

**In The United States Court of Appeals
for the First Circuit**

DIMBIL NOOR HASSAN,
Petitioner,

v.

JEFFERSON B. SESSIONS, III,
ATTORNEY GENERAL,
Respondent.

ON A PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

**THE UNITED NATIONS HIGH COMMISSIONER
FOR REFUGEES' *AMICUS CURIAE* BRIEF
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*

The Office of the United Nations High Commissioner for Refugees (“UNHCR”)¹ has a direct interest in this matter as the organization entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees and others of concern, and together with national governments, for seeking permanent solutions for refugees’ problems. Statute of the Office of the UNHCR, U.N. Doc. A/RES/428(V) ¶ 1 (Dec. 14, 1950). UNHCR fulfills its mandate by, among other things, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.” *Id.* ¶ 8(a). UNHCR’s supervisory responsibility is also reflected in the Preamble and Article 35 of the *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137 (“1951 Convention”)² and Article 2 of the *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 (“1967 Protocol”).³ Those instruments obligate States to cooperate with

¹ UNHCR represents that Petitioner consents to this filing, while Respondent takes no position. No person or entity other than UNHCR and its outside counsel authored this brief or provided any funding related to it.

² <<http://www.unhcr.org/3b66c2aa10.html>>

³ <<http://www.unhcr.org/3b66c2aa10.html>>

UNHCR in the exercise of its mandate and to facilitate its supervisory role.

UNHCR, which has won two Nobel Peace Prizes for its work, works in some 130 countries at a time when there are 65.6 million people affected by forced displacement worldwide. The views of UNHCR are informed by its more than six decades of experience supervising the treaty-based system of refugee protection. UNHCR's interpretation of the provisions of the *1951 Convention* and its *1967 Protocol* are both authoritative and integral to promoting consistency in the global regime for the international protection of refugees. Accordingly, “[the] Supreme Court has consistently turned [to UNHCR] for assistance in interpreting [U.S.] obligations under the Refugee Convention.” *N-A-M v. Holder*, 587 F.3d 1052, 1061–62 (10th Cir. 2009) (Henry, J., concurring) (per curiam) (collecting cases).

UNHCR exercises its supervisory responsibility in part by issuing interpretative guidelines on the meaning of international refugee instruments, in particular the *1951 Convention* and its *1967 Protocol*. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, U.N. Doc. HCR/1P/4/ENG/REV.3 (1979, re-edited Jan. 1992; reissued Dec. 2011) (“*Handbook*”)⁴ represents the first comprehensive such guidance. At the request of States, including the

⁴ <<http://www.unhcr.org/3d58e13b4.html>>

United States, the *Handbook* has subsequently been complemented by a number of UNHCR *Guidelines on International Protection*.

UNHCR has a specific interest in this matter because the Board's approach conflicts with UNHCR guidance in assessing whether States are "unable or unwilling" to provide effective protection against non-State agents of persecution. UNHCR's guidance is relevant to this Court's interpretation of the *1951 Convention* and its *1967 Protocol*, as implemented in U.S. law at section 101(a)(42) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(42) (2006).

UNHCR also has a specific interest in this matter because the Board's decision carries serious implications for certain groups that UNHCR is charged with protecting: those fleeing persecution at the hands of non-State actors. UNHCR respectfully seeks to explain its authoritative guidance on the "unable or unwilling" standard and assist this Court in fulfilling the United States' international and domestic legal obligations.

Consistent with its approach in other cases, UNHCR takes no position directly on the merits of Petitioner's claim.

SUMMARY OF ARGUMENT

This case presents the question of how to analyze whether a State is "unable or unwilling" to protect its citizens in the context of interpreting the refugee definition. This question should be answered in a manner

consistent with the United States' binding obligations under the *1951 Convention* and its *1967 Protocol*, as implemented in U.S. law.

States cannot always protect their citizens from non-State agents of persecution. Criminal gangs, insurgents, and other non-State agents threaten the freedom and safety of people living in affected areas. When States confront those threats, progress toward combatting non-State agents can be halting and uncertain. Accordingly, evidence that conditions are improving does not by itself suggest that a State can offer effective protection.

International and domestic law require holistic evaluation of country conditions in assessing a State's ability to protect individuals. The focus of the analysis is not whether a State offers some protection or has made some progress toward combatting non-State persecutors. Rather, the appropriate inquiry is whether the State is unable or unwilling to offer effective protection to the individual concerned.

