

United Nations High Commissioner for Refugees
Regional Office for the United States and the Caribbean
1775 K St. NW, Suite 300
Washington DC 20006

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS**

In the Matter of:)	
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Michelle THOMAS et al.)	File No.: A75-597-033/-034/-035/-036
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)	
In removal proceedings)	

**BRIEF OF THE OFFICE OF
THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
*AS AMICUS CURIAE***

**BRIEF AMICUS CURIAE OF
THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**

The Office of the United Nations High Commissioner for Refugees (“UNHCR”) respectfully submits this brief pursuant to the Board of Immigration Appeals’ (“BIA”) grant of its request for leave to file a brief *amicus curiae* in this matter.¹

INTEREST OF AMICUS CURIAE

UNHCR is mandated by the United Nations to lead and coordinate international action for the worldwide protection of refugees and the resolution of refugee problems. UNHCR’s primary purpose is to safeguard the rights and well-being of refugees. The Statute of UNHCR specifies that UNHCR shall provide for the protection of refugees by, *inter alia*, “promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”²

The supervisory responsibility of UNHCR is additionally recognized in the 1951 Convention Relating to the Status of Refugees³ and its 1967 Protocol.⁴ The United States is a State Party to the 1967 Protocol. Both conventions provide that the State Parties “undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions [of these conventions].”⁵

The views of UNHCR are informed by over 55 years of experience supervising the treaty-based system of refugee protection established by the international community. UNHCR

¹ See letter from Ana Landazabal Mann, Senior Legal Adviser, BIA to H. Elizabeth Dallam, Esq., UNHCR, Jan. 4, 2007.

² Statute of the UNHCR, U.N. Doc. A/RES/428(V), Annex, PP1, 6 (1950).

³ 1951 Convention relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259 [hereinafter *1951 Convention*].

⁴ 1967 Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter *1967 Protocol*].

⁵ *1951 Convention*, *supra* note 3, at art. 35, para. 1; 1967 Protocol, *supra* note 4 art. II, para. 1.

provides international protection and direct assistance to refugees throughout the world and has staff in over 100 countries. It has twice received the Nobel Peace Prize, in 1954 and 1981, for its work on behalf of refugees. UNHCR's interpretation of the provisions of the 1951 Convention and its 1967 Protocol are, therefore, both authoritative and integral to promoting consistency in the global regime for the protection of refugees. Under United States jurisprudence, United States courts have an obligation to construe United States statutes in a manner consistent with United States international obligations whenever possible.⁶

The present case involves the interpretation of statutory provisions based on the 1951 Convention and the 1967 Protocol. As such, it presents questions involving the essential interests of refugees within the mandate of the High Commissioner. Resolution of the case is likely to affect the interpretation by the United States of the 1967 Protocol with regard to the determination of refugee status and the grant of asylum to those who qualify for such status. Moreover, UNHCR anticipates that the decision in this case may influence the manner in which the authorities of other countries apply the refugee definition.⁷

INTRODUCTION

In analyzing claims to refugee status, UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees ("UNHCR Handbook") is internationally recognized as the key source of interpretation of international refugee law. The UNHCR Handbook was prepared by UNHCR in 1979 at the request of Member States of the Executive Committee of the High Commissioner's

⁶ *Murray v. The Charming Betsy*, 6 US 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). See also *INS v. Cardoza-Fonseca*, 480 US 421, 432-33 (1987) (The United States Supreme Court found "abundant evidence" that Congress intended to conform the definition of refugee and the asylum law of the United States "to the United Nation's (sic) Protocol to which the United States has been bound since 1968.").

⁷ UNHCR submits this *amicus curiae* brief in order to provide guidance to the Board on the relevant international standards and not to offer an opinion on the merits of the applicants' claim.

Programme,⁸ including the United States, to provide guidance to governments in applying the terms of the Convention and Protocol. At the time it was written, the guidance provided in the UNHCR Handbook was based on the knowledge accumulated by the Office over the years since its inception, taking into account the practice of States, exchanges of views between the Office and competent authorities of States party to the international refugee instruments, as well as the literature devoted to the subject.⁹ The UNHCR Handbook was re-edited in 1992. The United States Supreme Court has determined that, although the UNHCR Handbook is not legally binding on United States officials, it nevertheless provides "significant guidance" in construing the Protocol and in giving content to the obligations established therein.¹⁰

States also generally rely in their practice on a number of other documents, including UNHCR Executive Committee Conclusions,¹¹ and in particular UNHCR Guidelines on International Protection, which are issued by UNHCR to complement and update the UNHCR Handbook. Of specific relevance to this particular case are Guidelines that address "membership of a particular social group."¹² UNHCR issued these Guidelines in 2002 pursuant to its mandate, particularly its supervisory role as set forth in paragraph 8 of the UNHCR Statute in conjunction

⁸ The Executive Committee of the High Commissioner's Programme is an intergovernmental body currently comprised of 70 Member States, one of which is the United States. Its main functions, *inter alia*, are to review the use of funds and UNHCR's programs, as well as to advise the High Commissioner and the international community at large on international protection matters.

⁹ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees at 1, para. V [hereinafter *UNHCR Handbook*].

¹⁰ *Cardoza-Fonseca*, 480 U.S. at 439 n.22; *see also, In re S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996) (noting that in adjudicating asylum cases the BIA must be mindful of "the fundamental humanitarian concerns of asylum law," and referencing the *UNHCR Handbook*).

¹¹ In addition to its role of overseeing the operations and finances of the Office, the Executive Committee adopts Conclusions on International Protection contributing to the advancement of international norms and standards in the area of refugee protection, statelessness, and to some extent also the protection of internally displaced persons. The Conclusions assist in filling the gaps in legal interpretation and standards in these areas. While the Conclusions are not formally binding, they represent consensus approaches to the interpretation and application of the international refugee protection regime. Conclusions of the Committee constitute expressions of opinion which are broadly representative of the views of the international community. The specialized knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight.

¹² UNHCR Guidelines on International Protection: Membership of a particular social group: Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02 (7 May 2002) [hereinafter *UNHCR Guidelines on Membership of a Particular Social Group*] (attached for your easy reference).

with Article 35 of the Convention and Article II of the Protocol. They, like the UNHCR Handbook which they supplement in developing areas of international refugee law, are intended to provide legal interpretative guidance for governments, legal practitioners and decision-makers, including the judiciary.

