



**Submission by the Office of the United Nations High Commissioner for Refugees  
in case numbers 201701423/1/V2, 201704575/1/V2 and 201700575/1/V2  
before the Council of State**

**A. UNHCR's mandate and role<sup>1</sup>**

1. By letter of 17 January 2018, the Council of State requested the Office of the United Nations High Commissioner for Refugees (“UNHCR”) to submit a written intervention in the cases 201701423/1/V2, 201704575/1/V2 and 201700575/1/V2.
2. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, to seek solutions to the problem of refugees.<sup>2</sup> Paragraph 8 of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees,<sup>3</sup> whereas Article 35 of the 1951 Convention relating to the Status of Refugees<sup>4</sup> obliges State Parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of the provisions of the 1951 Convention.<sup>5</sup>
3. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretive guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention and the 1967 Protocol. Such guidelines include the UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (hereafter “UNHCR *Handbook*”),<sup>6</sup> which was subsequently complemented by a number of *Guidelines on International Protection*.<sup>7</sup>

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<sup>1</sup> This *submission* does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. See, UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

<sup>2</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), <http://www.refworld.org/docid/3ae6b3628.html>.

<sup>3</sup> *Ibid.*, para. 8(a).

<sup>4</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, <http://www.refworld.org/docid/3be01b964.html>, p. 137. According to Article 35 (1) of the 1951 Convention, UNHCR has the “*duty of supervising the application of the provisions of the Convention*”.

<sup>5</sup> *Ibid.*

<sup>6</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/ENG/REV. 3, <http://www.refworld.org/docid/4f33c8d92.html>. The UNHCR *Handbook and Guidelines on International Protection* are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

<sup>7</sup> See for example: 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*, 7 May 2002, HCR/GIP/02/02, <http://www.refworld.org/docid/3d36f23f4.html>, (hereafter “UNHCR, *Social Group Guidelines*”); and UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 28 April 2004, HCR/GIP/04/06, <http://www.refworld.org/docid/4090f9794.html>, (hereafter “UNHCR, *Guidelines on Religion-Based Refugee Claims*”).

4. The UNHCR *Handbook* has been found by the Supreme Courts of Canada, the United Kingdom, and of the United States to be a “highly relevant authority”,<sup>8</sup> a “highly persuasive authority”,<sup>9</sup> providing “significant guidance”,<sup>10</sup> and “should be accorded considerable weight’, in the light of the obligation of Member States under article 35 of the Convention to facilitate its duty of supervising the application of the provisions of the Convention”.<sup>11</sup> UNHCR’s *Handbook* and *Guidelines* have also been accepted as a valid source of interpretation under Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties, in reflecting “subsequent practice in the application of the treaty”.<sup>12</sup>
5. UNHCR submits this *amicus curiae* to provide neutral and expert information on the interpretation of the international refugee law concepts that are relevant in the cases to be adjudicated by the Council of State. UNHCR will only seek to address issues of legal principle arising and will refrain from taking a position on the individual cases. The submissions are based on applicable international human rights and refugee law as evolved over the years, as well as the EU acquis.
6. In this intervention UNHCR will address legal issues of principle pertaining to the scope of the particular social group category in Article 1A(2) of the 1951 Convention, as well as the categories of religion and political opinion and the issue of concealment in order to avoid persecution. With specific reference to the questions posed by the Council of State to the State Secretary, UNHCR will address the following:
  - I. Whether women who claim refugee status based on the assumption of “a western lifestyle” / who do not adhere to prevailing cultural and religious norms may constitute “a particular social group” as referred to in Article 1A(2) of the 1951 Convention and Article 10 of the Qualification Directive;<sup>13</sup>

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<sup>8</sup> *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, Canada: Supreme Court, 19 October 1995, [http://www.refworld.org/cases,CAN\\_SC,3ae6b68b4.html](http://www.refworld.org/cases,CAN_SC,3ae6b68b4.html) at paras. 46 and 119; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, [http://www.refworld.org/cases,CAN\\_SC,3ae6b673c.html](http://www.refworld.org/cases,CAN_SC,3ae6b673c.html) at pp. 713-714.

