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In removal proceedings

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

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TABLE OF CONTENTS

INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. THE UNITED STATES IS BOUND BY THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES.....	4
II. UNHCR PROVIDES AUTHORITATIVE GUIDANCE IN INTERPRETING THE REFUGEE DEFINITION INTERNATIONALLY AND IN THE UNITED STATES AND HAS DETERMINED THAT DOMESTIC VIOLENCE CAN FORM THE BASIS FOR REFUGEE STATUS.	6
III. DOMESTIC VIOLENCE MAY RISE TO THE LEVEL OF PERSECUTION.....	10
IV. WOMEN IN GUATEMALA OR WOMEN IN EL SALVADOR, AS WELL AS WOMEN IN DOMESTIC RELATIONSHIPS IN GUATEMALA OR EL SALVADOR WHO ARE UNABLE TO END THOSE RELATIONSHIPS, ARE MEMBERS OF A PARTICULAR SOCIAL GROUP.	11
A. Women in Guatemala or El Salvador Are Members of a Particular Social Group Under the <i>Acosta</i> “Protected Characteristics” Standard.	15
B. Women in Domestic Relationships in Guatemala or El Salvador Who Are Unable To End Those Relationships Are Members of a Particular Social Group Under the <i>Acosta</i> “Protected Characteristics” Standard.	16
C. Women in Guatemala or El Salvador, or Women in Domestic Relationships in Guatemala or El Salvador Who Are Unable To End Those Relationships, Would Qualify as Members of a Particular Social Group Under the Alternative “Social Perception” Standard.	19
V. DOMESTIC VIOLENCE MAY BE “ON ACCOUNT OF” MEMBERSHIP IN THE GROUP OF WOMEN OR WOMEN IN DOMESTIC RELATIONSHIPS IN GUATEMALA OR EL SALVADOR WHO ARE UNABLE TO END THOSE RELATIONSHIPS.	21
A. Domestic Violence Is Often On Account Of Membership in a Particular Social Group.....	22
B. Requiring Proof of Intent To Punish or Overcome the Protected Characteristic Is Inconsistent with the <i>1951 Convention</i> and <i>1967</i> <i>Protocol</i>	26
CONCLUSION	28

TABLE OF AUTHORITIES

FEDERAL CASES

Angoucheva v. INS, 106 F.3d 781 (7th Cir. 1997) 10

Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993) 16

INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) 5

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)..... 5, 7

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

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

Matter of Kasinga, 21 I. & N. Dec. 357 (BIA 1996) 11, 18, 27

Matter of S-A-, 22 I. & N. Dec. 1328 (BIA 2000)..... 10, 11, 26

Matter of S-E-G-, 24 I. & N. Dec. 579 (BIA 2008) 14, 20

Matter of S-P-, 21 I. & N. Dec. 486 (BIA 1996)..... 5, 7, 28

Matter of T-Z-, 24 I. & N. Dec. 163 (BIA 2007)..... 10

Mohammed v. Gonzales, 400 F.3d 785 (9th Cir. 2005) 8, 16

Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804) 6

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Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) 27

Rodriguez-Roman v. INS, 98 F.3d 416 (9th Cir. 1996) 7

The Paquete Habana, 175 U.S. 677 (1900) 6

Valdiviezo-Galdamez v. Att’y Gen., 663 F.3d 582 (3d Cir. 2011) 12

FEDERAL STATUTES AND LEGISLATIVE HISTORY

8 U.S.C. § 1101(a)(42) 2, 5, 6, 22
8 U.S.C. § 1158 23, 5
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8 U.S.C. § 1231(b)(3) 5
H.R. Conf. Rep. No. 96-781 (1980) 5
H.R. Rep. No. 96-608 (1979) 5
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Applicant A and Another v. Minister for Immig. & Ethnic Affairs, 190 C.L.R. 225
(Austl. High Ct. 1997) 19
C.R.D.D. T98-02494, [1999] RefLex Issue 129, Dec. 22, 1999, Refugee Div. (Can.
Immig. App. Div.) 9
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& Another, Ex Parte Shah (A.P.)*, [1999] UKHL 20, [1999] 2 A.C. 629 (H.L.) 9, 14, 16
Minister for Immig. & Multicultural Affairs v. Khawar, [2002] H.C.A. 14 (Austl. High
Ct.) 10, 16, 20
Ourbih, CE, SSR, 171858 (France: Conseil d’Etat, June 23, 1997) 20
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<i>Sec’y of State for the Home Dep’t v. K and Fornah v. Sec’y of State for the Home Dep’t</i> , [2006] UKHL 46 [2007] 1 A.C. 412	14
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UNHCR <i>Handbook on Procedures and Criteria for Determining Refugee Status</i> , U.N. Doc. HCR/1P/4/ENG/REV.3 (1979, reissued 1992 and 2011).....	6, 10, 23, 28

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Asylum Eligibility Part III: Nexus and the Five Protected Characteristics
(Mar. 12, 2009)..... 19, 25, 26, 27

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Female Asylum Applicants and Gender-Related Claims (Mar. 12, 2009)..... 17, 18, 21, 25

DHS Br. on Remand, *Matter of Valdiviezo-Galdamez*, A097 447 286 (BIA May 29,
2012)..... 15

DHS’s Position on Respt’s Eligibility for Relief, *Matter of R-A-*, 23 I. & N. Dec. 694
(A.G. Feb. 19, 2004)..... 18, 24

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Opinion,” *Matter of R-A-*, A073 753 922 (A.G. Jan. 9, 2004)..... 2

UNHCR *Amicus Curiae* Br. in Support of Petr.’s Pet. for Panel Reh’g or Reh’g En
Banc, *Granados Gaitan v. Holder*, No. 10-1724 (8th Cir. Apr. 30, 2012) 15

UNHCR *Amicus Curiae* Br. in Support of Petr., *Henriquez-Rivas v. Holder*, No. 09-
71571 (9th Cir. Feb. 23, 2012) 15

UNHCR *Amicus Curiae* Br. in Support of Resp., *Matter of Valdiviezo-Galdamez*,
A097 447 286 (BIA Aug. 10, 2012)..... 15

INTEREST OF AMICUS CURIAE

The United Nations High Commissioner for Refugees (“UNHCR”) 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, together with governments, for seeking permanent solutions to their problems. Statute of the Office of the UNHCR ¶ 1, U.N. Doc. A/RES/428(V) (Dec. 14, 1950).¹ According to its Statute, UNHCR fulfills its mandate by, *inter alia*, “[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 1951 *Convention Relating to the Status of Refugees*, July 28, 1951, 19 U.S.T. 6259 (“1951 Convention”),² and in Article II of the 1967 *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 (“1967 Protocol”),³ which obligate States to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role.