These Guidelines have been informed by and represent one of the outcomes of the process of Global Consultations on the International Protection of Refugees launched by UNHCR in 2000.¹³ In fact, the Agenda for Protection, which was endorsed by the Executive Committee and welcomed by the General Assembly in 2002, specifically tasks UNHCR with the production of such complementary guidelines to its Handbook.¹⁴ The topic of membership of a particular social group was discussed at an expert round table meeting in San Remo in September 2001. The meeting was part of the “second track” of the Global Consultations, dedicated to analyzing and discussing diverging views on the interpretation of certain aspects of the 1951 Convention.¹⁵ The San Remo seminar, like others discussing interpretive issues, enjoyed broad participation by governments, the International Association of Refugee Law Judges, other legal practitioners, non-governmental organizations and academia and was built around background studies commissioned from experts. The purpose was to take stock of the state of law and practice in these areas, to consolidate the various positions taken and to develop

¹³ For information on the Global Consultations on International Protection, including the “first track” ministerial meeting of December 2001 and the “third track” Executive Committee meetings, please consult the Global Consultations page of UNHCR’s website at www.unhcr.org.

¹⁴ See U.N. GAOR, 53rd Sess., at goal 1, obj. 6, Doc. A/AC.96/965/Add.1 (June 26, 2002).

¹⁵ In total, nine topics were identified for discussion in the “second track”: i) cessation (Article 1C); ii) exclusion (Article 1F); iii) supervision of the 1951 Convention (Article 35); iv) the scope and the content of the principle of *non-refoulement* (Article 33); v) gender-related persecution; vi) internal protection/relocation/flight alternative as an aspect of refugee status determination; vii) membership of a particular social group; viii) family unity; and ix) non-penalisation, detention and prosecution (Article 31).

concrete recommendations to achieve more consistent understandings of these various interpretative issues.¹⁶

ARGUMENT

I. THE STANDARD FOR ADJUDICATING PARTICULAR SOCIAL GROUP CASES ADVANCED BY DHS IN THE INSTANT CASE IS INCONSISTENT WITH UNHCR GUIDELINES

A. Under UNHCR's Guidelines, the "Protected Characteristics" and "Social Perception" Approaches to Particular Social Group Represent Alternate Approaches Rather than Dual Requirements

Of the five grounds for refugee protection, the category of "membership in a particular social group" has posed the greatest definitional challenges. The Convention does not itself provide a definition nor does the drafting history clarify the proper interpretation.¹⁷ While there is no "closed list" of potential social group categories, and this ground has been increasingly invoked to advance the evolutionary definition of refugee, the social group ground also cannot become a "catch all" classification that "render[s] the other four Convention grounds superfluous."¹⁸

¹⁶ Federal courts have referenced UNHCR's Guidelines in several asylum decisions. *See, e.g., Castellano-Chacon v. INS*, 341 F.3d 533, 547-48 (6th Cir. 2003) (citing UNHCR Guidelines on Membership of a Particular Social Group); *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (citing UNHCR's Guidelines on International Protection: Religion-based Refugee Claims); *see also, Rodriguez-Roman v. INS*, 98 F.3d 416, 425 (9th Cir. 1996) (noting the BIA "is bound . . . to consider the principles established by the United Nations High Commissioner for Refugees" in the UNHCR Handbook); *M.A. A26851062 v. United States INS*, 858 F.2d 210, 214 (4th Cir. 1998) (recognized that the "Handbook provides significant guidance in interpreting the Refugee Act.") .

¹⁷ The term "membership of a particular social group" was added near the end of the deliberations on the draft Convention but the *travaux* do not guide its interpretation. All that is recorded is the Swedish delegate's observation: "[E]xperience has shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included." Summary Record of the Third Meeting, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, at 14, U.N. Doc. A/Conf.2/SR.3 (July 3, 1951).

¹⁸ *UNHCR Guidelines on Membership of a Particular Social Group*, *supra* at note 12, at para. 2. *See also Castillo-Arias v. U.S. Atty Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006) ("Acosta strikes an acceptable balance between (1) rendering 'particular social group' a catch-all for all groups who might claim persecution, which would render the other four categories meaningless, and (2) rendering 'particular social group' a nullity by making its requirements too stringent or too specific.").

DHS argues in its brief that the Board has adopted a new test in *Matter of C-A-*, 23 I & N Dec. 951 (BIA 2006) that adds an additional requirement to the “immutable or fundamental characteristic” approach to the particular social group analysis that was established in *Matter of Acosta*, 19 I&N Dec. 211 (1985).¹⁹ According to DHS, the additional requirement is that there must be “social perception” or “visibility” of the group. It is not clear to us that the Board meant to adopt such a requirement, particularly given that the Board in *Matter of C-A-* referenced the definition set forth in the UNHCR Guidelines on Membership of a Particular Social Group, which does not include a requirement that a particular social group meet the “social perception” test nor that the group be “socially visible.”

The Guidelines on Membership of a Particular Social Group referenced by the Board surveyed State practice on interpreting particular social group, noting the two dominant approaches of “protected characteristics” and “social perception.”²⁰ These Guidelines sought to reconcile these two approaches by “adopt[ing] a *single* standard that incorporates both dominant approaches” as follows:

a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience, or the exercise of one’s human rights. (emphasis added)²¹

This is the definition referenced by the Board in *Matter of C-A-*, and, as the definition establishes, a decision-maker adopting the “protected characteristics” approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by

¹⁹ DHS Supplemental Brief, 10-11 (filed September 22, 2006) [hereinafter *DHS Supplemental Brief*].

²⁰ *UNHCR Guidelines on Membership of a Particular Social Group*, *supra* note 12, at paras. 5-7.