<sup>9</sup> *R v. Secretary of State for the Home Department, Ex parte Adan, Ex parte Aitseguer*, United Kingdom: House of Lords (Judicial Committee), 19 December 2000, [http://www.refworld.org/cases,GBR\\_HL,3ae6b73b0.html](http://www.refworld.org/cases,GBR_HL,3ae6b73b0.html).

<sup>10</sup> *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, United States Supreme Court, 9 March 1987, <http://www.refworld.org/cases,USSCT,3ae6b68d10.html>.

<sup>11</sup> *Al-Sirri (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and DD (Afghanistan) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)*, [2012] UKSC 54, United Kingdom: Supreme Court, 21 November 2012, [http://www.refworld.org/cases,UK\\_SC,50b89fd62.html](http://www.refworld.org/cases,UK_SC,50b89fd62.html) at para. 36. Similarly, the Handbook has been found “particularly helpful as a guide to what is the international understanding of the Convention obligations, as worked out in practice”. *R v. Secretary of State for the Home Department, Ex parte Robinson*, Case No: FC3 96/7394/D, United Kingdom: Court of Appeal (England and Wales), 11 July 1997, [http://www.refworld.org/cases,GBR\\_CA\\_CIV,3ae6b72c0.html](http://www.refworld.org/cases,GBR_CA_CIV,3ae6b72c0.html) at para. 11.

<sup>12</sup> *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 para. 54; *R v. Secretary of State for the Home Department, Ex parte Adan and Others*, United Kingdom: Court of Appeal (England and Wales), 23 July 1999, [http://www.refworld.org/cases,GBR\\_CA\\_CIV,3ae6b6ad14.html](http://www.refworld.org/cases,GBR_CA_CIV,3ae6b6ad14.html), at para. 71.

<sup>13</sup> This corresponds to question 2 of the questions posed by the Council of State.

- II. Whether women who claim refugee status based on the assumption of “a western lifestyle” / who do not adhere to prevailing cultural and religious norms may have a well-founded fear of persecution based on the “political opinion” and “religion” grounds as referred to in Article 1A(2) of the 1951 Convention and Article 10 of the Qualification Directive;<sup>14</sup>
- III. Whether women who have assumed “a western lifestyle” / who do not adhere to prevailing cultural and religious norms, can be expected to exercise restraint in order to avoid persecution (i.e. avoiding persecution through concealment or by exercising discretion);<sup>15</sup>
- IV. Whether women who have assumed “a western lifestyle” / who do not adhere to prevailing cultural/religious norms may have a well-founded fear of persecution and a real risk of analogous treatment in violation of Article 3 ECHR upon return to Afghanistan or Somalia;<sup>16</sup> and
- V. Whether an applicant is required to be “convincingly persuasive” for the establishment of a well-founded fear of persecution (in the context of the forward looking nature of the 1951 Convention definition of a refugee).<sup>17</sup>

**B. Legal issues regarding the interpretation of the Refugee Definition**

- 7. The criteria for refugee status are set out in Article 1A(2) of the 1951 Convention and are to be interpreted in accordance with their ordinary meaning, and in light of the object and purpose of the 1951 Convention. The preamble of the 1951 Convention contains strong human rights language, and indicates that the intention of the drafters was to incorporate human rights values in the application and interpretation of the Convention.<sup>18</sup>
- 8. The Treaty on the Functioning of the European Union (TFEU) expressly requires EU secondary legislation on asylum to conform to the 1951 Convention.<sup>19</sup> The Qualification Directive recognizes the 1951 Convention as the “cornerstone of the international legal regime for the protection of refugees”<sup>20</sup> and stipulates that the Directive’s minimum standards are laid

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<sup>14</sup> This corresponds to question 8 of the questions posed by the Council of State.

<sup>15</sup> This corresponds to question 3 of the questions posed by the Council of State.

