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Denis Coderre
Minister of Citizenship and Immigration
Ottawa, Ontario, K1A 1L1
Canada

Dear Minister Coderre:

As you know, the Canadian and United States governments are considering an agreement under which each government would consider the other to be a “safe third country,” and would refuse to allow anyone who has traveled to one country through the other to make a claim to asylum.¹ At the Center for Gender and Refugee Studies, we work with women asylum seekers fleeing human rights violations specific to their gender. The purpose of this letter is to comment on the potential impact of such an agreement on women fleeing gender persecution.

The recognition of gender-based violence as a basis for asylum, where all the other requirements of an asylum claim are met, is a right widely recognized under international law. As UNHCR has recently reiterated,

It is generally accepted that the primary responsibility for considering an asylum application lies in principle with the State to which it has been submitted. Such State may be able to transfer that responsibility to another State if it ensures that that other State ... will receive and examine the application in accordance with generally agreed international standards of refugee protection.²

Canada was and continues to be a leader in granting the protection of asylum to women fleeing gender persecution. In the United States, however, this issue remains highly controversial and

¹ See Immigration & Nationality Act [United States] § 208(a)(2)(A); Immigration Act [Canada] § 46.01(1)(b); Immigration and Refugee Protection Act [Canada], § 101(1)(e).

² UNHCR’s Observations on the European Commission’s Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (COM (2001) 447 final) (February 2002).

legally unsettled, and it is not uncommon for women fleeing gender persecution to have to litigate their basic right even to claim asylum, often without success.

Asylum adjudicators in the U.S. are denying protection to victims of gender persecution through rigid application of this country's particular version of the "nexus" doctrine, inflexible definitions of "particular social group," or simply through ruling that the persecution they suffered does not raise a claim for asylum. It is apparent that any agreement requiring Canadian-bound asylum seekers to make their claims in the United States has the potential to lead to denials of protection and to the return of women asylum seekers to their persecutors, in violation of international law.

Gender Persecution & International Law

For many years, the rights of women have been ignored or characterized as private and personal matters, often resulting in the exclusion of women from national and international protection. This has been in part because the serious harms women suffer typically are the result of cultural or customary practices and that these harms are often imposed at the hands of members of the woman's family or community.³

However, the international human rights community has come to view those harms more typically perpetrated against women and girls as important human rights concerns warranting the full protection accorded to other human rights violations. Many international human rights documents now specifically address the concerns of women,⁴ and, in 1993, the United Nations General Assembly adopted a Declaration on the Elimination of Violence against Women that recognized that gender-based violence is an important human rights issue.⁵

The international community's recognition of the special needs of women and girls for protection under refugee and asylum law has run parallel to these developments. In 1985, the Executive Committee of the United Nations High Commissioner for Refugees ("UNHCR") recognized that women fleeing gender-specific persecution may qualify for asylum.⁶ Numerous countries, led by Canada and including the United States, have developed immigration policy guidelines recognizing gender-based asylum claims, or have specifically adopted the position that gender is an appropriate characteristic defining a "particular social group" for asylum

³ In this section we are indebted to the discussion of international legal development by *amici* in *Matter of R-A-*, *Amicus Brief to Attorney General Reno* (January 2000).

⁴ See *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/23 (1993); *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, 15 September 1995, U.N. Doc. A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534.

⁵ G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993).

⁶ *Conclusion on Refugee Women and International Protection*, UNHCR Programme Executive Committee, 36th Sess., No. 39(k) (1985).

purposes.⁷ And the U.N. Special Rapporteur on Violence Against Women (the “Special Rapporteur”) has expressed support for the view that gender should be recognized as a “particular social group” for purposes of adjudicating asylum claims.⁸

In addition, there has been a growing recognition in the international community that domestic violence is an important human rights issue and a basis for asylum. For example, the 1993 Declaration on the Elimination of Violence against Women expressly recognized the importance of eliminating domestic violence in order to advance the human rights of women.⁹

The courts of many countries – including the British House of Lords – have granted refugee protection to women based on membership in social groups defined by gender-based characteristics.¹⁰ And consistent with the view that domestic violence is targeted at women based on their gender, parties to the U.N. Convention and Protocol have granted claims to refugee status based on domestic violence.¹¹

Canada & Gender Persecution

Canada has been a leader in the provision of asylum protection to women fleeing persecution related to their gender. Canada was the first country to issue gender guidelines for use by decision-makers hearing asylum cases, and those guidelines have been repeatedly updated.¹² Canada’s federal courts have recognized domestic violence as a basis for asylum dating back at least a decade,¹³ and decisions raising domestic violence as a basis for asylum are