²¹ *Id.* at para. 11.

a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.²²

If a claimant alleges a social group that is based on a characteristic that cannot be defined using the aforementioned approach, then a secondary inquiry “should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society.”²³ Under this approach, what distinguishes members of a particular social group from other persons in society is a common attribute and a societal perception that the group stands apart from other members of society. As expressed in the leading social perception decision of the High Court of Australia:

[T]he existence of such a group depends in most, perhaps all, cases on external perceptions of the group . . . [The term ‘particular social group’] connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them.²⁴

As worded in UNHCR’s submission in a recent precedent social group case decided by the United Kingdom House of Lords:

The question to be established is whether the particular social group is “*cognisable*” as a group, viewed objectively in terms of the relevant society. It may be cognisable “*objectively*” having regard to the circumstances considered by a Court. It may be seen to be “*set apart*”, for cultural, social, religious or legal factors.²⁵

²² *Id.* at para. 6.

²³ *Id.* at para. 13.

²⁴ *Applicant A and Another v. Minister for Immigration and Ethnic Affairs and Another*, (1997), 190 CLR 225 (Austl.).

²⁵ UNHCR submission in *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant) and Fornah (Appellant) v. Secretary of State for the Home Department (Respondent)*, (2006) 2006 UKHL 46 (U.K.) at para. 13 (6).

This secondary analysis for cognizable groups applies only where the social group trait is not immutable and would not be needed in the case of a social group based in whole or part on a “protected characteristic.”²⁶

B. There is no Requirement that a Particular Social Group be Readily Visible to Society at Large

In support of its position that “social visibility” is an additional requirement, DHS seems to suggest that a group must not just be perceived by society as a group (the “social perception” approach referenced in UNHCR’s Guidelines on Membership of a Particular Social Group), but that the members of the group must be *visible* to society at large. However, the members of a group need not be easily recognizable to the general public in order for the group as a whole to be perceived by society as a particular social group. For instance, the general population in Cuba would not automatically recognize homosexuals,²⁷ nor would average Salvadorans necessarily recognize former members of the national police,²⁸ nor would a typical Togolese tribal member inevitably be aware of young women who opposed female genital mutilation but had not been subjected to the practice.²⁹

Furthermore, as stated in UNHCR’s Guidelines on Membership of a Particular Social Group, the “immutable characteristic” and “social perception” approaches may frequently converge. “This is so because groups whose members are targets based on a common immutable or fundamental characteristic are also often perceived as a social group in their societies.”³⁰ It does not follow, however, that a group whose members share an immutable characteristic must be socially visible. In addition, “the social perception standard might recognize as social groups

²⁶ UNHCR, Advisory Opinion on International Norms: Gender-Related Persecution and Relevance to “Membership of a Particular Social Group” and “Political Opinion,” 8 (January 9, 2004), submitted in *Matter of R-A*, 22 I&N Dec. 906 (A.G. 2001; BIA 1999) [hereinafter *UNHCR Advisory Opinion in Matter of R-A*].

²⁷ *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990).

²⁸ *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988).

²⁹ *Matter of Kasinga*, 21 I&N Dec. 357, 366 (BIA 1996).

³⁰ *UNHCR Guidelines on Membership of a Particular Social Group*, *supra* note 12, at para. 9.

associations based on a characteristic that is neither immutable nor fundamental to human dignity . . . ”³¹

DHS also relies on commentary by refugee law scholar Guy Goodwin-Gill to support the notion of a visibility requirement. However, in citing Goodwin-Gill on the external perceptions of a social group,³² DHS removes his references to the actions of “State authorities” and awareness at “the official level.”³³ It is clear from Goodwin-Gill’s discussion that he is not suggesting that social visibility is a requirement for social group cases but that the notice taken of a group when State authorities are the persecutor may relate to how important the group is to the State.

In sum, the combination of the “protected characteristics” and “social perception approach” in the UNHCR Guidelines on Membership of a Particular Social Group definition was intended to create alternative approaches for particular social group analysis rather than a dual requirement, and “social visibility” is not a requirement of the definition.³⁴ By combining and reconciling the two approaches used in various jurisdictions in order to recognize particular social groups, the definition in the UNHCR Guidelines on Membership of a Particular Social Group is intended to help and guide adjudicators precisely with this task – to identify and discern

³¹ *Id.*

³² *DHS Supplemental Brief*, *supra* note 19, at pp. 10-11.

³³ Guy Goodwin-Gill, *The Refugee in International Law* 47 (Oxford University Press Inc. 1998) (1996). The full quote reads “Also highly relevant are the attitude to the putative social group of other groups in the same society and, in particular, the treatment accorded to it by State authorities. The importance, and therefore the identity, of a social group may well be in direct proportion to the notice taken of it by others – *the view which others have of us – particularly at the official level.*” (italics indicate omissions from quote as it appears in the *DHS Supplemental Brief*).

³⁴ DHS itself has in the past recognized the overlap in the two approaches, and that, while social perceptions may provide evidence of immutability or the fundamental nature of a protected characteristic, heightened social perception is merely an “indicator” of the social group’s existence rather than an additional factor. DHS Position on Respondents Eligibility for Relief, 25 (Feb. 19, 2004), submitted in *Matter of R-A-*, 22 I&N Dec. 906 (A.G. 2001; BIA 1999) [hereinafter *DHS Position on Respondent's Eligibility for Relief*]. DHS in its Position also criticized the Board’s reasoning in *Matter of R-A-*, *supra*, for applying “these [social perception] ‘factors’ as requirements, without relating them in any way to the *Acosta* immutability characteristic standard.”

social groups that exist in a particular society, without opening up the ground to become a “catch all” classification.

The Board’s ruling in *Acosta* has provided a well-formulated and widely accepted standard for determining particular social group claims.³⁵ The Board in *Acosta* did not require either a “social perception” or “social visibility” test, and UNHCR would caution the Board against adopting such a rigid approach which may disregard groups that the Convention is designed to protect.

II. FAMILIES REPRESENT THE “CLASSIC EXAMPLE” OF A PARTICULAR SOCIAL GROUP UNDER THE 1951 CONVENTION

A. UNHCR, Human Rights Instruments and Refugee Law Scholars Recognize the Fundamental Nature of the Family Unit

It is UNHCR’s view that a family unit represents a classic example of a “particular social group” under both the “protected characteristics” and “social perception” analyses. A family is a socially cognisable group in society and individuals are perceived by society on the basis of their family membership. Members of a family, whether through blood ties or through marriage and attendant kinship ties, meet the requirements of the definition by sharing a common characteristic which is innate and unchangeable as well as fundamental and protected. In addition, the family is widely perceived as a cognizable unit.