<sup>16</sup> This corresponds to question 4 of the questions posed by the Council of State.

<sup>17</sup> This corresponds to question 7 of the questions posed by the Council of State.

<sup>18</sup> UNHCR, *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, April 2001, <http://www.unhcr.org/refworld/docid/3b20a3914.html> (hereafter “UNHCR, Interpreting Article 1”), paras. 2–5.

<sup>19</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, <http://www.refworld.org/docid/4b17a07e2.html>. Article 78 para. 1 TFEU provides that the policy on asylum “must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”.

<sup>20</sup> Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and*

down with a view to guiding Member States in the application of the 1951 Convention.<sup>21</sup> The Court of Justice of the European Union (CJEU) has repeatedly reiterated that this instrument must be interpreted “in a manner consistent with the 1951 Convention and the other relevant treaties” referred to in Article 63(1) of the Treaty Establishing the European Community (Consolidated Version) (Rome Treaty).<sup>22</sup>

9. In all claims to refugee status, the well-founded fear of persecution needs to be related to one or more of the grounds specified in the refugee definition in Article 1A(2) of the 1951 Convention; that is, it must be for reasons of race, religion, nationality, membership of a particular social group or political opinion. However, the Convention ground need only be a contributing factor to the well-founded fear of persecution; it need not be shown to be the dominant or even the sole cause.<sup>23</sup>
10. As noted in the UNHCR *Guidelines on International Protection concerning Gender-related Persecution*,<sup>24</sup> it is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status. This approach has been endorsed by UNHCR’s Executive Committee, of which the Netherlands is a Member State.<sup>25</sup> The UN Committee on the Elimination of Discrimination Against Women has similarly recommended that “State parties should interpret the definition of a refugee in the 1951 Convention relating to the Status of Refugees in line with obligations of non-discrimination and equality: fully integrate a gender-sensitive approach while interpreting all legally recognized grounds; classify gender-related claims

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for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26, 2011/95/EU, <http://www.refworld.org/docid/4f197df02.html>, Recitals 3 and 4.

<sup>21</sup> Recital 23 of the Qualification Directive (recast).

<sup>22</sup> Now Article 78 para. 1 TFEU. See *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08, C-176/08, C-178/08 and C-179/08, CJEU, 2 March 2010, at paras. 53–54 (“Salahadin Abdulla”); *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, CJEU, 17 June 2010, (“Bolbol”), at para. 38; *Bundesrepublik Deutschland v. B. and D.*, C-57/09 and C-101/09, CJEU, 9 November 2010, at para. 78.

<sup>23</sup> UNHCR, *Handbook*, para. 20.

<sup>24</sup> 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*, 7 May 2002, HCR/GIP/02/01, <http://www.refworld.org/docid/3d36f1c64.html> (hereafter “UNHCR, *Guidelines on Gender-Related Persecution*”), para. 2.

<sup>25</sup> The Executive Committee of the High Commissioner’s Programme (“ExCom”) was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions. Its terms of reference are found in United Nations General Assembly Resolution 1166(XII) which states *inter alia* that it is “to advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office.” This includes issuing Conclusions on International Protection (often referred to as “ExCom Conclusions”), which address issues in the field of refugee protection and serve as “international guidelines to be drawn upon by States, UNHCR and others when developing or orienting their policies on refugee issues”; see: ExCom Conclusion No. 55 (XL) – 1989, 13 October 1989, at para. (p), <http://www.unhcr.org/excom/EXCOM/3ae68c43c.html>. ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 87 States are Members of the UNHCR Executive Committee. See also, UNHCR, *General Conclusion on International Protection*, 8 October 1999, No. 87 (L) - 1999, para. (n), <http://www.refworld.org/docid/3ae68c6ec.html>. See also General Conclusions No. 39, 73, 77 (g), 79 (o) and 81 (t), all of which are available at: UNHCR, *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 (Conclusion No. 1 – 114)*, October 2017, HCR/IP/3/Eng/REV. 2017, <http://www.refworld.org/docid/5a2ead6b4.html>.

