whether the couple holds itself out as a committed couple
- whether the couple took any steps to have the relationship recognized in some fashion
- whether the couple is financially interdependent
- whether there is objective evidence that the relationship continues while the applicant is in the United States

Other Forms of Harm Resulting from Forced Compliance with a Coercive Population Control Program

The Ninth Circuit has found that a forced gynecological exam that lasted for half an hour and was followed by threats of being subjected to a similar procedure at any time in the future was harm serious enough to rise to the level of persecution.¹⁸⁷

Other measures imposed on an individual as part of a coercive population control program, such as substantial monetary fines, the denial of schooling, and forced medical examinations and procedures, may cumulatively rise to the level of persecution.¹⁸⁸ Claims of such experience should be examined for severity, accumulation, and effect on the individual, as would any claim of past mistreatment.

• **Continuing Nature of Harm Resulting from Forced Abortions and Sterilizations**

Forced abortion or sterilization has been found by the BIA to be a “permanent and continuing act of persecution that ...deprive[s] ...couple[s] of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them.”¹⁸⁹

• **Harm for Resistance to Coercive Population Control**

The applicant must show that the past or threatened persecution was or would be inflicted for the resistance to a coercive population control program. In *Shi Liang Lin*, the Second Circuit held that an individual must demonstrate “past persecution

¹⁸⁷ *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (en banc); cf. *Huang v. U.S. Att’y Gen.*, 429 F.3d 1002 (11th Cir. 2005) (holding that an intrusive state-ordered gynecological exam, which caused pain and discomfort, along with a 20-day detention because of her refusal to submit to a second exam, amounted to persecution).

¹⁸⁸ *Matter of T-Z*, 24 I&N Dec. 163 (BIA 2007).

¹⁸⁹ See *Matter of Y-T-L*, 23 I&N Dec. 601, 607 (BIA 2003); *Yuging Zhu v. Gonzales*, 493 F.3d 588 (5th Cir. 2007), *Qu v. Gonzales*, 399 F.3d 1195 (9th Cir. 2005). For additional information, see RAI0 Training Module, *Well-Founded Fear*.

or a fear of future persecution for ‘resistance’ that is directly related to his or her own opposition to a coercive family planning policy.”¹⁹⁰ In *Matter of M-F-W- & L-G-*, the BIA explained that “[t]he statute requires more than proof of an act of resistance and an unconnected imposition of harm that rises to the level of persecution. There must be a link between the harm and the ‘other resistance.’”¹⁹¹ The BIA held that the applicant could not meet this requirement because the reinsertion of her IUD was carried out as part of a routine medical procedure, rather than to target her for her opposition or resistance to the family planning policy.

The Second Circuit held in *Shi Liang Lin* that where an applicant himself has not demonstrated resistance to coercive population control policies, but his spouse or partner has, whether by failure or refusal to undergo a procedure, or for other resistance, the applicant may be able to demonstrate, through direct or circumstantial evidence, that his partner’s resistance has been or will be imputed to him.¹⁹²

Persecution of a parent due to resistance to population control measures does not automatically make the child of that parent eligible for asylum. The child, however, may be able to establish eligibility for asylum if the child establishes that he or she suffered persecution on account of any political opinion imputed to the child based on the parent’s resistance.¹⁹³

ASM Supplement – At Least One Central Reason

The REAL ID Act requires that the protected ground be at least one central reason motivating the persecutor to harm the applicant. Asylum officers should cite this standard in their assessments.

While several courts have suggested that the “one central reason” requirement is a more onerous burden than the applicant’s burden under pre-REAL ID case law,¹⁹⁴

¹⁹⁰ *Shi Liang Lin v. USDOJ*, 494 F.3d 296, 313 (2d Cir. 2007) (en banc). See also *Li v. Ashcroft*, 356 F.3d 1153 (9th Cir. 2004) (en banc).

¹⁹¹ *Matter of M-F-W- & L-G-*, 24 I&N Dec. 633, 643 (BIA 2008).

¹⁹² *Shi Liang Lin v. USDOJ*, 494 F.3d 296, 313 (2d Cir. 2007) (en banc).

¹⁹³ *Zhang v. Gonzales*, 408 F.3d 1239 (9th Cir. 2005) (finding that the hardships suffered by the applicant, including economic deprivation resulting from fines against her parents, lack of educational opportunities, and trauma from witnessing her father’s forcible removal from home, were on account of an imputed political opinion based on her parent’s resistance to CPC measures). But see *Tao Jiang v. Gonzales*, 500 F.3d 137 (2d Cir. 2007) (no evidence that resistance was imputed to child of woman who was forcibly sterilized).