Human rights instruments recognize the centrality of the family unit and its need for protection. Article 23(1) of the 1966 International Covenant on Civil and Political Rights and

³⁵ As T. Alexander Aleinikoff noted in his paper, *Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group,’* p. 275, prepared as part of UNHCR’s Global Consultations on International Protection, the BIA’s approach in *Acosta* has been highly influential. “It was cited with approval and largely followed in the Canadian Supreme Court’s decision in *Canada (Attorney-General) v. Ward* [1993] 2 S.C.R. 689 (Can.) and has been widely cited in cases arising in other jurisdictions as well.” See, e.g., *Islam v. Secretary of State for the Home Department* and *R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah*, UK House of Lords, [1999] 2 W.L.F. 1015; [1999] I.N.L.R. 144; *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant) and Fornah (Appellant) v. Secretary of State for the Home Department (Respondent)*, (2006) 2006 UKHL 46 (U.K.).

Article 16(3) of the 1948 Universal Declaration of Human Rights provide that the family is the natural and fundamental group unit of society entitled to protection by society and the State. Article 10(1) of the 1966 International Covenant on Economic, Social and Cultural Rights provides that “[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society.”

In addition, leading refugee scholars recognize that the family may constitute a particular social group. Professor James Hathaway has stated:

as a rule therefore whenever there is an indication that the status or activity of a claimant’s relative is the basis for a risk of persecution, a claim founded in family background is properly receivable under the social group category.³⁶

In the words of Professor Guy Goodwin-Gill:

[I]n principle other innate or unchangeable factors relevant to non discrimination in the enjoyment of fundamental rights may also be included such as ...family background, property, birth or other status, national or social origin; in short the very sorts of social factors that are or ought to be irrelevant to the enjoyment of fundamental human rights.³⁷

In addition, T. Alexander Aleinikoff concluded the following when commenting on the case of *Minister for Immigration and Multicultural Affairs v. Sarrazola* [1999] FCA 1134 in which the Federal Court of Australia found that a member of a family could assert a claim to refugee protection when the motive for persecuting the principal member of the family was not on account of one of the five protected grounds:

This seems a sensible result. It is the family as such that is being targeted; it is a status that cannot be escaped, and the State is unable to provide protection from the persecution.

The proper standard for considering families as a social group was well-articulated by DHS in *Matter of R-A*.³⁸ Within this framework, DHS explained how concerns about the

³⁶ James C. Hathaway, *The Law of Refugee Status* 165-66 (Anne Lynas Shah ed., Butterworths Canada Ltd. 1992) (1991).

³⁷ Guy S. Goodwin-Gill, *The Refugee in International Law* 361 (Oxford University Press Inc. 1998) (1996).

³⁸ See generally, *DHS Position on Respondents Eligibility for Relief*, *supra* note 34.

potential for unlimited expansion of the social group ground have acted to conflate the separate elements for asylum status. Recognizing families as a social group does not create overly-broad classifications that lack homogeneity or cohesion, since the other elements in the refugee definition adequately serve a filtering function. For refugee status based on membership in a particular social group, it is insufficient merely to prove membership in the invoked category, be it gender, sexual orientation, kinship ties, etc.³⁹ The asylum seeker must also demonstrate a nexus between the feared persecution and this social group ground⁴⁰ and that the feared ill-treatment would amount to persecution and an inability or unwillingness to avail him or herself of the protection of the country of origin.

A social group need not be numerically small or homogenous, but should instead be limited to situations where the group's protected characteristic "accurately identif[ies] the reasons why the persecutors seek to harm the victims."⁴¹ This distinct nexus requirement that persecution be "for reasons of" a protected Convention ground already serves to limit the broad categories of race, religion, political opinion, and national origin.

B. The Factors to be Considered When Determining When a Family May Constitute a Particular Social Group Should be Consistent with International Standards

In the present matter, DHS acknowledges that families may constitute a particular social group "depending on the nature and degree of the relationships involved and how those

³⁹ See also *UNHCR Guidelines on Membership of a Particular Social Group*, *supra* note 12, at para. 16 ("mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status.")

⁴⁰ See *DHS Position on Respondent's Eligibility for Relief*, *supra* note 34, at 22 ("The fact that these [particular social group] claims would have failed on other elements of the refugee definition has colored the analysis of whether the social group is cognizable. It is in that context that the groups were found to be overbroad.")

⁴¹ *Id.*; see also, *UNHCR Guidelines on Membership of a Particular Social Group*, *supra* note 12, at para 18 ("The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2)").

relationships are viewed by the society in question” and concedes that the Respondents’ family qualifies as a recognizable social group.⁴²

However, DHS appears to limit when family relationships may rise to the level of particular social group because of its approach that “social visibility” is an additional requirement in any particular social group analysis. DHS states that “in order for a family unit to constitute a cognizable particular social group, the relationship that unifies it must be one that is so significant in the society in question that the people who share it are distinguished from other groups or from society at large.”⁴³ As discussed above, it appears that DHS may be conflating social cognizability with social visibility. While the family unit as such is likely a cognizable unit or group in all or most societies, this does not mean that in order to be protected as a particular social group, the family must be a famous family or one that is visible to society at large.⁴⁴

UNHCR urges the Board to analyze family cases consistent with other particular social group cases and within the framework discussed above.

III. THE CAUSAL REQUIREMENT SHOULD BE INTERPRETED IN LIGHT OF WELL-ESTABLISHED INTERNATIONAL STANDARDS

A. Determining Whether Persecution is “for reasons of” a Convention Ground

In order to qualify for designation as a refugee and protection under the Convention, an individual’s well-founded fear of persecution must be related to one or more of the Convention grounds. The nexus requirement is satisfied when the persecution is “for reasons of” race,

⁴² *DHS Supplemental Brief, supra* note 19, at 10.