The views of UNHCR are informed by more than six decades of experience supervising the treaty-based system of refugee protection established by the international community. UNHCR has won two Nobel Peace Prizes for its work and currently cares for over 33 million refugees and uprooted people in 125 countries. UNHCR’s interpretation of the provisions of the *1951 Convention* and its *1967 Protocol* are authoritative and integral to promoting consistency in the global regime for the protection of refugees. Accordingly, the

¹ Available at <http://www.unhcr.org/refworld/docid/3ae6b3628.html> (last visited Nov. 12, 2012). Every Internet citation in this brief was last visited on November 12, 2012; hereinafter, no date of last visit will be indicated.

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

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

Supreme Court has “consistently turned [to UNHCR] for assistance in interpreting our obligations under the Refugee Convention.” *N-A-M v. Holder*, 587 F.3d 1052, 1061–62 (10th Cir. 2009) (Henry, C.J., concurring) (citing cases).

UNHCR has a direct interest in the resolution of the question posed by the Board of Immigration Appeals (“Board”) in its request for supplemental briefing in these matters: “whether domestic violence can, in some instances, form the basis of an asylum or withholding of removal claim under sections 208 and 241(b) of the Immigration and Nationality Act” (“INA”). This question involves interpretation of the refugee definition in the *1951 Convention* and its *1967 Protocol* and as implemented in United States law at section 101(a)(42) of the INA, 8 U.S.C. § 1101(a)(42). The proper interpretation of the refugee definition, including its application to protection claims based on domestic violence, falls squarely within UNHCR’s mandate. Accordingly, UNHCR has published interpretive guidance for assessing protection claims, including those arising from gender-based persecution such as domestic violence, and submitted a letter brief to the U.S. Attorney General in a previous high-profile immigration appeal confronting that issue.⁴

UNHCR submits this *amicus* brief regarding domestic violence as a basis for asylum in both cases named in the above caption. Consistent with its approach in other cases, UNHCR submits this brief to provide guidance to the Board on the relevant international standards and not to offer an opinion directly on the merits of Respondents’ claims.

⁴ See UNHCR, Advisory Opinion on International Norms: Gender-Related Persecution and Relevance to “Membership of a Particular Social Group” and “Political Opinion,” *Matter of R-A-*, A073 753 922 (A.G. Jan. 9, 2004), available at http://cgrs.uchastings.edu/documents/legal/unhcr_ra-amicus.pdf.

SUMMARY OF THE ARGUMENT

Drawing on over sixty years of supervising international application of the refugee definition in the *1951 Convention*, UNHCR has determined that domestic violence perpetrated against women may constitute persecution for reason of membership in a particular social group. State parties to the *1951 Convention* and *1967 Protocol*, including Canada, the United Kingdom, Australia, and New Zealand, have reached the same conclusion.

UNHCR's authoritative interpretation applies to, and is consistent with, United States immigration law, which implements the Nation's obligations under those agreements. No special restrictions or standards apply to domestic violence cases; rather, under the well-established principles of the *1951 Convention*, *1967 Protocol*, and 1980 Refugee Act, domestic violence may give rise to refugee status. As with other asylum applicants, victims of domestic violence must meet all of the elements of the refugee definition, but the principles underlying three foundational elements merit particular explication here.

First, there can be no doubt that domestic violence may rise to the level of persecution in specific cases. Abusers often inflict pain and suffering—which may be physical, mental, or both—of such a severe nature that it may constitute persecution.

Second, victims of domestic violence may be members of a particular social group defined by the immutable characteristic of gender or gender in combination with other characteristics, such as relationship status. In these cases, the relevant social group may be articulated as “women in Guatemala or in El Salvador” or “women in domestic relationships in Guatemala or in El Salvador who are unable to end those relationships.” These groups qualify as particular social groups under both accepted international approaches—the “protected characteristics” approach and the “social perception” approach. The Board's jurisprudence concerning membership in a particular social group is currently in a state of

flux, and UNHCR urges the Board to return to its previous “protected characteristics” approach, with reliance on the social perception test only when the shared characteristic has been found to be neither immutable nor fundamental.

Third, in establishing the nexus requirement, the intent or motive of the perpetrator may be a relevant factor, but is not determinative. What is required is an overall assessment of the facts of the case, taking into account the context in which the persecution takes place. Further, requiring proof of intent to “punish or overcome” the protected characteristic goes far beyond the threshold required by the *1951 Convention*, its *1967 Protocol*, and the 1980 Refugee Act.

UNHCR submits that the Board should conclude that domestic violence may form the basis for a claim of asylum or withholding of removal. Deciding otherwise may result in refugees being erroneously denied international protection and subjected to refoulement—return to a country where their life or freedom would be threatened—in violation of the United States’ fundamental obligations under the *1951 Convention* and *1967 Protocol*.

ARGUMENT

I. THE UNITED STATES IS BOUND BY THE 1951 CONVENTION AND THE 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; they address who is a refugee, his or her rights and responsibilities, and the legal obligations of States. The *1967 Protocol* binds State 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. I(1). The *1967 Protocol* also removes from the refugee definition in Article 1A(2) and 1B of the *1951 Convention* the geographical and temporal limitations to events that occurred in

Europe before January 1, 1951, thereby universalizing the refugee definition. *Id.* art. I(2)–(3). The core of both the *1951 Convention* and its *1967 Protocol* is the obligation to provide protection to refugees and to safeguard the principle of non-refoulement, which is the obligation not to return a refugee to any country where she or he would face threats to his or her life or freedom including serious human rights violations or other serious harm. *1951 Convention* art. 33; *1967 Protocol* art. I. In 1968, the United States acceded to the *1967 Protocol*, thereby binding itself to the international refugee protection regime of the *Protocol* and the *1951 Convention*. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987).

Congress enacted the Refugee Act of 1980 expressly to “bring United States refugee law into conformance with the [*1967 Protocol*].” *Id.* (citing H.R. Conf. Rep. No. 96-781, at 19 (1980); H.R. Rep. No. 96-608, at 9 (1979); S. Rep. No. 96-256, at 4 (1979)); see also *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999); *Matter of S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996). In fulfilling the requirements of the *1967 Protocol*, Congress provided a path for refugees to seek and receive protection in the United States. See 8 U.S.C. §§ 1101(a)(42), 1158. Congress also obligated the United States to refrain from returning refugees to a place where they would face threats to life or freedom including serious human rights violations or other serious harm, so as to comply with the fundamental principle of non-refoulement. See *INS v. Stevic*, 467 U.S. 407, 421 (1984) (citing 8 U.S.C. § 1253(h) (1976), now codified at 8 U.S.C. § 1231(b)(3)).