¹⁹⁴ *Parussimova v. Mukasey*, 555 F.3d 734, 740 (9th Cir. 2009) (finding that the REAL ID Act’s “one central reason” standard is more onerous than the Ninth Circuit’s “at least in part” rule, and overruled the Ninth Circuit’s presumption of political motivation absent a legitimate prosecutorial interest); *Singh v. Mukasey*, 543 F.3d 1, 4-5 (1st Cir. 2008).

the BIA has held that the “one central reason” standard is not a radical departure from most pre-REAL ID Act case law.¹⁹⁵ The BIA analyzed the legislative history of the REAL ID Act, coming to the conclusion that the “at least one central reason” standard was specifically designed to overrule certain circuit court case law.¹⁹⁶

In applying the “at least one central reason” standard, the Ninth Circuit has held that, in order for a protected ground to be a central motivating factor, it must have been important enough that the persecutor would not have acted had it not existed.¹⁹⁷ There is no requirement that the motivation relating to the protected ground be dominant or primary.¹⁹⁸

The applicant must establish that the protected ground was “at least one central reason” and played more than a “minor,” “tangential,” or “superficial” role.¹⁹⁹ While the applicant is not required to show that the protected characteristic is the sole reason for the persecutor’s action, the protected characteristic cannot be tangential or incidental to the persecutor’s motivation.²⁰⁰ The BIA has held that a tangential motivation is one that is only “superficially relevant” and an incidental motivation is one that is minor or casual.²⁰¹

Example: In *J-B-N- & S-M-*, the applicant and his wife, citizens of Rwanda who were born in Burundi, moved to Rwanda in 1996. In 2004, the applicant’s aunt took over a valuable parcel of land that had been deeded to him by his uncle. After a legal ruling declared him the land’s owner, the applicant’s cousin called him and demanded that he return to Burundi. He testified that his cousin, a major in the national police, placed the calls because he could not bear to lose the property and was hostile to the applicant because the applicant was from Burundi. Later, the applicant’s cousin came to the applicant’s home with three other men dressed in police uniforms. They demanded that the applicant and his wife return to Burundi, which they did.

An expert witness testified that citizens of Rwanda who are born in Burundi have low social status in Rwanda, and that land disputes are common there. Country conditions also indicated that land disputes are common in Rwanda, and that the

¹⁹⁵ *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007) (“Having considered the conference report and the language of the REAL ID Act, we find that our standard in mixed motive cases has not been radically altered by the amendments.”).

¹⁹⁶ *Id.* at n.9. (Congress sought to overrule the Ninth Circuit’s approach in mixed motive cases and overruled the Ninth’s Circuit’s presumption of political motivation absent a legitimate prosecutorial interest.)

¹⁹⁷ *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009).

¹⁹⁸ *Id.*

¹⁹⁹ *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211 (BIA 2007).

²⁰⁰ *Id.* at 213 (citing House Conf. Rpt., 109-72, 2005 USCCAN 240, 288).

²⁰¹ *Id.* at 212-13.

disputes frequently turn violent.

The applicant claimed that his aunt and cousins' motivation was his Burundian origins and because they were "old case-load" refugees. Both he and his wife testified that, before the land dispute, relations between the applicant and his family had been friendly. The BIA rejected the applicant's asylum claim, finding that he was unable to show that his Burundian origins or his status as a repatriated refugee was more than a tangential motivation for the threats against him and his wife.²⁰²

Asylum may not be granted if a protected ground is only an "incidental, tangential, or superficial" reason for the persecution of an asylum applicant.²⁰³ Notably, the Third Circuit rejected the BIA's interpretation that the protected ground may not be "subordinate" to other reasons for the persecution.²⁰⁴

²⁰² *Id.*

²⁰³ *Ndayshimiye v. Att'y Gen. of U.S.*, 557 F.3d 124, 130 (3d Cir. 2009).

²⁰⁴ *Id.*

SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

- 1.
- 2.

ADDITIONAL RESOURCES

- 1.
- 2.

SUPPLEMENTS

IO Supplement - Motivation

NOTE:

The Immigration and Nationality Act (INA) is the governing statute for asylum and refugee adjudications. INA § 207 is the statutory provision for refugee admissions, and 8 C.F.R. Part 207 contains the corresponding regulations. INA § 208 is the statutory provision for asylum adjudications and 8 C.F.R. Part 208 contains the corresponding regulations.

The REAL ID Act of 2005 amended INA § 208 but did not amend INA § 207. Therefore, any changes the REAL ID Act made to asylum law do not apply in the overseas refugee processing context. The principal change the REAL ID Act makes to the law surrounding nexus is the requirement that asylum applicants establish that one of the five protected grounds was, or would be, at least one central reason in motivating the persecutor. Refugee officers should disregard the word “central” when they see it in this context and should refrain from making it part of their analysis. In the refugee processing context, you must determine whether a reasonable person would fear that the danger arises on account of one of the five grounds.

***Note:** There are five protected grounds in the refugee definition. “Particular social group” (PSG) is one of these grounds but is not discussed in this module. PSG is covered in a separate module, *Nexus – Particular Social Group*.