States may be unable or unwilling to offer effective protection despite exercising control in some areas or over some groups. States need not be "completely helpless" against the non-State groups for persecution to occur. Only where States exercise effective control in preventing persecution, can a decision-maker's analysis begin with a presumption of protection from persecution. Especially in situations of armed conflict, where power structures shift rapidly, decision-makers must carefully evaluate a State's ability and willingness to offer effective protection in

word and in deed. To do otherwise places at risk the cornerstone of international protection, the principle of *non-refoulement*, as outlined in international and domestic law and may invalidate otherwise meritorious claims. A narrow inquiry like the one the Board undertook in this case would also place at risk vulnerable populations targeted by non-State actors, including children, domestic violence victims, gang violence victims, and lesbian, gay, bisexual, transgender, and intersex (“LGBTI”) individuals.

ARGUMENT

I. THE UNITED STATES IS BOUND BY THE *1951 CONVENTION* AND ITS *1967 PROTOCOL* RELATING TO THE STATUS OF REFUGEES.

The *1951 Convention* and its *1967 Protocol* are the key international instruments governing the protection of refugees and address who is a refugee, his or her rights and responsibilities, and the legal obligations of States. The *1967 Protocol* binds parties to comply with the substantive provisions of Articles 2 through 34 of the *1951 Convention* with respect to “refugees” as defined in Article 1A(2) of the *1951 Convention*. *1967 Protocol* Art. 1 ¶¶ 1–2. The *1967 Protocol* removes the geographical and temporal limitations from the *1951 Convention* definition, thus universalizing the refugee definition. *Id.* ¶¶ 2–3. The core of both the *1951 Convention* and its *1967 Protocol* is the obligation to provide international protection to refugees and to safeguard the principle

of *non-refoulement*, which is the obligation on States not to return a refugee to any country where he or she would face persecution or a real risk of serious harm. In 1968, the United States acceded to the *1967 Protocol*,⁵ thereby binding itself to the international refugee protection regime and the definition of a refugee in the *1951 Convention*.

Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), expressly to “bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees,” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (citing H.R. Rep. No. 96-781, at 19). As the Supreme Court has recognized, “one of Congress’ primary purposes’ in passing the Refugee Act was to implement the principles agreed to in the 1967 [Protocol]” *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (quoting *Cardoza-Fonseca*, 480 U.S. at 436–37). The Refugee Act thus serves to bring the United States into compliance with its international obligations under the *1967 Protocol*, and through this Protocol the *1951 Convention*. It should be interpreted and applied in a manner consistent with those instruments. *See Cardoza-Fonseca*, 480 U.S. at 437 (noting that by enacting the 1980 Refugee Act, Congress intended “that the new statutory definition of ‘refugee’ be interpreted in conformance with the Protocol’s definition.”).

⁵ H.R. Rep. No. 96-781, at 19 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. 160, 160; S. Exec. Doc. No. 14, 90th Cong., 2d Sess., 4 (1968).

II. UNHCR PROVIDES AUTHORITATIVE GUIDANCE IN EVALUATING CLAIMS OF PERSECUTION BY NON-STATE ACTORS.

Over the more than 60 years of its existence, UNHCR has issued guidance on the interpretation of the refugee definition. The most authoritative of these is the UNHCR *Handbook*, which is internationally recognized as an important source of interpretation of international refugee law. It was prepared in 1979 at the request of member States, including the United States, to provide guidance to governments in applying the terms of the *1951 Convention* and its *1967 Protocol*. The Supreme Court has determined that, although the *Handbook* is not legally binding on U.S. officials, it nevertheless provides “significant guidance” in construing the *1967 Protocol* and in giving content to the obligations established in it. *See Cardoza-Fonseca*, 480 U.S. at 439 n.22; *see also Matter of S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1996).

The UNHCR *Handbook* recognizes that, although persecution “is normally related to action by the authorities of a country[,]” actions committed by non-State actors constitute persecution “if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.” *Handbook* ¶ 65. This Court has held as much. *See, e.g., Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014); *Ivanov v. Holder*, 736 F.3d 5, 12 (1st Cir. 2013).

In this case, the Board construed the “unable or unwilling” standard too narrowly by requiring the Petitioner to demonstrate “complete

helplessness” on the part of the State. B.I.A. Op. at 2. UNHCR guidance makes clear that a claimant need only show that the State is unable or unwilling to offer effective protection.