⁴³ *Id.*

⁴⁴ See, e.g., *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant) and Fornah (Appellant) v. Secretary of State for the Home Department (Respondent)*, (2006) 2006 UKHL 46 (U.K.) (There, the applicant, an Iranian woman, was found to be persecuted for reasons of her membership of the particular social group of her husband’s family, which was not a family that was particularly set apart from society at large and was probably perceived by society as any other family (as opposed to a famous and well-known family)).

religion, nationality, membership of a particular social group, or political opinion.⁴⁵ It is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause.⁴⁶ As worded in the recent judgment in the *Fornah* decision, “The ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that the ground relied on is an effective reason.”⁴⁷ The causal connection is between a Convention ground and the applicant’s well-founded fear, and the focus should therefore be on the applicant’s predicament.⁴⁸ The causal link between the applicant’s predicament and a Convention ground will be revealed by either direct or circumstantial evidence of the reasons which led either to the infliction or threat of a relevant harm, or which caused the applicant’s country of origin to withhold effective protection in the face of a privately inflicted risk.⁴⁹

In some jurisdictions, such as the United States, the causal link must be separately established, while in other States causation is not treated as a discrete analytical question but is subsumed within the analysis of other Convention requirements and thus considered as part of the holistic analysis of the refugee definition.⁵⁰ United States law emphasizes the motivation of

⁴⁵ *UNHCR Handbook*, *supra* note 9, at para. 66.

⁴⁶ UNHCR Guidelines on International Protection: Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, HCR/GIP/06/07 at para. 29 (7 April 2006) [hereinafter *UNHCR Trafficking Guidelines*].

⁴⁷ *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant) and Fornah (Appellant) v. Secretary of State for the Home Department (Respondent)*, (2006) 2006 UKHL 46 para. 17. (U.K.).

⁴⁸ James C. Hathaway, *The Michigan Guidelines on Nexus to a Convention Ground*, 23 Mich. J. of Int’l Law 207, para. 6 (2002) [hereinafter *Michigan Guidelines*]. Every second year, the University of Michigan’s Program in Refugee Law hosts a Colloquium on Challenges in International Refugee Law. Leading academic experts are invited to develop an intellectual framework for resolution of a significant problem facing international refugee law. As a result of the Colloquium convened in March 2001, The Michigan Guidelines on Nexus to a Convention Ground were issued. Several leading refugee scholars contributed to the development of these guidelines after reflecting on the relevant norms and a comprehensive survey of state practice in leading asylum countries.

⁴⁹ *Id.* at paras. 8 and 14.

⁵⁰ *UNHCR Trafficking Guidelines*, *supra* note 46, at para. 29; UNHCR Guidelines on International Protection: Gender-Related Persecution: Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees at para. 20 [hereinafter *UNHCR Gender Guidelines*]. See *supra* note 16 for discussion of weight to be given to UNHCR guidelines on international protection.

the persecutor in analyzing nexus. However, even when the “for reasons of” language is considered as an independent element of the refugee definition, “the existence of a nexus to a Convention ground must be assessed in the light of the text, context, objects and purposes of the Refugee Convention and Protocol.”⁵¹

In this regard, it should be recalled that “while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.”⁵² The United States Supreme Court has acknowledged the difficulty that asylum seekers face in establishing the motives of their persecutor and has explicitly stated that direct proof of the persecutor’s motives is not required and that circumstantial evidence will suffice.⁵³ It will often not be possible for an adjudicator to establish the subjective motivation of the persecutor, unless he or she has clearly announced this. Instead, all available direct and circumstantial evidence will need to be used in order to determine, in a protection-oriented and forward-looking manner, whether a relevant Convention ground is a contributing factor to the persecution feared. As the Department of Homeland Security (“DHS”) has noted, the persecutor’s motivation can generally be “readily determined (often from the pattern of conduct or other direct or circumstantial evidence).”⁵⁴ The evidentiary requirements and standards of proof must be the same in cases involving alleged persecution for reasons of membership of a particular social group as in those related to one of the other protected grounds.

B. The Causal Nexus May be Attributed to *Either* the State or a Non-State Actor

⁵¹ *Michigan Guidelines*, *supra* note 48, at para. 2.

⁵² *UNHCR Handbook*, *supra* note 9, at para. 196. *See also Michigan Guidelines*, *supra* note 48, at para. 3 (states that “it is not the duty of the applicant accurately to identify the reason he or she has a well-founded fear of being persecuted.”)

⁵³ *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

⁵⁴ *DHS Supplemental Brief*, *supra* note 19, at 16.

Refugee law does not require that the persecutor be a State actor, nor does the Convention privilege one type of claim over another. The UNHCR Handbook notes that persecution, while normally related to action by the authorities of a country, “may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned.”⁵⁵

DHS asserts that the concept of persecution is “more readily recognized in governmental persecution cases” indicating a discriminatory motive is more likely to be found when the State is the persecutor.⁵⁶ UNHCR appreciates that it may be easier for an adjudicator of asylum claims to identify or recognize the intent or motive of a State agent of persecution compared to that of a non-State persecutor, as State policies and views towards particular groups, issues or phenomena have often been formulated in speeches, government policy documents or been detected through previous actions vis-à-vis the public. Asylum claims involving non-State agents of persecution have thus tended to be regarded as more complicated to determine. This complexity, however, should not render these claims less relevant for refugee protection.

In UNHCR’s view, the source of the feared harm is of little, if any, relevance to the finding whether persecution has occurred, or is likely to occur. It is axiomatic that the purpose and objective of the 1951 Convention is to ensure the protection of refugees. There is certainly nothing in the text of the Article that suggests the source of the feared harm is in any way determinative of that issue. UNHCR has consistently argued, therefore, that the concerns of well-foundedness of fear, of an actual or potential harm which is serious enough to amount to persecution, for a reason enumerated in the Convention are the most relevant considerations.⁵⁷

Accordingly, nexus can be potentially established with respect to a non-State actor or the State. In cases involving non-State actors, the causal link could be established in two different ways. The causal link may be satisfied if *either* the risk of harm by a non-State actor is for

⁵⁵ *UNHCR Handbook*, *supra* note 9, at para. 65.

⁵⁶ *DHS Supplemental Brief*, *supra* note 19, at 16.