Because the Refugee Act serves to bring the United States into compliance with its international obligations under the *1967 Protocol* and the *1951 Convention*, it should be interpreted and applied in a manner consistent with those instruments. More generally, courts should construe federal statutes in a manner consistent with United States treaty obligations to the fullest extent possible. See *Murray v. Schooner Charming Betsy*, 6 U.S. 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"); *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained . . . by the courts of justice").

II. UNHCR PROVIDES AUTHORITATIVE GUIDANCE IN INTERPRETING THE REFUGEE DEFINITION INTERNATIONALLY AND IN THE UNITED STATES AND HAS DETERMINED THAT DOMESTIC VIOLENCE CAN FORM THE BASIS FOR REFUGEE STATUS.

The *1951 Convention* and its *1967 Protocol*, as well as the 1980 Refugee Act, define "refugee" to include any person outside his or her country of nationality who is unable or unwilling to avail himself or herself of the protection of that country because of a well-founded fear of persecution for reasons of "race, religion, nationality, membership of a particular social group or political opinion." *1951 Convention* art. 1A(2), as amended by *1967 Protocol* art. I(2)–(3); 8 U.S.C. § 1101(a)(42) (changing "of" to "in," such that it reads "membership *in* a particular social group" (emphasis added)). Over the more than sixty years of its existence, UNHCR has issued authoritative guidance on the interpretation of this definition. That authoritative guidance includes unequivocal recognition that domestic violence can form the basis for refugee status.

UNHCR exercises its supervisory responsibility over the application of international conventions for the protection of refugees in part by issuing interpretative guidance on the meaning of provisions and terms contained in those instruments, in particular the *1951 Convention* and its *1967 Protocol*. That guidance includes the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, U.N. Doc. HCR/1P/4/ENG/REV.3 (1979, reissued 1992 and 2011) ("*Handbook*"),⁵ and the subsequent *Guidelines on*

⁵ Available at <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

International Protection (“*Guidelines*”).⁶ UNHCR prepared the *Handbook* in 1979 at the request of Member States of the Executive Committee of the High Commissioner’s Programme, which then and now includes the United States, to provide guidance to governments in applying the terms of the *1951 Convention* and *1967 Protocol*. The *Handbook* is recognized internationally and in the United States as an important source of interpretation of international refugee law. The Supreme Court has determined that, although the UNHCR *Handbook* is not legally binding on United States officials, it provides “significant guidance” in construing the *1967 Protocol* and giving content to the obligations established therein. *Cardoza-Fonseca*, 480 U.S. at 439 n.22; see *Rodriguez-Roman v. INS*, 98 F.3d 416, 425 (9th Cir. 1996) (“Both the Supreme Court and this court have looked to the Handbook in determining refugee status, and consider it to be authoritative on the subject.” (internal quotation marks omitted)); cf. *Matter of S-P-* 21 I. & N. Dec. at 489 (citing with favor the UNHCR *Handbook*).

In 2002, UNHCR began issuing *Guidelines*, as envisaged under the 2002 UNHCR Agenda for Protection,⁷ which was endorsed by the Executive Committee⁸ and the UN General Assembly.⁹ The *Guidelines* complement and update the *Handbook* and draw upon

⁶ Available at <http://www.unhcr.org/refworld/docid/4f33c8d92.html>, at 77–170 (*Guidelines* Nos. 1–8), and at <http://www.unhcr.org/refworld/docid/50348afc2.html> (*Guideline* No. 9).

⁷ UNHCR, *Agenda for Protection [Global Consultations on International Protection/General]*, Goal 1, June 26, 2002, A/AC.96/965/Add.1, at 5, available at <http://www.unhcr.org/refworld/docid/3d4fd0266.html>.

⁸ UNHCR Executive Committee, *General Conclusion on International Protection*, Oct. 8, 2002, No. 92 (LIII) – 2002, available at <http://www.unhcr.org/refworld/docid/3dafdce27.html>.

⁹ UN General Assembly, Office of the UNHCR, *Resolution Adopted by the General Assembly*, Feb. 6, 2003, A/RES/57/187, ¶ 6, available at <http://www.unhcr.org/refworld/docid/3f43553e4.html>.

applicable international legal standards, judicial decisions, State practice, Executive Committee Conclusions, academic literature, and the accumulated views of UNHCR to provide guidance regarding particular topics arising under the *1951 Convention* and *1967 Protocol*. Like the *Handbook*, the *Guidelines* are intended to provide legal interpretive guidance for governments, legal practitioners, and decisionmakers, including the judiciary.

Relevant in particular here are the *Guidelines on 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 (May 7, 2002) (“*Gender Guidelines*”),¹⁰ and on “*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 (May 7, 2002) (“*Social Group Guidelines*”).¹¹ The *Gender Guidelines* provide a thorough interpretation of the refugee definition as it pertains to gender-related claims, and the *Social Group Guidelines* offer a detailed interpretation of the “membership of a particular social group” protection ground. Courts have expressly relied on the *Gender Guidelines* and *Social Group Guidelines* in assessing refugee claims and have recognized that UNHCR’s “analysis provides significant guidance for issues of refugee law.” *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (relying on both sets of *Guidelines*).

In accordance with its authoritative interpretations in the *Handbook* and *Guidelines*, UNHCR has determined that domestic violence can form the basis for refugee status. “There is no doubt that . . . domestic violence . . . ha[s] been used as [a] form[] of persecution” *Gender Guidelines* ¶ 9. This form of persecution may be linked to any one of the five

¹⁰ Available at <http://www.unhcr.org/refworld/docid/3d36f1c64.html>.

¹¹ Available at <http://www.unhcr.org/refworld/docid/3d36f23f4.html>.

protected grounds, including, as relevant in these appeals, membership in a particular social group.¹² *Id.* ¶ 30.

Consistent with UNHCR's interpretation, other State parties to the *1967 Protocol* and *1951 Convention* have recognized the validity of asylum claims based on domestic violence. Authoritative decisionmakers and judges in Canada, the United Kingdom, Australia, and New Zealand all have determined that, not only may domestic violence amount to persecution, but it may be persecution on account of membership of a particular social group. *See, e.g.*, C.R.D.D. T98-02494, [1999] RefLex Issue 129, Dec. 22, 1999, Refugee Div. (Can. Immig. App. Div.);¹³ *Islam (A.P.) v. Sec'y of State for the Home Dep't, and Regina v. Immig. App. Tribunal & Another, Ex Parte Shah (A.P.)*, [1999] UKHL 20, [1999] 2 A.C. 629 (H.L.);¹⁴ *Minister for Immig. & Multicultural Affairs v. Khawar*, [2002] H.C.A. 14 (Austl. High Ct.);¹⁵ Refugee Appeal No. 71427/99 [2000] N.Z.A.R. 545 (N.Z. Refugee Status App. Auth.).¹⁶

Cognizant of this background, the Board should give careful consideration to a claim for protection from domestic violence based on social group membership, as discussed in more detail below.