under the ground of membership of a particular social group, where necessary.”<sup>26</sup> Even though gender is not specifically mentioned in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims.<sup>27</sup>

11. Ensuring that a gender-sensitive interpretation is given to each of the Convention grounds is important in determining whether a particular claimant has fulfilled the criteria of the refugee definition. It is important to be aware that in many gender-related claims, the persecution feared could be for one, or more, of the Convention grounds; they are not mutually exclusive and may overlap.<sup>28</sup> For example, a claim for refugee status based on transgression of social or religious norms may be analysed in terms of religion, political opinion or membership of a particular social group. Moreover, the claimant is not required to identify accurately the reason or reasons for the persecution feared.<sup>29</sup>

***I. Whether women who claim refugee status based on the assumption of “a western lifestyle” / who do not adhere to prevailing cultural and religious norms may constitute “a particular social group” as referred to in Article 1A(2) of the 1951 Convention and Article 10 of the Qualification Directive***

12. Membership of a particular social group is one of the five grounds enumerated in the refugee definition contained in Article 1A(2) of the 1951 Convention. This refugee definition has been incorporated into EU asylum law, notably through Article 2(c) of the Qualification Directive which includes the “membership of a particular social group” ground. Article 10(1)(d) of the Qualification Directive provides specific guidance to Member States on how to interpret “membership of a particular social group” as a reason for persecution.
13. Neither the 1951 Convention nor the 1967 Protocol provides a definition of “membership of a particular social group” or a specific list of particular social groups. Although the drafting history also does not shed any light on its meaning, over time, expert commentary and jurisprudence/case law have sought to clarify the term. In UNHCR’s *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 (“*Social Group Guidelines*”), UNHCR has noted that the term “membership of a particular social group” should be read in “an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”<sup>30</sup> The *Social Group Guidelines* provide legal interpretative guidance on assessing claims of persons who fear being persecuted for reasons of their membership of a particular social group, including groups defined by the members’ gender. Of particular relevance to the

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<sup>26</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014, CEDAW/C/GC/32, <http://www.refworld.org/docid/54620fb54.html>, para. 38

<sup>27</sup> UNHCR, *Guidelines on Gender-Related Persecution*, para. 6.

<sup>28</sup> *Ibid.*, para. 23; UNHCR, *Handbook*, para. 67.

<sup>29</sup> UNHCR, *Handbook*, paras. 66-67.

<sup>30</sup> UNHCR, *Social Group Guidelines*, para. 3.

questions posed by the Court are also UNHCR's *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* ("Guidelines on Gender-Related Persecution"),<sup>31</sup> which provide interpretative guidance on the application of Article 1A(2) of the 1951 Convention to persons making claims for international protection based, inter alia, on their gender.

14. As noted in the *Social Group Guidelines*, States have adopted two main approaches to defining a particular social group consistent with the 1951 Convention: (i) the "protected characteristics" approach<sup>32</sup> and (ii) the "social perception" approach.<sup>33</sup> UNHCR's *Social Group Guidelines* acknowledges the validity of each approach and attempts to thus accommodate both as **alternative** approaches in one comprehensive standard definition:

*"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."*<sup>34</sup>

15. The *Social Group Guidelines* therefore make it clear that in UNHCR's view, only one of the two requirements (sharing a common characteristic or being perceived as a group by society) needs to be met in order to satisfy the particular social group definition. UNHCR notes that the final wording of Article 10(1)(d) of the Qualification Directive adopts a "cumulative" rather than an "alternative" approach to determining a particular social group. UNHCR has recommended that the EU adopt an "alternative" approach so as to avoid protection gaps.<sup>35</sup> UNHCR also notes that the Qualification Directive provides that Member States may introduce or retain more favourable standards than those set out in the Directive.<sup>36</sup>
16. In UNHCR's view, women who assert their human rights, including such rights as freedom of expression and freedom of thought, conscience and religion, and who in doing so are seen as

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<sup>31</sup> UNHCR, *Guidelines on Gender-Related Persecution*.