⁵⁷ UNHCR, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, para. 19 (April 2001).

reasons related to a Convention ground, regardless of the State’s reasons for failing to protect against that harm; *or* if the risk of harm by the non-State actor is unrelated to a Convention ground, but the State’s unwillingness or inability to protect from that harm is for reasons of a Convention ground.⁵⁸

Refugee claims based on membership in a particular social group, in particular, often involve persecution by non-State actors. In undertaking the “either-or” nexus analysis, even what appears to be purely personal persecution may amount to a refugee claim if the State’s failure to protect is motivated by a Convention ground. For example, if in a domestic violence case a persecuting husband abuses his wife for mixed motives, say both for personal reasons and on account of her feminist political opinion and/or status in the relationship, nexus may be established because the husband’s persecution is “for reasons of” or “on account of” a Convention ground. Alternatively, in a case in which the husband abuses his spouse for purely personal reasons, nexus is established if the State’s failure to protect the wife was for reasons of a Convention ground such as State discrimination against women.⁵⁹

In contrast to this simple “either-or” approach to nexus, which is consistent for all types of claims, DHS proposes a new standard for analyzing nexus at least in cases involving membership of a particular social group based on membership in a family. DHS suggests that “the greater the role of a governmental actor in the persecution of a family, the more likely the family-based harm would be to be considered persecution on account of family membership

⁵⁸ *UNHCR Trafficking Guidelines*, *supra* note 46, at para. 29; UNHCR, UNHCR Position on Claims for Refugee Status Under the 1951 Convention relating to the Status of Refugees Based on a Fear of Persecution Due to an Individual’s Membership of a Family or Clan Engaged in a Blood Feud, para. 12 (Mar. 17, 2006) [hereinafter *UNHCR Position on Blood Feuds*]; *UNHCR Gender Guidelines*, *supra* note 50, at para. 21; and *UNHCR Guidelines on Membership of a Particular Social Group*, *supra* note 12, at para. 23. *See also*, *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant) and Fornah (Appellant) v. Secretary of State for the Home Department (Respondent)*, (2006) 2006 UKHL 46 (U.K.) at 102-103 (citing *Shah*, *supra* note 35).

⁵⁹ *UNHCR Guidelines on Membership of a Particular Social Group*, *supra* note 12, at para. 22; *see also UNHCR Advisory Opinion in Matter of R-A*, *supra* note 26, at 10.

rather than a personal dispute...”⁶⁰ One could turn this statement around by arguing that in the majority of cases involving persecution for reasons of membership of a particular family, the lesser the role/involvement of the government is -- in protecting the family members from the private persecutor – the more likely it is that the lack of state protection may be linked to one of the protected grounds.

There is nothing about cases involving family as a particular social group that suggest a different causal analysis from other types of asylum claims. In addition, adoption of the DHS approach would depart from the very same long-settled BIA jurisprudence on nexus cited with approval earlier in the DHS brief.⁶¹ DHS’s proposed framework takes the focus of nexus analysis away from its traditional concern with the reasons for the harm inflicted or feared and substitutes instead an unwarranted emphasis on the identity of the persecutor.

C. A Persecutor, Whether a State or a Non-State Actor, May Have Mixed Motives

Mixed motives do not preclude a refugee determination; rather, the causal link is satisfied if the persecutor acts “at least in part” on a Convention ground. In analyzing the causal requirement, it is immaterial whether the Convention ground is the sole or even the dominant cause of persecution, so long as it is a relevant contributing factor.⁶² United States law is consistent with this approach.⁶³

⁶⁰ *DHS Supplemental Brief*, *supra* note 19, at 16.

⁶¹ *Id.* at 12-13 (citing *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985); and *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996)).

⁶² *UNHCR Position on Blood Feuds*, *supra* note 58, at para. 13; *UNHCR Trafficking Guidelines*, *supra* note 46, at para. 30; *UNHCR Gender Guidelines*, *supra* note 50, at para. 20. *See also Michigan Guidelines*, *supra* note 48, at para. 13 (“[I]n view of the unique objects and purposes of refugee status determination, and taking account of the practical challenges of refugee status determination, the Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted. A Convention ground will be a contributing cause if its presence increases the risk of being persecuted.”)

⁶³ Even if the case at bar were subject to the provisions of the REAL ID Act, the asylum seeker would not be required to demonstrate that the persecution was *solely* on account of a Convention ground, so long as the protected ground was at least one central reason for persecution.

In cases where the persecutor is a non-State actor, it may be more likely to have multiple causes for the persecution. Cases frequently arise where more than one Convention ground is implicated, such as where individuals are persecuted on account of inter-linked, cumulative grounds such as religion and actual or imputed political opinion.

It is also common for cases to arise where both Convention grounds and non-Convention grounds are implicated. For example, victims of trafficking may sometimes warrant refugee protection. While the trafficker may be motivated by profit and may not have the intent to persecute on a Convention ground, that does not exclude the possibility that the targeting and selection of victims may be based on a Convention ground. In addition, the selection of trafficking victims may be based on a knowledge that the State will fail to protect a certain group because of race, religion, nationality, social group or political opinion.⁶⁴

In contrast, DHS identifies several types of claims involving non-State actors as being “especially unlikely” to be considered persecution based on family membership, namely “intra-family or inter-family disputes, vendettas, or vigilante actions, in the absence of any government involvement.” In identifying these types of claims, DHS appears to infer that these type of claims may be localized personal disputes or involve non-discriminatory criminality not protected under asylum laws.

DHS’s categorization of intra-family disputes as unlikely to merit protection is inconsistent with UNHCR’s and DHS’s previous endorsement of asylum eligibility for the domestic violence claim put forward in *Matter of R-A*.⁶⁵ In that case, DHS acknowledged that a “pattern of state inaction demonstrates that, while not active participants in the abuse, the state

⁶⁴ *UNHCR Trafficking Guidelines*, *supra* note 46, at para. 31.