¹² Domestic violence on account of race, religion, nationality, or political opinion is beyond the scope of this *amicus* brief. Also beyond the scope of this brief is application of the fact-specific requirements of the refugee definition, although UNHCR affirms that, on a case-by-case basis, victims of domestic violence are capable of showing that the government of their home country is unable or unwilling to protect them and that the threat of persecution exists country-wide or that it would be unreasonable to expect them to relocate within their home country.

¹³ Available at <http://www.irb-cisr.gc.ca:8080/RefLex/Issue.aspx?id=129>.

¹⁴ Available at <http://www.unhcr.org/refworld/docid/3dec8abe4.html>.

¹⁵ Available at <http://www.unhcr.org/refworld/docid/3deb326b8.html>.

¹⁶ Available at <http://www.unhcr.org/refworld/docid/3ae6b7400.html>.

III. DOMESTIC VIOLENCE MAY RISE TO THE LEVEL OF PERSECUTION.

Although there is no universally-accepted definition of persecution, it may be inferred from Article 33 of the *1951 Convention* that a threat to life or freedom on account of a Convention ground is always persecution. *Handbook* ¶ 51. Other serious violations of human rights, as well as other serious harm, may also constitute persecution. *Id.*; see *Stevic*, 467 U.S. at 428 n.22 (persecution is a “seemingly broader concept than threats to ‘life or freedom’”).

There can be no doubt that domestic violence inflicts pain and suffering that can rise to the level of persecution in specific cases. Domestic violence can include serious physical harm such as hitting, kicking, punching, and sexual abuse. It may also include severe psychological harm such as keeping the victim locked in the home, forbidding contact with family or friends, and threats to the life or safety of the victim, her children, or other loved ones. Such abuse qualifies as persecution under U.S. jurisprudence. See, e.g., *Angoucheva v. INS*, 106 F.3d 781, 790 (7th Cir. 1997) (sexual assault is persecution); *Matter of S-A-*, 22 I. & N. Dec. 1328, 1335 (BIA 2000) (physical abuse by father amounted to persecution); *Matter of T-Z-*, 24 I. & N. Dec. 163, 171 (BIA 2007) (harm associated with persecution does not have to be only physical).

As the Board has recognized, the fact that persecution is inflicted by a private individual—in domestic violence cases, often a member of the victim’s family—rather than by the government, does not preclude it from qualifying as persecution. See, e.g., *Matter of S-A-*, 22 I. & N. Dec. at 1335 (recognizing persecution inflicted by applicant’s father); *Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (recognizing persecution threatened by applicant’s family members). Where the persecution is committed by a private individual such as a husband, other domestic partner, or family member, it can be considered persecution if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are

unable, to offer effective protection. *Gender Guidelines* ¶ 20. Indeed, in Guatemalan and Salvadoran societies, domestic violence against women is considered “socially acceptable.” U.S. State Dep’t, El Salvador Country Report on Human Rights Practices for 2011, at 15–16; *see* U.S. State Dep’t, Guatemala Country Report on Human Rights Practices for 2011, at 16–17 (finding that domestic violence “remained a serious problem” but the government “failed to respond to requests for assistance”).

IV. WOMEN IN GUATEMALA OR WOMEN IN EL SALVADOR, AS WELL AS WOMEN IN DOMESTIC RELATIONSHIPS IN GUATEMALA OR EL SALVADOR WHO ARE UNABLE TO END THOSE RELATIONSHIPS, ARE MEMBERS OF A PARTICULAR SOCIAL GROUP.

The particular social group applicable in these cases may be defined by gender alone or by gender in combination with other characteristics related to relationship status. In UNHCR’s view, gender alone is sufficient to define a particular social group for purposes of the refugee definition in the *1951 Convention* and *1967 Protocol* and as implemented in the 1980 Refugee Act.¹⁷ Nevertheless, the proposed group in this case—women in domestic relationships in Guatemala or El Salvador who are unable to end those relationships—also qualifies as a particular social group.¹⁸ That formulation of the social group closely tracks the formulations advanced by Respondents and recognized by the Government as legitimate. *See* DHS Br. at 10, *Matter of Cifuentes-Garza et al.*, Nos. A099 528 680 et al. (BIA Dec. 11,

¹⁷ Although the Board does not generally entertain social group formulations not raised by the Respondents, it retains the authority to consider alternative theories when significant developments intervene. The Board’s request for additional briefing from *amici* on the issue of “whether domestic violence can, in some instances, form the basis of an asylum or withholding of removal claim” is such an intervening development.

¹⁸ This formulation is not the only possible particular social group in domestic violence cases. As the Board has emphasized, “[t]he particular kind of group characteristic that will qualify . . . remains to be determined on a case-by-case basis.” *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

2010) (confirming DHS’s position in *Matter of R-A-* that “married women in Guatemala who are unable to leave the relationship” constitute a particular social group); DHS’s Supp. Br. at 14, *Matter of L-R-* (BIA Apr. 13, 2009) (arguing that “Mexican women in domestic relationships who are unable to leave” are a particular social group).¹⁹

Of the five grounds for refugee status in the *1951 Convention*, “membership of a particular social group” has posed the greatest interpretive challenges.²⁰ Yet, over time and as reflected in the *Social Group Guidelines*, jurisprudence and expert commentary have clarified the meaning of this term. UNHCR’s *Social Group Guidelines* adopt, as alternatives, two internationally accepted approaches to defining a social group drawn from the jurisprudence of State parties:

[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.

Social Group Guidelines ¶ 11 (emphasis added); *see id.* ¶¶ 5–7. These two alternative approaches—“protected characteristics” and “social perception”—may at times converge because groups whose members are targeted based on a common immutable or fundamental characteristic may often be perceived as a group by society, but this convergence will not always be the case. *Id.* ¶ 9.

Until recently, the Board’s interpretation of membership of a particular social group conformed to UNHCR’s authoritative view of applying the “protected characteristics”

¹⁹ Available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf>.