It is the view of UNHCR that the Board further misconstrued the standard by crediting Somalia’s incremental territorial gains as evidence that it is able to prevent persecution by al-Shabaab. *Id.* Such marginal gains do not necessarily reflect an ability or willingness to provide protection and are alone insufficient to reject an asylum claim.

A. The Board Construed the “Unable or Unwilling” Standard Too Narrowly.

The Board’s unduly narrow construction of the “unwilling or unable” standard diverges from UNHCR guidance in two key ways. First, the Board’s focus on the “complete helplessness” of a State to control non-State actors neglects the Board’s obligation to determine refugee status based on a holistic consideration of interrelated elements. In this regard, the Board failed to perform the exacting analysis necessary to evaluate State control of non-State actors in situations of armed conflict and violence like Somalia, where power structures shift rapidly. Second, the Board misapplied the presumption of protection by holding that a State is presumed to provide effective protection unless a claimant demonstrates that the State exercises *no* control over non-State actors. Such a presumption attaches only where State authorities exercise effective control.

1. Refugee Status Must be Determined by a Holistic Consideration of Interrelated Elements.

The *1951 Convention* created a definition of “refugee” to be used by all States party. *See 1951 Convention*, Art. I. UNHCR’s interpretive guidance on Article I instructs decision-makers to “have regard to all the relevant circumstances of the case.” UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* ¶ 8 (Apr. 2001).⁶ This guidance makes clear that the determination of refugee status requires a holistic and integrated analysis. *See id.* ¶ 7.

To properly perform that holistic analysis, decision-makers must “have both a full picture of the asylum-seeker’s personality, background and personal experiences, as well as an analysis and up-to-date knowledge of all the relevant objective circumstances in the country of origin.” *Id.* ¶ 8. The analysis “requires a judicious balancing” of several factors, including “the general state of law, order and justice in the country, and its effectiveness, including the resources available and the ability and willingness to use them properly and effectively to protect residents.” *Id.* ¶ 15. The level of political stability; the existence of non-discriminatory laws to protect fundamental rights and freedoms; the existence of machinery to ensure law and order and redress where human rights may be violated; the general level of respect for human rights; and

⁶ <<http://www.refworld.org/docid/3b20a3914.html>>

the level of national reconciliation and implementation of peace agreements and accords also inform the analysis. *See id.* ¶ 55.

Holistic evaluation is particularly important with respect to a State's ability and willingness to offer effective protection against persecution by non-State actors. The effectiveness of the protection depends on both *de jure* and *de facto* capability and willingness of State authorities to provide protection. *See, e.g.,* UNHCR, *Guidelines on International Protection No. 7: The application of 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*, U.N. Doc. HCR/GIP/06/07 ¶ 22 (Apr. 7, 2006).⁷ Despite a State's best efforts, there may be incongruity between the State's avowed commitments and the reality on the ground. The mere existence of a law prohibiting certain persecutory acts will not of itself be sufficient, nor will some successes in combatting persecution.

For example, UNHCR guidance on the status of victims of human trafficking provides:

Whether the authorities in the country of origin are able to protect victims or potential victims of trafficking will depend on whether legislative and administrative mechanisms have been put in place to prevent and combat trafficking, as well as to protect and assist the victims and on

⁷ <<http://www.refworld.org/docid/443679fa4.html>>

whether these mechanisms are effectively implemented in practice.

Id. Decision-makers must examine whether a State is, in reality, effectively implementing promised protections.

Effective implementation of promised protections may be especially limited in situations of internal armed conflict. By their very nature, situations of armed conflict cast doubt on an asylum-seeker's ability to avail him- or herself of State protection. *See Handbook* ¶ 98. “[A] state of war, civil war or other grave disturbance[may] prevent[] the country of nationality from extending protection or make[] such protection ineffective.” *Id.* Accordingly, the analysis to be undertaken is whether the applicant's fear continues to be well-founded, regardless of the steps taken to prevent persecution or serious harm.