⁶⁵ *Matter of R-A*, 22 I&N Dec. 906 (A.G. 2001; BIA 1999). See *DHS Position on Respondent’s Eligibility for Relief*, *supra* note 34; *UNHCR Advisory Opinion in Matter of R-A*, *supra* note 26.

authorities were unwilling to stop” the husband’s persecution of the wife.⁶⁶ UNHCR in an advisory opinion provided to then Attorney General Ashcroft concluded that Ms. Alvarado was a member of a particular social group as defined by her sex, marital status and her position in a society that condones discrimination against women. UNHCR also noted that the State of Guatemala failed to protect Ms. Alvarado for Convention-related reasons, namely its discrimination against women, its tolerance of both male dominance and abuse of married women by their husbands. This tolerance was evidenced by the authorities’ inaction and criticism of Ms. Alvarado because she transgressed social mores by no longer tolerating abuse by her husband and trying to involve the authorities to protect her.

DHS now argues that in intra-family cases, there is no nexus since the persecutor “cannot fairly be said to be actuated by any desire to overcome or suppress the other family member’s membership in the family.”⁶⁷ However, this formulation of the causal link is too limited, since it omits the parallel notion of “punishment” as a motivation, as elaborated in *Matter of Mogharrabi* cited earlier in the DHS brief.⁶⁸ An abusive spouse or parent could be motivated by a desire to *punish* the victimized family member for real or perceived failures to live up to their membership in the family.

In response to DHS’s suggestion that “inter-family disputes, vendettas, or vigilante actions” are “especially unlikely” to form the basis for a refugee claim, we also note that individuals targeted because of a blood feud may in some cases meet the refugee definition.⁶⁹ In blood feud cases, an individual is typically not attacked indiscriminately, but rather is targeted

⁶⁶ *DHS Position on Respondent’s Eligibility for Relief*, *supra* note 34, at 41, 43.

⁶⁷ *DHS Supplemental Brief*, *supra* note 19, at 18.

⁶⁸ *Id.* at 13.

⁶⁹ *UNHCR Blood Feud Guidelines*, *supra* note 58, at para. 2. The Guidelines note in para. 3 that generally, “a blood feud involves the members of one family killing the members of another family in retaliatory acts of vengeance which are carried out according to an ancient code of honour and behaviour,” though the exact situation may vary.

because he or she belongs to a particular family and on the basis of a long-established code. The targeted family member is not merely a victim of a private vendetta but also the victim of the code which regulates the blood feud tradition.⁷⁰ Not every blood feud claim will amount to a refugee claim. As in all cases, each element of the refugee claim must be established. However, it is equally the case that these types of claims should not be dismissed out of hand as merely involving personal vendettas.

With respect to DHS's mention of "the absence of any government involvement" in intra-family or inter-family disputes, vendettas, or vigilante actions,⁷¹ reference is made to the discussion in section III.B *supra*.

In sum, as in any particular social group analysis, there may be cases in which family members are targeted "for reasons of" or "on account of" their relationship in the family by either State or non-State actors and meet the refugee definition.

D. Refugees Fleeing Situations of Generalized Violence Must Meet the Same Causal Requirement as Other Refugees

While not commenting on the facts of this case, with regard to DHS's suggestion that the incidents of violence against the Thomases "occurred in a well-documented environment of rampant general crime," we note that while situations of generalized violence and lawlessness do not necessarily lead to a refugee claim, neither are refugee claims precluded by generally unsafe country conditions. In situations of war or generalized violence, the nexus assessment should be conducted in the same manner as it is in other claims, and no additional requirements should be applied.⁷²

⁷⁰ *Id.* at para. 14.

⁷¹ *DHS Supplemental Brief, supra* note 19, at 17.

⁷² See *Michigan Guidelines, supra* at note 48, at para. 17. (While applicants in such situations must establish the same elements as required by the refugee definition, "They are nonetheless entitled to be recognized as refugees if their race, religion, nationality, membership of a particular social group or political opinion is a contributing factor to their well-founded fear of being persecuted in such circumstances.")

In fact, war and violence themselves are often the very instruments of persecution, used by persecutors to target specific groups on account of their race, religion, nationality, membership of a particular social group or political opinion.⁷³ Furthermore, in some situations the very purpose of the violence is to persecute members of protected groups, and the conflict is deeply rooted in a Convention ground. As such, it is important to examine the context of the conflict in question.

For example, in Colombia, where an ongoing internal armed conflict has resulted in generalized violence and has forced large numbers to flee, many individuals have a well-founded fear of persecution on account of Convention grounds.⁷⁴ It is imperative to identify those groups who are specifically targeted for reasons of a protected ground amidst all the other victims of widespread human rights violations that are perpetrated for reasons unrelated to the Convention.⁷⁵ These groups are distinguishable from the general population (which is also at risk of harm) because they are specifically targeted for persecution on account of a protected characteristic, or they are more vulnerable than the general population because of such a characteristic, and are thus more likely to be harmed or less likely to be protected.

In cases where they are at greater risk of persecution than the general population, and that increased risk is on account of a Convention-related ground, circumstantial evidence of nexus exists.⁷⁶ Furthermore, as the Michigan Guidelines advise, the applicant's risk of persecution need not be greater than the general population's, but the nexus requirement is met if the

⁷³ UNHCR, *International Protection Considerations Regarding Colombian Asylum-Seekers and Refugees*, para. 86 (March 2005) [hereinafter *Colombian Guidelines*].

⁷⁴ *Id.* at para. 83.

⁷⁵ Groups that may have refugee claims in addition to other more generally applicable humanitarian law claims include actual or perceived supporters of parties to the conflict; former members of parties to the conflict; municipal and departmental authorities and former authorities; persons involved in the administration of justice; human rights defenders; trade union leaders; journalists; individuals with a high public or community profile; indigenous persons and Afro-Colombians; child soldiers; marginalized social groups; and victims of trafficking. *Id.* at paras. 91- 132.

⁷⁶ *Michigan Guidelines*, *supra* note 48, at para. 15.

Convention ground is “causally connected to the applicant’s predicament, irrespective of whether other individuals or groups also face a well-founded fear of being persecuted for the same or a different Convention ground.”⁷⁷

Allowing individualized claims where the victim’s circumstances involve a situation of war or generalized violence will not result in all victims of such general conditions being recognized as refugees. Each asylum seeker will still need to establish each element of the refugee definition.

CONCLUSION

In conclusion, UNHCR respectfully urges the Board to consider the relevant international standards when determining a framework for examining claims based on membership of a particular social group and that it not adopt the proposed approach asserted in DHS’s Supplemental Brief.