²⁰ Neither the *1951 Convention* nor the *1967 Protocol* provides a definition for this category, and the drafting history does not specify its exact meaning. *See Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 594 (3d Cir. 2011) (reciting the sparse drafting history).

approach. In *Matter of Acosta*, the Board established a definition of membership of a particular social group that, like the protected characteristics approach in the *Social Group Guidelines*, assesses the immutability or fundamentality of the characteristic, or its historical relevance, without requiring more. See 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). That approach has guided Immigration Judges, the Board, and U.S. courts of appeals for over twenty years. The *Acosta* social group definition provides that membership of a particular social group refers to

a group of persons all of whom share a common, immutable characteristic [that] . . . might be an innate one such as sex, color, or kinship ties, or . . . a shared past experience such as former military leadership or land ownership. . . . [T]he common characteristic . . . must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

19 I. & N. Dec. at 233. This interpretation conforms to UNHCR’s authoritative view that a particular social group is commonly composed of persons who share a common innate, unchangeable, or otherwise fundamental characteristic. *Social Group Guidelines* ¶ 11. In the view of UNHCR, as expressly articulated in the *Social Group Guidelines*, if the common attribute of a social group is innate and thus unchangeable or fundamental to an individual’s identity, conscience, or human rights, then a particular social group has been established without need for any further showing. *Id.* ¶ 6. The *Acosta* decision takes this approach.

A number of common law countries with well-developed bodies of refugee law have endorsed *Acosta*’s “protected characteristics” test for membership of a particular social group, to the exclusion of an approach with cumulative requirements. The seminal Canadian decision on this point approves of *Acosta* as a “good working rule” that takes into account the “general underlying themes . . . that form the basis for the international refugee protection

initiative” and adopts a very similar approach. *Canada v. Ward*, [1993] 2 S.C.R. 689, 739 (Can.).²¹ In the United Kingdom, the House of Lords has also endorsed the *Acosta* approach, *Shah and Islam*, 2 A.C. 629, and has explicitly rejected the use of a conjunctive approach to defining membership of a particular social group, *Sec’y of State for the Home Dep’t v. K and Fornah v. Sec’y of State for the Home Dep’t*, [2006] UKHL 46 [2007] 1 A.C. 412.²² And in New Zealand, the Refugee Status Appeals Authority has similarly adopted *Acosta* as its guide. Refugee Appeal No. 1312/93 *Re GJ* [1995], 1 NLR 387 (N.Z.).²³

The Board recently diverged from its well-established approach by requiring asylum-seekers to prove what it has termed “social visibility” and “particularity” in addition to satisfying the *Acosta* protected characteristics standard. See, e.g., *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582 (BIA 2008). The imposition of these additional requirements is contrary to the object and purpose of the *1951 Convention* and *1967 Protocol* as well as the express interpretation in the *Social Group Guidelines*.²⁴

²¹ Available at <http://www.unhcr.org/refworld/docid/3ae6b673c.html>.

²² Available at <http://www.unhcr.org/refworld/docid/4550a9502.html>.

²³ Available at <http://www.unhcr.org/refworld/docid/3ae6b6938.html%C2%A0>.

²⁴ First, the *Social Group Guidelines* identify two *alternative* approaches to defining a particular social group consistent with the *1951 Convention* and *1967 Protocol*; they do not require applicants to satisfy both approaches. Second, the “social perception” approach in the *Guidelines* does not require that members of a particular social group be visible to the naked eye as the term has mistakenly been interpreted, but rather looks to whether there is an awareness of the existence of such a group within the society. Third, the Board’s “particularity” requirement serves no useful purpose, as it is already subsumed within both the “protected characteristics” and “social perception” approaches. See UNHCR *Amicus Curiae* Br. in Support of Resp., *Matter of Valdiviezo-Galdamez*, A097 447 286 (BIA Aug. 10, 2012) (“Under the ‘protected characteristics’ approach, which is embodied by the *Acosta* standard, it is the immutable or fundamental characteristic that defines the social group and makes it particular. Under the ‘social perception’ approach, it is the awareness or cognizance within society of such a group that defines it and makes it particular.”); see also UNHCR *Amicus Curiae* Br. in Support of Petr.’s Pet. for Panel Reh’g or Reh’g En Banc, *Granados Gaitan v. Holder*, No. 10-1724 (8th Cir. Apr. 30, 2012), available at

Following the Board's current approach, DHS has recently proposed a "social distinction" standard, which operates as a modified reformulation of the Board's "Acosta-and" approach. See DHS Br. on Remand at 8–9, *Matter of Valdiviezo-Galdamez*, A097 447 286 (BIA May 29, 2012). Because the social distinction test requires an applicant both to satisfy the protected characteristic approach, as required under *Acosta*, and in addition establish that the group is 'perceived by society as distinct', it is inconsistent with the object and purpose of the *1951 Convention* and *1967 Protocol* and with the *Social Group Guidelines*, and the Board should reject it.²⁵ See UNHCR's *Amicus Curiae* Br. in Support of Resp., *Matter of Valdiviezo-Galdamez*, A097 447 286 (BIA Aug. 10, 2012).

A. Women in Guatemala or El Salvador Are Members of a Particular Social Group Under the *Acosta* "Protected Characteristics" Standard.

In UNHCR's view, the particular social group applicable in domestic violence cases may be defined by gender alone under the protected characteristics approach: for example, "women in Guatemala" or "women in El Salvador." Gender is a plain example of an immutable characteristic properly within the ambit of the social group category. *Gender Guidelines* ¶ 30. "Women [are] a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to [sic] men." *Social Group Guidelines* ¶ 12. Indeed, the Board explicitly identified sex as an immutable characteristic by which a particular social group could be defined in *Acosta*, 19 I. & N. Dec. at

<http://www.unhcr.org/refworld/country,,AMICUS,SLV,,4c406e882,0.html>; UNHCR *Amicus Curiae* Br. in Support of Petr., *Henriquez-Rivas v. Holder*, No. 09-71571 (9th Cir. Feb. 23, 2012), available at <http://www.unhcr.org/refworld/country,,AMICUS,SLV,,4f4c97c52,0.html>.

²⁵ Although the "social distinction" test improves upon the Board's recent approach by eliminating the requirement that the characteristic be visible to the eye, that improvement does not resolve the overarching problem with imposing additional requirements on top of *Acosta*'s protected characteristics standard.

233.²⁶ In addition to the Board itself in *Acosta*, the Third Circuit in *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (Alito, J.), the Ninth Circuit in *Mohammed*, 400 F.3d at 797–98, the INS in its guidance for adjudicating asylum claims from women,²⁷ and, interpreting the *1951 Convention*, the British House of Lords,²⁸ the Canadian Supreme Court,²⁹ and the High Court of Australia³⁰ have all recognized that gender can serve as a shared characteristic defining a particular social group for purposes of refugee protection.