The analysis must be comprehensive and look to more than incremental progress because, as UNHCR has recognized, in these situations, “the division between state and non-state actors is not always clear, especially as power shifts, situations overlap and alliances change.” UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, U.N. Doc. HCR/GIP/16/12 ¶ 29 (Dec. 2, 2016).⁸ The fluidity of agents of

⁸ <<http://www.refworld.org/docid/583595ff4.html>>

persecution—like criminal gangs, paramilitary groups, militias, insurgents, bandits, pirates, terrorist organizations, and private military or security companies—complicates a State’s ability to offer effective protection. *See id.* ¶ 28. And because these situations are often “characterized by civil war, anarchy or breakdown of law and order in the whole or parts of the territory,” and may lead to serious institutional weakness, “the constituted State authority may have hardly any control over agents of persecution.” UNHCR, *Agents of Persecution – UNHCR Position* ¶ 6 (Mar. 14, 1995).⁹

In evaluating an application from such an area, UNHCR Guidelines instruct that “[t]he particularities of the situation of armed conflict and violence will be relevant, since the state may be prevented from extending protection to affected populations.” *Guidelines on Armed Conflict* ¶ 30. A State may in fact be unable or unwilling to extend protection “where it has lost control over its territory and population or where such control is fluid or uncertain.” *Id.* Blanket conclusions that a State is offering effective protection, based on the State’s efforts or progress against a non-State group may not adequately reflect the realities of the situation.

Indeed, in undertaking the required holistic and comprehensive analysis in a case such as this one, UNHCR’s Position on Returns to

⁹ <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=3ae6b31da3>>

Southern and Central Somalia states that “even in those cities that have been recovered by AMISOM/SNAF [African Union Mission in Somalia/Somali National Armed Forces], the presence of Al-Shabaab is reported to remain significant at the urban periphery and in some parts of these cities. . . . Some analysts maintain that it is more correct to say that the FGS [Federal Government of Somalia] ‘has influence’ over these cities than to say that the cities are under the effective control of the FGS.” UNHCR, *UNHCR Position on Returns to Southern and Central Somalia (Update I)* ¶ 8 (May 2016).¹⁰ “Furthermore, UNHCR considers that in relation to a proposed IFA/IRA [Internal Flight Alternative/Internal Relocation Alternative] for Somalis fleeing persecution or serious harm by Al-Shabaab, protection from the State is generally not available in Mogadishu even though the city is under the control of government forces supported by AMISOM troops.” *Id.* ¶ 17.

To reconcile a State’s legal obligations concerning refugee protection with the realities faced by individuals targeted by non-State actors, adjudicators tasked with making refugee status determinations must take a comprehensive view of multiple independent and reliable sources and understand the situation in an applicant’s country of origin. As relevant here, by looking only at efforts to combat violence by private actors—and by finding that those efforts indicated something more than

¹⁰ <<http://www.refworld.org/docid/573de9fe4.html>>

“complete helplessness”—the Board’s analysis was incomplete. Rather than one indicator of State control preoccupying the Board at the expense of any indicia to the contrary, the Board must examine all of the circumstances of an asylum-seeker’s application to determine whether a State is unable or unwilling to offer effective protection.

2. A Presumption of Protection from Persecution Attaches Only Where State Authorities Exercise Effective Control.

The hallmark of State protection is the State’s willingness and ability to provide *effective* protection, which requires effective control of non-State actors. *See Handbook* ¶ 65 (acts may constitute persecution “if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable to offer effective protection.”).¹¹ The Board presumed that Somalia offers protection from persecution because it has made some progress in its fight against al-Shabaab. Under the *1951 Convention* and the *1967 Protocol*, however, the question is not whether

¹¹ The Council of the European Union adopted a similar standard: “Protection is generally provided when the [State] take[s] reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.” Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, art. 7(2), 2004 O.J. (L 304) 16 (EU), *available at* <http://www.refworld.org/docid/4157e75e4.html>.

some progress is being made or whether some protections exist. Rather, the question is whether the State is either unable or unwilling to provide effective protection against harm to individuals targeted by non-State actors.

“The availability of protection requires an assessment of the effectiveness, accessibility and adequacy of protection in the individual case.” UNHCR, *Statement relating to Appeal Case UM 12033-09 before the Stockholm Migration Court (Availability of State protection in Iraq)* ¶ 3.1.4 (Jan. 2010).¹² UNHCR has undertaken this assessment in other cases. For example, in a case relating to an Iraqi asylum-seeker, UNHCR analyzed the effectiveness, accessibility, and adequacy of protection in Iraq, and was of the view that where the “level of instability, violence and human rights violations by various actors remains,” it was “not appropriate to establish a presumption that the authorities are able to offer protection from persecution or harm emanating from non-State actors.” *Id.* ¶¶ 5.1, 6.3.