<sup>32</sup> The protected characteristics approach examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status): *Social Group Guidelines*, at para. 6.

<sup>33</sup> The social perception approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large: *Social Group Guidelines*, at para. 7.

<sup>34</sup> UNHCR, *Guidelines on Gender-Related Persecution*, para. 29, (emphasis added).

<sup>35</sup> Regarding Article 10(d) of the QD Recast, UNHCR has recommended that the EU adopt an alternative approach. See, e.g. *UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM(2016)466*, February 2018, p. 17, <http://www.refworld.org/docid/5a7835f24.html>. Also see recommendations contained in UNHCR, *Annotated Comments on the EC 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 (OJ L 304/12 of 30.9.2004)*, 28 January 2005, <http://www.refworld.org/docid/4200d8354.html>; and *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, <http://www.unhcr.org/refworld/docid/4c63ebd32.html>.

<sup>36</sup> Article 3 of the Qualification Directive; Article 3 Qualification Directive (recast).

not adhering to prevailing cultural and/or religious norms (or who have adopted “a western lifestyle”) can be considered a social group within the meaning of Article 1A(2) of the 1951 Convention (and meet the definition of a social group contained in Article 10(1)(d) of the Qualification Directive), in that they share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and they are perceived as being different by the surrounding society.<sup>37</sup>

17. The size of the group has sometimes been used as a basis for refusing to recognise “women” generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size.<sup>38</sup> The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2). This is true as well for cases arising under the other Convention grounds. For example, States may seek to suppress religious or political ideologies that are widely shared among members of a particular society—perhaps even by a majority of the population; the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.<sup>39</sup>
18. There should equally be no requirement that the particular social group be cohesive or that members of it voluntarily associate,<sup>40</sup> or that every member of the group is at risk of persecution.<sup>41</sup> It is well accepted that it should be possible to identify the group independently of the persecution, however, discrimination or persecution may be a relevant factor in determining the visibility of the group in a particular context.<sup>42</sup>

## ***II. Whether women who claim refugee status based on the assumption of “a western lifestyle” / who do not adhere to prevailing cultural and religious norms may have a well-founded fear of persecution based on the “political opinion” and “religion” grounds as referred to in Article 1A(2) of the 1951 Convention and Article 10 of the Qualification Directive***

19. Many cases which have been considered under the rubric of membership in a particular social group, in fact can be decided on the basis of (an imputed) political opinion, or on the basis of religion, and need not necessarily involve a social group analysis. In light of the strict gender roles in certain societies, the underlying causes of persecution that appears to be on account of gender may in fact be based on one or more of the other four grounds. “An example of this might be refusal to wear clothing or to behave in ways prescribed for women. This may be objectionable for the authorities not because of the sex of the individual who is refusing to

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<sup>37</sup> See also Executive Committee Conclusion No. 39, Refugee Women and International Protection, 1985: “States ... are free to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as ‘a particular social group’ within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention.” <http://www.refworld.org/docid/5a2ead6b4.html>.

<sup>38</sup> UNHCR, *Guidelines on Gender-Related Persecution*, para. 31.

<sup>39</sup> UNHCR, *Social Group Guidelines*, para. 18.

<sup>40</sup> UNHCR, *Guidelines on Gender-Related Persecution*, para. 31.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

behave in the prescribed fashion, but because the refusal indicates an “unacceptable” religious or political opinion.”<sup>43</sup> The convention grounds are not mutually exclusive, thus, the intersectionality of the basis of the claim should be considered.