⁷ See, e.g., Immigration and Refugee Board of Canada, *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (March, 1993); Office of International Affairs, U.S. Immigration and Naturalization Service, *Consideration for Asylum Officers Adjudicating Asylum Claims for Women* (May 26, 1995); Australian Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (July 1996); Immigration and Refugee Board of Canada, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Nov. 25, 1996); Refugee Act, No. 17, §1.-(1) (1996) (Ireland); *Islam (A.P.) v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah*, 2 A11 E.R. 545 (H.L. 1999); Immigration Appellate Authority (United Kingdom), *Asylum Gender Guidelines* (November 2000).

⁸ *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, ESCOR Commission on Human Rights, 54th Sess., Provisional Agenda Item 9(a), at sec. III.B.1., U.N. Doc. E/CN.4/1998/54 (1998).

⁹ G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993).

¹⁰ See, e.g., *Islam*, note 7 above; Refugee Appeal No. 71427/99 (16 August 2000) (New Zealand); RRT Reference: V98/09568 (27 June 2000) (Australia). See generally CGRS, Gender Asylum Case Law, at <<http://www.uchastings.edu/cgrs/law/law.html>>.

¹¹ See, e.g., *Islam*, note 7 above; *Cuffy v. Canada (M.C.I.)* (1995) 121 F.T.R. 81 (TD); CRDD A99-00782, Noseworthy, March 7, 2001 (reasons signed May 1, 2001).

¹² See note 7, above.

¹³ *Canada (M.E.I.) v. Mayers*, (A544-92) 97 D.L.R. (4th) 729 (1992).

handled in the same manner as other asylum claims.¹⁴ And the Supreme Court in Canada held in 1993 that a particular social group could be defined by gender.¹⁵ Following this foundation of guidance and case law, Canadian judges have granted asylum to many women fleeing gender-based persecution, including victims of domestic violence, FGM, forced marriage, trafficking for prostitution, and dowry death,¹⁶ among others.

Canada's gender guidelines state that "[g]ender is an innate characteristic and, therefore, women may form a particular social group within the Convention refugee definition."¹⁷ In seeking to give content to the meaning of persecution, the guidelines refer to international law: "social, cultural, traditional and religious norms and the laws affecting women in the claimant's country of origin ought to be assessed by reference to human rights instruments which provide a framework of international standards for recognizing the protection needs of women."¹⁸ Treaties and human rights instruments referenced include the Convention on the Political Rights of Women and the Declaration on the Elimination of Violence Against Women.¹⁹

United States & Gender Persecution

In the United States, the legal situation is currently in a far more tenuous and unsettled state, and in many cases victims of gender persecution harm are being denied protection on the argument that the persecution they suffered does not raise a colorable claim for asylum, and/or because of a rigid application of the strict "nexus" requirement.

Guidelines and Law

Like other countries, the United States began to recognize women's asylum claims in the mid-1990s. In 1995, the Department of Justice (DOJ) and Immigration and Naturalization Service (INS) issued gender guidelines.²⁰ And in June 1996, gender jurisprudence moved forward with the precedential decision by the Board of Immigration Appeals (BIA) in *Matter of Kasinga*,²¹ which recognized the cultural practice of female genital mutilation to be persecution,

¹⁴ See, e.g., *Lim v. Canada (Minister of Citizenship and Immigration) (C.A.)* (July 19, 2000).

¹⁵ *Attorney General (Canada) v. Ward*, [1993] 2 SCR 689.

¹⁶ See, e.g., *Tobar v. Canada (M.C.I.)*, IMM-1139-98 (May 26, 1999); CRDD T98-04876 et al., Kitchener, Rucker, September 14, 1999 (FGM); *Sawadogo v. M.C.I.*, 2001 FCT 497, IMM-4162-00 (FGM & forced marriage); CRDD M97-06821 et al., Michnick, Arvanitakis, July 14, 1998 (forced marriage); CRDD V95-02904, Neuenfeldt, November 26, 1997 (trafficking); CRDD U96-03318, Wakim, June 9, 1997 (dowry death).

¹⁷ Canadian Gender Guidelines, at <http://www.cisr.gc.ca/legal/guidline/women/index_e.stm>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See note 7, above.

²¹ 21 I. & N. Dec. 357 (BIA 1996).

and ruled that social groups could be defined by gender in combination with other characteristics.