Additional UNHCR guidance emphasizes that there is no presumption of protection unless a State exercises effective control over non-State actors. For example, UNHCR Guidelines issued with respect to whether asylum-seekers may flee or be relocated internally assert:

A state may, for instance, have lost effective control over its territory and thus not be able to

¹² <<http://www.refworld.org/docid/4b4b3d762.html>>

protect. Laws and mechanisms for the claimant to obtain protection from the State may reflect the State's willingness, but *unless they are given effect in practice*, they are not of themselves indicative of the availability of protection.

UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/03/04 ¶ 15 (July 23, 2003) (emphasis added).¹³

Accordingly, a State's efforts to control non-State agents of persecution, or its incremental progress against them, do not alone warrant a presumption that the State is providing effective protection. Instead, only when a State *effectively* controls non-State actors may an adjudicator begin the inquiry with a presumption of protection.

B. Evidence of Improved Country Conditions is Insufficient to Reject an Asylum Claim.

In many countries, the conditions faced by individuals targeted by non-State actors stand side-by-side with welcome and necessary change. But under the *1951 Convention* and the *1967 Protocol*, the question is not whether some progress is being made to combat persecution by non-State actors. Nor is it whether a State exercises some control over them. Rather, the ultimate question is whether the State is able and willing to provide effective protection. *See Handbook* ¶ 65.

¹³ <<http://www.refworld.org/docid/3f2791a44.html>>

The Board’s focus on Somalia’s territorial gains from al-Shabaab conflicts with UNHCR guidance that warns against emphasizing reforms in situations where progress remains fluid. *See* UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/12/01 ¶ 37 (Oct. 23, 2012).¹⁴ This Court has accepted the danger in focusing on interim progress. *See Khattak v. Holder*, 704 F.3d 197, 206 (1st Cir. 2013). In *Khattak*, this Court held that although military progress against the Taliban “indicates that the Pakistani government is *willing* to take on the Taliban, such action does not show that the Pakistani government is *able* to protect its citizens from Taliban attacks.” *Id.* (emphasis in original). So too here. Somalia’s progress against al-Shabaab may indicate a willingness, but not necessarily an ability to provide effective protection to its citizens.

Instead of focusing on incremental gains, decision-makers must examine several factors to determine whether the State has made sufficient progress to allay an asylum-seeker’s threat of persecution. These factors include: the level of political stability; the existence of non-dis-

¹⁴ <<http://www.refworld.org/docid/50348afc2.html>>

criminatory laws to protect fundamental rights and freedoms; the existence of machinery to ensure law and order and redress where human rights may be violated; the general level of respect for human rights; and the level of national reconciliation and implementation of peace agreements and accords. *See Interpreting Article 1, supra* note 6 ¶ 55.

UNHCR has also provided guidance for when changed circumstances are sufficiently objective, verifiable, stable, durable, and effective to evince State ability and willingness to protect against non-State persecutors. *See UNHCR, Conclusions Adopted by the Executive Committee on the International Protection of Refugees, No. 69 (XLIII) Cessation of Status* (1992).¹⁵ In general, changed circumstances must hold for a minimum of 12–18 months before they can be considered reliable. *See UNHCR, Discussion Note on the Application of the “ceased circumstances” Cessation Clauses in the 1951 Convention*, U.N. Doc. EC/SCP/1992/CRP.1 ¶ 12 (Dec. 20, 1991).¹⁶

This guidance concerning the duration of stability is particularly important when assessing asylum claims from areas of armed conflict. UNCHR’s *Note on Cessation Clauses* provides:

Where the changes take place in a violent environment, where warring groups or factions have yet to be reconciled, where repatriation itself

¹⁵ <<http://www.refworld.org/pdfid/4b28bf1f2.pdf>>

¹⁶ <<http://www.refworld.org/docid/3ae68ccf10.html>>

has provoked new clashes or killings, where the new regime has yet to govern effectively over the entire territory and where there is a lack of human rights guarantees, the changes are manifestly not yet confirmed, and the period for assessing their durability will be longer.