## **Religion**

20. The *travaux préparatoires* of the 1951 Convention show that religion-based persecution formed an integral and accepted part of the refugee definition throughout the drafting process. There was, however, no attempt to define the term as such. No universally accepted definition of “religion” exists. International human rights standards provide guidance in defining the term “religion” also in the context of international refugee law, against which action taken by States to restrict or prohibit certain practices can be examined<sup>44</sup>. As the Human Rights Committee notes, “religion” is “not limited [...] to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions”. It also broadly covers acts of failing or refusing to observe a religion or to hold any particular religious belief.<sup>45</sup> The use of the term ‘religion’ in the 1951 Convention can therefore be taken to encompass freedom of thought, conscience or belief.<sup>46</sup>
21. Claims based on “religion” may involve one or more of the following elements: a) religion as belief (including non-belief);<sup>47</sup> b) religion as identity;<sup>48</sup> c) religion as a way of life. For some individuals, “religion” is a vital aspect of their “way of life” and how they relate, either completely or partially, to the world. Their religion may manifest itself in such activities as the wearing of distinctive clothing or observance of particular religious practices, including observing religious holidays or dietary requirements. Such practices may seem trivial to non-adherents, but may be at the core of the religion for the adherent concerned.
22. Particular attention should be paid to the impact of gender on religion-based refugee claims, as women and men may fear or suffer persecution for reasons of religion in different ways to each other. Clothing requirements, restrictions on movement, harmful traditional practices, or unequal or discriminatory treatment, including subjection to discriminatory laws and/or punishment, may all be relevant.<sup>49</sup>

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<sup>43</sup> UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, paras 30-31, <http://www.refworld.org/docid/3b20a3914.html>.

<sup>44</sup> In determining religion-based claims, it is therefore useful, inter alia, to draw on Article 18 of the 1948 Universal Declaration of Human Rights (the “Universal Declaration”) and Articles 18 and 27 of the 1966 International Covenant on Civil and Political Rights (the “International Covenant”).

<sup>45</sup> UNHCR, *Guidelines on Religion-Based Refugee Claims*, para. 4.

<sup>46</sup> UNHCR, *Handbook*, para. 71.

<sup>47</sup> “Belief”, in this context, should be interpreted so as to include theistic, nontheistic and atheistic beliefs. Beliefs may take the form of convictions or values about the divine or ultimate reality or the spiritual destiny of humankind. Claimants may also be considered heretics, apostates, schismatic, pagans or superstitious, even by other adherents of their religious tradition and be persecuted for that reason.

<sup>48</sup> “Identity” is less a matter of theological beliefs than membership of a community that observes or is bound together by common beliefs, rituals, traditions, ethnicity, nationality, or ancestry. A claimant may identify with, or have a sense of belonging to, or be identified by others as belonging to, a particular group or community. In many cases, persecutors are likely to target religious groups that are different from their own because they see that religious identity as part of a threat to their own identity or legitimacy.

<sup>49</sup> UNHCR, *Guidelines on Religion-Based Refugee Claims*, para. 24.



23. In certain States, the religion assigns particular roles or behavioural codes to women and men respectively. Where a woman does not fulfil her assigned role or refuses to abide by the codes, and is punished as a consequence, she may have a well-founded fear of being persecuted for reasons of religion. Failure to abide by such codes may be perceived as evidence that a woman holds unacceptable religious opinions regardless of what she actually believes. A woman may face harm for her particular religious beliefs or practices, or those attributed to her, including her refusal to hold particular beliefs, to practise a prescribed religion or to conform her behaviour in accordance with the teachings of a prescribed religion.<sup>50</sup>
24. There is some overlap between the grounds of religion and political opinion in gender-related claims, especially in the realm of imputed political opinion. While religious tenets require certain kinds of behaviour from a woman, contrary behaviour may be perceived as evidence of an unacceptable political opinion. For example, in certain societies, the role ascribed to women may be attributable to the requirements of the State or official religion. The authorities or other actors of persecution may perceive the failure of a woman to conform to this role as the failure to practice or to hold certain religious beliefs. At the same time, the failure to conform could be interpreted as holding an unacceptable political opinion that threatens the basic structure from which certain political power flows. This is particularly true in societies where there is little separation between religious and State institutions, laws and doctrines.<sup>51</sup>