After *Matter of Kasinga*, the BIA did not issue another precedent decision in a gender case until 1999, when with its decision in *Matter of R-A*,²² it rejected a claim to asylum from a victim of ten years of brutal domestic violence in Guatemala who had established that neither the police nor the courts of her country would protect her. Reversing a judge's grant of asylum, the BIA grossly misrepresented the well-understood dynamic of domestic violence and its societal context, and created an additional two-part test for the definition of gender social groups that appeared to be aimed at confining the *Kasinga* decision to its facts.²³ In the aftermath of the *R-A* decision, adjudicators have denied cases involving trafficking for prostitution, gang rape, honor killing, and domestic violence.

In 2000, the Board published a third gender decision, *Matter of S-A*-, Int. Dec. 3433 (BIA 2000). This decision, granting asylum to a young woman from Morocco who was battered by her father, found the persecution to be on account of religion, thus avoiding the barriers to social group erected by *Matter of R-A*-. Although *Matter of S-A*- is a positive development, and some judges have relied on it in granting asylum to victims of gender persecution, including domestic violence, its applicability is limited to cases where religion is implicated.

The impact of the guidelines has been mixed; a number of cases have been granted asylum at the lower administrative court level. Yet comparison with Canadian practice is instructive. Although as in the United States the gender guidelines are not binding on courts, it appears to be not uncommon in Canada to raise as an issue for appeal the fact that a Board member failed to consider the Gender Guidelines, and Canada's federal courts will review the decision below on this basis.²⁴ By contrast, in the United States, immigration judges and the BIA often simply dismiss the INS Gender Guidelines without substantive consideration.²⁵

Proposed Regulations

In December 2000, the DOJ under the former Clinton administration published proposed regulations intended to provide guidance on the definitions of persecution, the nexus requirement, and membership in a particular social group, and to make clear that gender can form the basis of a particular social group – issues that the DOJ and INS said required further

²² *Matter of R-A*-, Int. Dec. 3403 (BIA 1999), *vacated*, (AG 2001).

²³ For example, the *R-A*- decision sought to impose, as one of two new additional criteria for gender social group claims, that an asylum seeker demonstrate that the harm she suffered “is an important societal attribute” *Matter of R-A*-, at 17. It is unclear what purpose this requirement serves, other than distinguishing the *Kasinga* case, which involved female genital mutilation.

²⁴ *See, e.g.*, *Hernandez v. Canada* (Minister of Citizenship & Immigration), [2001] F.C. 643; *Griffith v. Canada* (Minister of Citizenship & Immigration), File No. IMM4543-98.

²⁵ *See, e.g.*, *Matter of R-A*-, at 10 (gender guidelines are “instructive but not controlling on us”).

examination after *Matter of R-A*.²⁶ And in January 2001, the outgoing Attorney General Janet Reno issued an order vacating the *Matter of R-A* decision and ordering that the case be reheard under the proposed regulations after they become final. (As of this date, the regulations remain yet to be finalized.) Yet the key section of the regulations seeks to give guidance in the definition of particular social group with a six-part test drawn from two highly problematic legal precedents, and would in effect largely codify the *Matter of R-A* decision.²⁷

The first three of these criteria are drawn from *Sanchez-Trujillo v. INS*,²⁸ and the last three from *Matter of R-A* itself. Most problematic is the inclusion of the *Matter of R-A* factors. The stated purpose of the proposed regulations is to remove barriers raised by *Matter of R-A*,²⁹ and yet the principal barrier posed by that decision is the additional criteria that were developed there. These criteria have no basis in the landmark cases of *Matter of Acosta*³⁰ (the BIA's influential 1985 decision interpreting the "particular social group" ground), *Matter of Kasinga*, or any other precedential decision which applies or interprets the particular social group statutory ground. The inclusion of the *Sanchez-Trujillo* factors is also questionable, as that decision has never been influential outside of the Ninth Circuit,³¹ and has recently been limited and clarified by the Ninth Circuit itself in a manner consistent with *Matter of Acosta*.³²

INS's position on the application of the regulations may well be demonstrated by its response to *Aguirre-Cervantes v. INS*.³³ That Ninth Circuit case reversed a BIA decision denying asylum to a young woman victim of domestic violence at the hands of her father. In ruling that a family group may qualify as a particular social group, the court held that the applicant's social group met the requirements of the proposed regulations. In response, the INS successfully sought

²⁶ Asylum & Withholding Definitions, 65 Fed. Reg. 76588, 76588 (Dec. 7, 2000).