UNHCR, *Note on Cessation Clauses*, EC/47/SC/CRP.30 ¶ 22 (May 30, 1997).¹⁷ UNHCR recognizes that territorial gains may be fleeting, and “[u]ntil national reconciliation takes root and political changes are stable and firmly in place, such changes cannot be considered durable.” *Id.*

As with the larger question of refugee status, the cornerstone of the changed circumstances analysis is whether the new situation allows the State to provide effective protection. Effective protection “means more than mere physical security or safety,” and includes “the existence of basic structures of administration including a functioning system of law and justice.” *Id.* ¶ 25. “Brief periods of peace [are] insufficient.” *Id.* ¶ 26.

In this case, the Board intimated that when a State makes every effort to combat violence by private actors and makes partial progress, the violence in such instances does not constitute persecution. In addition to contradicting UNHCR guidance described above, that holding appears to be based on a misreading of this Court’s decisions in *Khan v. Holder*, 727 F.3d 1 (1st Cir. 2013) and *Burbiene v. Holder*, 568 F.3d 251 (1st Cir. 2009). In *Khan*, this Court rejected a petition for review based

¹⁷ <<http://www.refworld.org/docid/47fdfaf1d.html>>

on alleged persecution by the Taliban. 727 F.3d at 9. The petitioner failed to show that Pakistan was “unable or unwilling” to protect him from the Taliban because the Pakistani police had responded to his complaints by arresting Taliban members and “calling on the Pakistani army to secure the area,” which “improved the situation” but did not eradicate Taliban presence entirely. *Id.* at 7–8 (internal alterations omitted).

In so holding, this Court quoted from its earlier decision in *Burbiene*. It noted that “where a government is ‘making every effort to combat’ violence by private actors, and its ‘inability to stop the problem’ is not distinguishable ‘from any other government’s struggles,’ the private violence has no government nexus and does not constitute persecution.” *Id.* at 7 (quoting *Burbiene*, 568 F.3d at 255–56). The Board appears to have seized upon those quotes without analyzing them in their proper context.

Burbiene involved asylum claims based on fear of victimization to human trafficking in the sex trade in Lithuania. 568 F.3d at 252. In conducting a holistic analysis of whether Lithuania was “able and willing” to offer protection against human traffickers, this Court employed a phrase used by the Immigration Judge, noting that the Lithuanian government was “making every effort to combat” human trafficking. *Id.* at 255. Those efforts included forming a joint task force that uncovered an organized crime ring that had transported nearly 100 young girls and women to work in the sex trade and opening 24 criminal cases against

the traffickers. *Id.* Thus, this Court observed that “Lithuania’s inability to stop the problem is [not] distinguishable from any other government’s struggles to combat a criminal element.” *Id.*

The *Burbiene* Court’s analysis thus respected international legal obligations. Rather than using Lithuania’s efforts and laudable progress against the scourge of human trafficking as a broad brush to reject asylum applications, this Court combed the record for evidence that Lithuania was “able and willing” to protect the claimant. The Court conducted a holistic analysis of relevant country conditions and recognized that, although Lithuania had made progress in combatting human trafficking, its partial success did not necessarily mean it was “able and willing” to offer effective protection. The Court did not hold that *any* effort and *any* partial success absolves the decision-maker of its duty to conduct rigorous analysis of the State’s “ability and willingness” to offer effective protection. That rigorous analysis is necessary in this case, even in light of Somalia’s incremental territorial gains from al-Shabaab.

III. THE STANDARD ARTICULATED IN THE BOARD’S DECISION WOULD UNDERMINE PROTECTION FOR VULNERABLE GROUPS.

The Board’s interpretation of the “unable or unwilling” standard carries grave implications for otherwise meritorious asylum claims. The Board’s stringent standard places at risk vulnerable groups like chil-

dren, domestic violence victims, gang violence victims, and LGBTI individuals whose persecution is especially likely to emanate from non-State actors.

For example, in the context of child asylum cases UNHCR has recognized that “the agent of persecution is frequently a non-State actor.” UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/09/08 ¶ 37 (Dec. 22, 2009).¹⁸ And in child trafficking cases specifically, adjudicators must focus on “indications of possible complicity of the child’s parents, other family members or caregivers in arranging the trafficking or consenting to it.” *Id.* ¶ 28. Under the Board’s articulation of the “unable or unwilling” standard, children suffering persecution by their parents, caretakers, or other community and religious leaders may be without recourse. Unless the child could demonstrate that the State is “completely helpless” in protecting him or her from persecution that may take place in private, out of the view of State authorities, the Board would reject an asylum claim. Such an outcome is incompatible with authoritative UNHCR guidance instructing decision-makers to evaluate whether “the State or its agents have taken sufficient action to protect the child . . . on a case-by-case basis.” *Id.* ¶ 37.