B. Women in Domestic Relationships in Guatemala or El Salvador Who Are Unable To End Those Relationships Are Members of a Particular Social Group Under the *Acosta* “Protected Characteristics” Standard.

Other characteristics in addition to gender may also be relevant in describing the social group. The proposed group in this case—“women in domestic relationships in Guatemala or in El Salvador who are unable to end those relationships”—is a subset of women that also qualifies as a social group under the *Acosta* standard. Members of this group share the common characteristic of relationship status in addition to gender.

Relationship status may be immutable or fundamental for a number of reasons, as DHS has recognized. For example, when a woman’s religious or moral convictions dictate that marital status is a fundamental attribute of her identity, she should not be required to change it. Relationship status also may be immutable if a woman cannot reasonably be expected to divorce or otherwise end the relationship “because of [external] religious, cultural

²⁶ Although “sex” and “gender” are distinct concepts, those terms are often used interchangeably in U.S. case law, and that usage is reflected in the discussion here.

²⁷ See INS Office of Int’l Affairs, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* at 13–15 (May 26, 1995).

²⁸ See *Shah and Islam*, 2 A.C. 629, slip op. at 9–10, 16.

²⁹ See *Canada v. Ward*, 2 S.C.R. at 739.

³⁰ See *Khawar* H.C.A. 14, ¶ 33.

or legal constraints.” Asylum Officer Basic Training Course, DHS, U.S. Citizenship & Immig. Servs., *Female Asylum Applicants and Gender-Related Claims* 30 (Mar. 12, 2009) (“AOBTC, *Female Asylum Applicants*”).³¹ A woman’s relationship status may be unchangeable if her partner would not recognize a divorce or separation as ending the relationship or altering his authority and right to control her. A domestic relationship may also be immutable if the victim could not reasonably be expected to leave because of the persecutor’s threats to her life or freedom if she does so. *Id.* 30–31. Indeed, it is well-recognized that “[a]t the point that separation (or the decision to separate) occurs, the risk of violence to the battered woman increases [B]attered women . . . are more likely to be killed after having left the relationship.” *Id.* at 16 (internal quotation marks omitted).

The Board recognized in *Kasinga* that a particular social group defined in this way—by gender in combination with other factors—is cognizable under U.S. law. 21 I. & N. Dec. at 366. Courts of appeals have reached the same conclusion. *See, e.g., Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (recognizing social group defined by gender and tribal membership). This accords with *Acosta*, which explicitly recognized that the common characteristic can be one that the members of the group cannot change. 19 I. & N. Dec. at 233.

A social group defined by gender or gender and other characteristics, including relationship status, could, in some contexts, potentially include many women, but “the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.” *Social Group Guidelines* ¶ 18;

³¹ Available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf>.

Gender Guidelines ¶ 31. “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)” of the *1951 Convention*. *Social Group Guidelines* ¶ 18. As with other Convention grounds, such as race, religion, and ethnicity, which likewise are not limited by the size of the group, not every member of a particular social group will be entitled to asylum or withholding of removal, because each applicant must satisfy the other elements of the refugee definition as well. *Gender Guidelines* ¶ 4; *Social Group Guidelines* ¶ 19. Additional restrictions to *Acosta*’s well-established standard are thus unnecessary and are likely to leave unprotected group members with legitimate claims to refugee status. *See, e.g.*, DHS’s Position on Respt’s Eligibility for Relief at 22–23, *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. Feb. 19, 2004) (“DHS *R-A-* Br.”) (“[E]rroneously import[ing] . . . separate element[s] of the refugee definition[] into the analysis of whether a particular social group exists . . . results in an incorrect and misleading conclusion.”);³² *Niang*, 422 F.3d at 1199–1200 (rejecting the argument that, because of the size of the group, gender cannot constitute a social group).

Women—because of their gender as well as, in these cases, their relationship status—constitute a social group under the protected characteristics approach. As a result, the Board need not conduct any further inquiry to conclude that a particular social group has been established. However, even if the Board were to consider the alternative “social perception” approach, women—including those who are unable to end a domestic relationship—would

³² Available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf; *see also* Asylum Officer Basic Training Course, DHS, U.S. Citizenship & Immig. Servs., *Asylum Eligibility Part III: Nexus and the Five Protected Characteristics* 3, 31 (Mar. 12, 2009) (“AOBTC, *Nexus*”), available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Nexus-the-Five-Protected-Characteristics-31aug10.pdf> (discussing DHS’s *R-A-* Brief regarding the proper breadth of social group categories).

also satisfy that approach. UNHCR presents the following argument only to address that contingency.

C. Women in Guatemala or El Salvador, or Women in Domestic Relationships in Guatemala or El Salvador Who Are Unable To End Those Relationships, Would Qualify as Members of a Particular Social Group Under the Alternative “Social Perception” Standard.

UNHCR recognizes the “social perception” approach to assessing social group membership as an accepted interpretation of the social group ground that is used in a number of jurisdictions. The social perception approach, established in *Applicant A and Another v. Minister for Immigration & Ethnic Affairs*, 190 C.L.R. 225, 226 (Austl. High Ct. 1997),³³ by the High Court of Australia, examines whether group members share a common characteristic that makes them a cognizable group or that in some way sets them apart or distinguishes them from society at large. *Social Group Guidelines* ¶ 7; *see also Ourbih*, CE, SSR, 171858 (France: Conseil d’Etat, June 23, 1997) (applying a social perception approach).³⁴

In UNHCR’s view, in the event that a shared characteristic is found to be neither immutable nor fundamental (as explained above), further analysis to determine “whether the group is nonetheless perceived as a cognizable group in that society” can be undertaken to ensure that individuals in need of international refugee protection receive it.³⁵ *Social Group Guidelines* ¶ 13. Should the Board not accept that women or women in domestic relationships in Guatemala or El Salvador who are unable to end those relationships satisfy the protected characteristics approach, then the Board should conclude that they satisfy the

³³ Available at <http://www.unhcr.org/refworld/docid/3ae6b7180.html>.

³⁴ Available at <http://www.unhcr.org/refworld/docid/3ae6b67c14.html>.

³⁵ The Board has misunderstood UNHCR’s guidance to the extent that it has interpreted the *Social Group Guidelines* definition to suggest that social perception is required in addition to the requirements of the protected characteristics approach. *See, e.g., Matter of S-E-G-*, 24 I. & N. Dec. at 586.

alternative social perception standard because group members share common attributes that their society recognizes or that distinguish them from society at large.