Respectfully submitted,

H. Elizabeth Dallam, Esq.
Senior Protection Office
Office of the United Nations
High Commissioner for Refugees
1775 K Street, N.W., Suite 300
Washington, D.C. 20006

Kate Jastram, Esq.
Lecturer in Residence
University of California, Berkeley
School of Law (Boalt Hall)
455 Boalt Hall
Berkeley, CA 94720

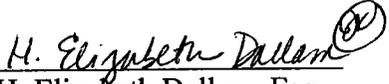
⁷⁷ *Id.* at para. 16.

CERTIFICATE OF SERVICE

I, H. Elizabeth Dallam, hereby certify that on this 25th day of January, 2007, I served a copy of the foregoing brief upon the parties by Federal Express overnight delivery to:

George R. Martin
Appellate Counsel
U.S. Department of Homeland Security
5113 Leesburg Pike, Suite 200
Falls Church, VA 22041

Errol I. Horwitz, Esq.
Edward M. Bialack, Esq.
5550 Topanga Canyon Blvd., Suite 200
Woodland Hills, CA 91367


H. Elizabeth Dallam, Esq.
Protection Officer
United Nations High Commissioner for Refugees
Regional Office for the United States and the Caribbean
1775 K Street NW, Suite 300
Washington, DC 20006

**GUIDELINES ON INTERNATIONAL PROTECTION:
“Membership of a particular social group” within the context
of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol
relating to the Status of Refugees**

UNHCR issues these Guidelines pursuant to its mandate, as contained in *the Statute of the Office of the United Nations High Commissioner for Refugees*, and Article 35 of the *1951 Convention relating to the Status of Refugees and/or its 1967 Protocol*. These Guidelines complement the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Reedited, Geneva, January 1992)*. They further supersede IOM/132/1989 – FOM/110/1989 *Membership of a Particular Social Group* (UNHCR, Geneva, 12 December 1989), and result from the Second Track of the Global Consultations on International Protection process which examined this subject at its expert meeting in San Remo in September 2001.

These Guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determinations in the field.

**“Membership of a particular social group” within the context of
Article 1A(2) of the 1951 Convention and/or its 1967 Protocol
relating to the Status of Refugees**

I. INTRODUCTION

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

II. SUBSTANTIVE ANALYSIS

A. Summary of State Practice

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

² See UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Reedited, Geneva, January 1992), paragraphs 66-67, 77; and see also Summary Conclusions – Membership of a Particular Social Group, no. 3.

5. Judicial decisions, regulations, policies, and practices have utilized varying interpretations of what constitutes a social group within the meaning of the 1951 Convention. Two approaches have dominated decision-making in common law jurisdictions.
6. The first, the “protected characteristics” approach (sometimes referred to as an “immutability” approach), examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status). Human rights norms may help to identify characteristics deemed so fundamental to human dignity that one ought not to be compelled to forego them. A decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it. Applying this approach, courts and administrative bodies in a number of jurisdictions have concluded that women, homosexuals, and families, for example, can constitute a particular social group within the meaning of Article 1A(2).
7. The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large. This has been referred to as the “social perception” approach. Again, women, families and homosexuals have been recognized under this analysis as particular social groups, depending on the circumstances of the society in which they exist.
8. In civil law jurisdictions, the particular social group ground is generally less well developed. Most decision-makers place more emphasis on whether or not a risk of persecution exists than on the standard for defining a particular social group. Nonetheless, both the protected characteristics and the social perception approaches have received mention.
9. Analyses under the two approaches may frequently converge. This is so because groups whose members are targeted based on a common immutable or fundamental characteristic are also often perceived as a social group in their societies. But at times the approaches may reach different results. For example, the social perception standard might recognize as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity—such as, perhaps, occupation or social class.

B. UNHCR’s Definition

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

a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which

is otherwise fundamental to identity, conscience or the exercise of one's human rights.

12. This definition includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.³
13. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart.

The role of persecution

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

No requirement of cohesiveness

15. It is widely accepted in State practice that an applicant need not show that the members of a particular group know each other or associate with each other as a group. That is, there is no requirement that the group be “cohesive.”⁶ The relevant inquiry is whether there is a common element that group members share. This is similar to the analysis adopted for the other Convention grounds, where there is no requirement that members of a religion or holders of a political opinion associate together, or belong to a “cohesive” group. Thus women may constitute a particular social group under certain circumstances based on the common characteristic of

³ For more information on gender-related claims, see UNHCR's *Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/01, 10 May 2002), as well as Summary Conclusions of the Expert Roundtable on Gender-Related Persecution, San Remo, 6-8 September 2001, no. 5.

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

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

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

sex, whether or not they associate with one another based on that shared characteristic.

16. In addition, mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.⁷

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

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

Relevance of size

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

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

20. Cases asserting refugee status based on membership of a particular social group frequently involve claimants who face risks of harm at the hands of non-State actors, and which have involved an analysis of the causal link. For example, homosexuals may be victims of violence from private groups; women may risk abuse from their husbands or partners. Under the Convention a person must have a well-founded fear of being persecuted and that fear of being persecuted must be based on one (or more) of the Convention grounds. There is no requirement that the persecutor be a State actor. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.⁹
21. Normally, an applicant will allege that the person inflicting or threatening the harm is acting for one of the reasons identified in the Convention. So, if a non-State actor inflicts or threatens persecution based on a Convention ground and the State is

⁷ See UNHCR’s Handbook, paragraph 79.

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

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

unwilling or unable to protect the claimant, then the causal link has been established. That is, the harm is being visited upon the victim for reasons of a Convention ground.

22. There may also arise situations where a claimant may be unable to show that the harm inflicted or threatened by the non-State actor is related to one of the five grounds. For example, in the situation of domestic abuse, a wife may not always be able to establish that her husband is abusing her based on her membership in a social group, political opinion or other Convention ground. Nonetheless, if the State is unwilling to extend protection based on one of the five grounds, then she may be able to establish a valid claim for refugee status: the harm visited upon her by her husband is based on the State's unwillingness to protect her for reasons of a Convention ground.
23. This reasoning may be summarized as follows. The causal link may be satisfied: (1) where there is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.