¹⁸ <<http://www.refworld.org/docid/4b2f4f6d2.html>>

Women and domestic violence victims are likewise vulnerable to suffering harm by non-State actors. In these types of cases too, contextual analysis of State “ability and willingness” to protect is critical. For example, UNHCR has advised that “[i]f the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution.” UNHCR, *Guidelines on International Protection No. 1: 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*, U.N. Doc. HCR/GIP/02/01 ¶ 15 (May 7, 2002).¹⁹ Similarly, if a husband abuses his wife and the State is unwilling to protect her because she is a woman, she can establish fear of persecution. See UNHCR, *Guidelines on International Protection No. 2: “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*, U.N. Doc. HCR/GIP/02/02 ¶ 22–23 (May 7, 2002).²⁰ In a strictly patriarchal State where women are granted few rights, the State may not necessarily “condone” such private violence, and it may not be “completely helpless”

¹⁹ <<http://www.refworld.org/docid/3d36f1c64.html>>

²⁰ <<http://www.refworld.org/docid/3d36f23f4.html>>

to prevent it. But the Board’s decision would nevertheless foreclose a claim of persecution.

Victims of gang violence are also put at risk by the Board’s decision. Like State efforts to combat terrorist groups, successes combatting gang violence are unlikely to be resounding and complete. Thus, States which have implemented constitutional reforms, new laws, and/or anti-gang taskforces have shown neither a tolerance of, nor a complete helplessness against, gang activity. However, under the Board’s standard, those fleeing gang violence could not make out a claim of persecution.²¹ As UNHCR has noted in its *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* ¶ 27 (Mar. 31, 2010),²² “[a] State is not expected to guarantee the highest possible standard of protection to all its citizens all the time, but protection needs to be real and effective.”

The divergence between a State’s stated intentions to provide effective protection from persecution and its actual ability and willingness

²¹ *But see*, UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras*, U.N. Doc. HCR/EG/HND/16/03, at 36–39 (July 27, 2016), available at <http://www.refworld.org/pdfid/579767434.pdf>; *see also*, UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, U.N. Doc. HCR/EG/SLV/16/01, at 22–23 (Mar. 15, 2016), available at <http://www.refworld.org/docid/56e706e94.html>.

²² <<http://www.refworld.org/docid/4bb21fa02.html>>

to do so also affects LGBTI asylum-seekers. As described in the *Sexual Orientation Guidelines*:

Where the legal and socio-economic situation of LGBTI people is improving in the country of origin, the availability and effectiveness of State protection needs to be carefully assessed based on reliable and up-to-date country of origin information. The reforms need to be more than merely transitional. Where laws criminalizing same-sex conduct have been repealed or other positive measures have been taken, such reforms may not impact in the immediate or foreseeable future as to how society generally regards people with differing sexual orientation and/or gender identity.

Sexual Orientation Guidelines ¶ 37. The fact that some progress is achieved in a given State does not foreclose the reality that LGBTI individuals nonetheless face persecution. The *Sexual Orientation Guidelines* recognize that reality:

The existence of certain elements, such as anti-discrimination laws or presence of LGBTI organizations and events, do not necessarily undermine the well-foundedness of the applicant's fear. Societal attitudes may not be in line with the law and prejudice may be entrenched, with a continued risk where the authorities fail to enforce protective laws. A *de facto*, not merely *de jure*, change is required and an analysis of the circumstances of each particular case is essential.

Id.

In States where progress is made, but has not fully taken hold, the Board's decision would foreclose claims from individuals who have a legitimate fear of persecution. Such a result is inconsistent with international and domestic law obligating the United States to provide effective protection to refugees and safeguard the principle of *non-refoulement*.

CONCLUSION

UNHCR respectfully urges this Court to remand this case and direct the Board to conduct a thorough, holistic analysis of Petitioner's claims in view of the foregoing international standards.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)(a) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century Expanded BT 14-point font.

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/s/ Ana C. Reyes _____

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DATED: NOVEMBER 20, 2017

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on November 20, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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DATED: NOVEMBER 20, 2017