Virtually all societies recognize gender as a distinguishing attribute. Gender is, after all, based on socially and culturally constructed and defined identities, statuses, roles and responsibilities that are assigned to one sex or another, which in turn determine social status and standing in the community. *Gender Guidelines* ¶ 3. “Women in any society are a distinct and recognizable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments. . . . Women would still constitute a social group if such violence were to disappear entirely.” *Khawar*, [2002] H.C.A. 14, at ¶ 35; *see Social Group Guidelines* ¶ 7 (“[W]omen . . . have been recognized under this [social perception] analysis as [a] particular social group[] . . .”).

In Guatemalan and Salvadoran societies, the intersection of gender and relationship status also identifies a particular social group. Women in domestic relationships are typically considered subordinate to, and under the control of, their male partners—a societal view that contributes to the serious problem of domestic violence in both Guatemala and El Salvador. This, in turn, reinforces the view of men that “the women they live with are their possessions or chattels that they can treat as they wish and as they consider appropriate.” U.N. Centre for Soc. Dev. & Humanitarian Affairs, *Violence Against Women in the Family* 33, U.N. Doc. ST/CSDHA/2 (1989). The subordinate status of women generally and in particular of a woman in a domestic relationship places her in a segment of society that is not accorded protection from harm inflicted by a domestic partner. *See, e.g., AOBTC, Female Asylum Applicants* at 7 (“Requests for protection from abuse may be ignored if the abuser is a

woman's husband . . ."). Women in domestic relationships are thus clearly recognized in the society in which they live as members of a social group.³⁶

In summary, under either of the two legitimate approaches to defining a particular social group, gender or gender in combination with relationship status constitutes a particular social group for purposes of refugee protection.

V. DOMESTIC VIOLENCE MAY BE “ON ACCOUNT OF” MEMBERSHIP IN THE GROUP OF WOMEN OR WOMEN IN DOMESTIC RELATIONSHIPS IN GUATEMALA OR EL SALVADOR WHO ARE UNABLE TO END THOSE RELATIONSHIPS.

To qualify as a refugee under the *1951 Convention* and *1967 Protocol*, an applicant's fear of persecution must be “for reasons of” one of the five protected grounds. *1951 Convention* art. 1A(2); *1967 Protocol* art. I(2). Similarly, the 1980 Refugee Act provides that a refugee is one who fears persecution “on account of” a protected ground. 8 U.S.C. § 1101(a)(42). As discussed above, in UNHCR's view, under the refugee definition in the *1951 Convention* and *1967 Protocol* and as implemented in the 1980 Refugee Act, a particular social group may be defined by gender alone. Thus, in the cases now before the Board, “women in Guatemala” and “women in El Salvador” would each constitute a particular social group. Likewise, “women in domestic relationships in Guatemala or El Salvador who are unable to end those relationships” would also constitute a particular social group. Perpetrators of domestic violence in societies that oppress women often abuse their victims because of their perception of the subordinate status of women and their

³⁶ Should there be any concern as to how such a relationship would be defined, DHS itself has recognized that U.S. immigration law already contains a framework for determining what constitutes a domestic relationship in the context of domestic violence. *See* 8 U.S.C. § 1227(a)(2)(E)(I); DHS *L-R- Br.* at 19.

corresponding belief in their right to control and abuse their female partners, which their society overtly or tacitly affirms. As with other asylum claims, victims of domestic violence need not prove that their persecutor acted with intent to punish or overcome a particular characteristic—such a requirement goes far beyond the threshold required in the *1951 Convention*, its *1967 Protocol*, and the 1980 Refugee Act.

A. Domestic Violence Is Often On Account Of Membership in a Particular Social Group.

Under the *1951 Convention*, the protected ground need only be a “relevant contributing factor, though it need not be shown to be the sole, or dominant, cause” of the persecution. *Gender Guidelines* ¶ 20; 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* ¶ 29, HCR/GIP/06/07 (Apr. 7, 2006).³⁷ Under U.S. law, an applicant for asylum must show that the protected ground was or will be “at least one central reason” for the persecution. 8 U.S.C. § 1158(b)(1)(B)(i).

In UNHCR’s view, the focus of the nexus inquiry is on “the reasons for the applicant’s feared predicament within the overall context of the case and how he or she would experience the harm rather than on the mind-set of the perpetrator.” 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* ¶ 39, HCR/GIP/12/01 (Oct. 23, 2012) (“*SOGI Guidelines*”).³⁸ Nowhere in the drafting history of the *1951 Convention* was it suggested that

³⁷ Available at <http://www.unhcr.org/refworld/docid/4f33c8d92.html>, at 133–46.

³⁸ Available at <http://www.unhcr.org/refworld/docid/50348afc2.html>.

the motive or intent of the persecutor was to be a controlling factor in either the definition or the determination of refugee status. Accordingly, the intent of the persecutor can be relevant but is not determinative. *Id.* Although U.S. courts have interpreted the nexus requirement to include the persecutor's motive, the Supreme Court has made clear that direct evidence of motive is not necessary. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

When the persecutor is a non-State actor, as is virtually always the case in claims based on domestic violence, the nexus is established if the persecutor targets his victim based on a protected ground. “There is no requirement [under the Convention] that the persecutor be a State actor.” *Social Group Guidelines* ¶ 20 (citing *Handbook* ¶ 65). In UNHCR's view, the nexus may also be established “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 reasons of a Convention ground.” *Gender Guidelines* ¶ 21; *Social Group Guidelines* ¶ 20 (harm committed by non-State actors “can be considered persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection”). Even where a particular country's laws may prohibit domestic violence, the government may continue to condone or tolerate it or may be unable to provide effective protection. UNHCR recognizes these as two separate ways to establish the nexus—targeting by the private actor or non-protection by the government—and has no doubt that at least the first way indisputably satisfies the nexus requirement under U.S. law. *See Matter of Acosta*, 19 I. & N. Dec. at 222 (recognizing that suffering inflicted on the basis of a Convention ground by a non-State actor that the government is unwilling or unable to control is persecution on account of that Convention ground); INS Office of Int'l Affairs, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* at 16 (May 26, 1995) (same).

Perpetrators of domestic violence in societies that oppress women often abuse their victims precisely because they are the women with whom they are in a domestic relationship and the women are unable to leave, as DHS has acknowledged. *See DHS R-A- Br. at 27* (“A group defined as ‘married women in Guatemala who are unable to leave the relationship’ . . . accurately identifies the reason why the persecutor chose his wife as his victim.”). The domestic relationship places the woman in a subordinate position and her partner abuses her because of this subordinate status and his corresponding belief in his right to control and abuse her, which his society affirms. *See Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85, ¶¶ 27, 53 U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996);³⁹ U.N. Centre for Soc. Dev. & Humanitarian Affairs, *Violence Against Women in the Family* at 33. When “the abuser uses violence to enforce power and control over the applicant because of the social status that a woman may acquire when she is in a domestic relationship,” a sufficient nexus has been shown. AOBTC, *Female Asylum Applicants* at 26. Evidence of this nexus may come not only directly from the abuser but also from circumstantial evidence (such as country of origin information) that domestic violence against women is accepted or supported by the legal system or social norms in the country or reflects a prevalent belief within the society. *Id.*; *see* AOBTC, *Nexus* at 13. This latter evidence can also be used to show that the government’s inability or unwillingness to protect domestic violence victims is on account of a gendered social and cultural value system.