²⁷ After restating the longstanding and respected *Acosta* rule, the proposed regulation lists six additional factors that adjudicators may consider in determining the existence of a particular social group:

- (1) the members of the group are closely affiliated with each other;
- (2) the members are driven by a common motive or interest;
- (3) a voluntary associational relationship exists among them;
- (4) the group is a societal faction or recognized segment of the population in the country;
- (5) members view themselves as members of the group;
- (6) society distinguishes members of the group for different treatment or status than others in the society.

Asylum & Withholding Definitions, 65 Fed. Reg. 76588, 76598 (proposed 8 C.F.R. §208.15(c)(3)).

²⁸ 801 F.2d 1571 (9th Cir. 1986).

²⁹ See Asylum & Withholding Definitions, 65 Fed. Reg. 76588-89.

³⁰ 19 I & N Dec. 211 (BIA 1985), *modified on other grounds*, *Matter of Mogharrabi*, 19 I & N Dec. 439 (BIA 1987).

³¹ See, e.g., *Lwin v. INS*, 144 F.3d 505, 511-12 (7th Cir. 1998) ("The Ninth Circuit's requirement of a 'voluntary associational relationship,' read literally, conflicts with *Acosta*'s immutability requirement.')

³² *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 n.6 (9th Cir. 2000) (gay Mexican man with female sexual identity is member of a particular social group).

³³ – F.3d – (No. 99-70861, 9th Cir. 2001), *vacated*, 273 F.3d 1220 (9th Cir. 2001).

reversal of the decision by the Ninth Circuit. Although the INS argued that its objection to the case was procedural in nature, it appeared to express a hostile opinion towards the decision, stating that “*whether, and to what extent, the victims of domestic violence should be eligible for asylum in the United States – involves policy judgments of the most sensitive nature that must be resolved in the first instance by the Executive Branch.*”³⁴

The lack of a broad-ranging precedent leaves the question of whether women fleeing gender persecution even qualify for the legal protection of asylum very much unsettled under United States law. Some women raising such claims have been granted, or have had their cases denied for failure to meet the burden of proof on an element of the refugee definition, such as credibility. But other judges hearing cases from women seeking asylum from honor killing, forcible prostitution, forced marriage and gang-rape have rejected their cases as not raising a colorable claim for asylum.

Social Group & Nexus

U.S. asylum adjudicators seeking to deny protection to victims of gender persecution often seize on inflexible definitions of “particular social group,” and on rigid application of the requirement that there be a “nexus” between the persecution and the grounds for asylum. For example, in the *Matter of R-A-* decision, the BIA rejected Ms. Alvarado’s suggested social group in part because it did not encompass an “important social attribute,” and – on nexus – ruled that her claim failed because there was no evidence that Ms. Alvarado’s persecutor had beaten any other women in Guatemala. In Canada, the *Ward* decision provides the key framework for interpreting social group and provides a broader scope for encompassing human rights violations than does the difficult and contradictory U.S. law. And while application of the nexus doctrine by U.S. courts is too complex to briefly summarize, suffice to say that Canadian courts have not imposed the same hurdles as have U.S. courts. As is clear from many cases since the *R-A-* decision, these complex legal doctrines are being applied with particular force and rigidity in cases involving gender persecution.

Conclusion

It is widely recognized under international law that gender-based violence can be a basis for asylum. Clearly, the protection offered women fleeing gender persecution in the United States is below the standard offered in Canada. More importantly, the unsettled state of U.S. law is leading to denials of protection to victims of gender persecution in a manner that is not consistent with international law.

Scholars and advocates have long argued that women fleeing persecution related to their gender can and should be granted protection under existing asylum case law, and decisions from the United Kingdom, Canada and other countries have done exactly that. As stated in the United Kingdom’s guidelines, “[g]ender-specific harm does not differ analytically from other forms of ill-treatment and violence that are commonly held to amount to persecution and may constitute

³⁴ INS Petition for Rehearing en banc, *Aguirre-Cervantes v. INS*, No. 97-70861, at 10-11 (emphasis added).

torture or cruel inhuman or degrading treatment or punishment.”³⁵ In the United States, unlike in Canada, asylum applicants continue to be forced to litigate this basic premise.

We hope that this discussion of gender persecution in the United States and Canada is helpful, and we thank you for your attention to this important issue.

Sincerely,

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³⁵ Immigration Appellate Authority (United Kingdom), *Asylum Gender Guidelines* ¶ 2A.16 (Nov. 2000).