³⁹ Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G96/105/09/PDF/G9610509.pdf?OpenElement>.

In addition, abusers are empowered to persecute their victims because of their perception, often shared by their society, that women are unable to unilaterally end or leave the relationship. Indeed, domestic violence often escalates when the woman attempts to leave the relationship. AOBTC, *Female Asylum Applicants* at 16. This escalation demonstrates that abusers persecute their domestic partners in part because of their belief that women lack the right to leave or end the relationship.

A consideration sometimes invoked in the nexus inquiry that has no place in the context of a claim based on domestic violence is whether the abuser targets other members of the social group; that is, whether he targets the female domestic partners of other men. The persecutor abuses his wife or partner specifically because she is *his* subordinate domestic partner and he can, with the approval of society, be it tacit or overt, exercise authority over her. The fact that he does not abuse women over whom he does not perceive himself to have the same authority and control does not suggest that the abuse is not on account of the victim's status as his subordinate domestic partner. *Cf. Matter of S-A-*, 22 I. & N. Dec. at 1336 (Islamic father persecuted his daughter on account of her liberal beliefs, even though there was no evidence that he would persecute liberal daughters of other fathers). The government made this point well in *Matter of R-A-*, where it analogized to a slave owner who may beat his own slave but have neither the inclination nor the opportunity to beat his neighbor's slave—it would still be reasonable to conclude that the beating was on account of the victim's status as a slave. *See* AOBTC, *Nexus* at 12–13 (discussing this argument in the DHS *R-A-* brief). Similarly, it is the woman's subordinate status in the domestic relationship that motivates—and permits—the abuser to harm her.

B. Requiring Proof of Intent To Punish or Overcome the Protected Characteristic Is Inconsistent with the 1951 Convention and 1967 Protocol.

One of the IJs in these matters decided that the Respondent in that case could not show that she was persecuted or had a well-founded fear of persecution due to social group membership because the harm was not inflicted to “punish or overcome” the protected characteristic. *See Matter of Cifuentes-Garza*, I.J. Dec. at 5. The requirement that an applicant prove a persecutor’s motivation to punish or overcome a protected characteristic is deeply problematic, inconsistent with the *1951 Convention* and *1967 Protocol*, and should not be a basis for denying refugee status.

Even accepting that the persecutor’s intent is relevant, the notion that a persecutor should have a desire to overcome or punish far exceeds a reasonable interpretation of the “for reasons of” or “on account of” element of the refugee definition. The Board has long recognized that a persecutor need not act out of “punitive” or “malignant” intent for an applicant to be eligible for asylum. *Kasinga*, 21 I. & N. Dec. at 365. Even acts undertaken with “subjectively benign intent” may be persecution on account of membership in a particular social group. *Id.* at 367. In fact, the U.S. government has instructed that the relevant inquiry regarding motivation “is whether the persecutor has committed an intentional action, or intends to commit an action that is seriously harmful to the applicant, because of a characteristic (or perceived characteristic) of the victim, regardless whether the persecutor intends the victim to experience the harm as harm.” AOBTC, *Nexus* at 10–11. The motivation need not be one of enmity, malignity, or other antipathy toward the victim on the part of the persecutor, if the applicant experiences the abuse as harm. An individual may intentionally cause harm to another for any number of reasons, even ones that are rationalized by the persecutor as being for the benefit of the person. For example, agents of persecution

may view physical abuse as upholding cultural, social, or religious values, or they may inflict harm with “the intention of ‘correcting,’ ‘curing’ or ‘treating’ the person.” *SOGI Guidelines* ¶ 39; see *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997).

Further, persecutors often act not to punish or overcome a characteristic but to exploit, ridicule, or control an individual or group, or simply out of hatred or disdain for the group or individuals within it. Such motivation is no less “on account of” the protected characteristic. Moreover, the “overcome” intent appears to import additional requirements borrowed from another Convention regime, and is more closely aligned with genocidal intent (“intent to destroy, in whole or in part, a national, ethnical, racial or religious group,” *Convention on the Prevention and Punishment of the Crime of Genocide*, art. II, U.N. Gen. Assembly Res. 260 (III) A, Dec. 9, 1948, 78 U.N.T.S. 277, 280⁴⁰), an extreme form of persecution and human rights violation. While such an intent would certainly establish the nexus, it would go far beyond what is required to prove the need for protection under the *1951 Convention* and *1967 Protocol*.

Requiring proof of a motive to punish or overcome is also unduly burdensome, calling for an applicant to demonstrate a persecutor’s motive with unreasonable—and almost impossible—precision. Moreover, it would almost necessarily require direct evidence of the persecutor’s motive, contrary to the Supreme Court’s explicit instruction that motive may be proved by circumstantial evidence. *Elias-Zacarias*, 502 U.S. at 483. The Board has recognized that an “applicant does not bear the unreasonable burden of establishing the exact motivation of a persecutor.” *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988); see also *Matter of S-P-*, 21 I. & N. Dec. at 489 (“Proving the actual, exact reason for persecution

⁴⁰ Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en.

or feared persecution may be impossible in many cases. An asylum applicant is not obliged to show conclusively why persecution has occurred or may occur. Such a rigorous standard would largely render nugatory the Supreme Court’s decision in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), and would be inconsistent with the ‘well-founded fear’ standard embodied in the ‘refugee’ definition.”). UNHCR’s *Handbook* clarifies that it is for the examiner to ascertain the reasons for the persecution, taking into account the overall circumstances of the claim. *Handbook* ¶ 67.

In accordance with the *1951 Convention*, the *1967 Protocol*, and the 1980 Refugee Act, the Board should make clear that an applicant need not show that the persecutor intends to punish or overcome a particular characteristic—only that the persecution is “on account of” a Convention ground, taking into account all the circumstances of the case.

CONCLUSION

For the foregoing reasons, UNHCR respectfully urges the Board to consider the relevant international standards and the views of UNHCR in examining claims based on domestic violence to ensure that the United States fulfills its obligations under the *1951 Convention* and its *1967 Protocol*.

Respectfully submitted,

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