### **Political Opinion**

25. The starting point to address the doctrine of imputed political opinion is the 1951 Convention. Under the Convention ground of political opinion, a claimant must show that he or she has a well-founded fear of being persecuted for holding certain political opinions (usually different from those of the Government or parts of the society), or because the holding of such opinions has been attributed to him or her. The refugee definition does not require applicants to describe their beliefs as political for their convictions to be considered political opinions for purposes of protection provided by the 1951 Convention.
26. UNHCR highlights that the Dutch Aliens Act transposes the Qualification Directive (recast) and the Directive expressly protects those persecuted because of the characteristics listed in Articles 2(d) and 10(1) of the Directive whether or not they actually have the characteristic, provided it is “*attributed to the applicant [for international protection] by the actor of persecution*”.<sup>52</sup>
27. Under this ground, a claimant must show that he or she has a well-founded fear of being persecuted for holding certain political opinions (usually different from those of the Government or parts of the society), or because the holding of such opinions has been

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<sup>50</sup> UNHCR, *Guidelines on Gender-Related Persecution*, para. 25. See also, UNHCR, *Guidelines on Religion-Based Refugee Claims*, which states that “in communities in which a dominant religion exists or where there is a close correlation between the State and religious institutions, discrimination on account of one’s failure to adopt the dominant religion or to adhere to its practices, could amount to persecution in a particular case.” Para. 12.

<sup>51</sup> UNHCR, *Guidelines on Gender-Related Persecution*, para. 26.

<sup>52</sup> Article 10(2), Qualification Directive (recast).

attributed to him or her. Political opinion should be understood in the broad sense, to incorporate “any opinion on any matter in which the machinery of State, government, society, or policy may be engaged”.<sup>53</sup> This may include an opinion as to gender roles. It would also include non-conformist behaviour which leads the persecutor to impute a political opinion to him or her. In this sense, there is not as such an inherently political or an inherently non-political activity, but the context of the case should determine its nature.<sup>54</sup>

28. A claim on the basis of political opinion does, however, presuppose that the claimant holds or is assumed to hold opinions not tolerated by the authorities or society, which are critical of their policies, traditions or methods. It also presupposes that such opinions have come or could come to the notice of the authorities or relevant parts of the society, or are attributed by them to the claimant. It is not always necessary to have expressed such an opinion, or to have already suffered any form of discrimination or persecution. In such cases the test of well-founded fear would be based on an assessment of the consequences that a claimant having certain dispositions would have to face if he or she returned.<sup>55</sup>

***III. Whether women who have assumed “a western lifestyle” / who do not adhere to prevailing cultural and religious norms, can be expected to exercise restraint in order to avoid persecution (i.e. avoiding persecution through concealment or by exercising discretion)***

29. The importance or centrality of a particular practice to a religion will vary from religion to religion and from person to person; it is self-determined and context specific. What constitutes an important or central part of the religion or belief is to be determined in the context of each individual case.<sup>56</sup>
30. One’s religious belief, identity or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution, in particular where the risk of being persecuted hinges on the future behaviour of an applicant.<sup>57</sup> In fact, being compelled to forsake or conceal one’s religious belief, identity or way of life where this is instigated or condoned by the State may itself constitute persecution, or be part of a pattern of measures that cumulatively amount to persecution in an individual case.

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<sup>53</sup> G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), p. 87; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, <http://www.refworld.org/docid/3ae6b673c.html>. See also, UNHCR, *Guidelines on Gender-Related Persecution*, para. 32.

<sup>54</sup> UNHCR, *Guidelines on Gender-Related Persecution*, para. 32, (emphasis added).

<sup>55</sup> *Ibid.* (emphasis added).

<sup>56</sup> UNHCR, *Statement on Religious Persecution and the Interpretation of Article 9(1) of the EU Qualification Directive*, 17 June 2011, C-71/11 & C-99/11, <http://www.refworld.org/docid/4dfb7a082.html>, at para 4.2.7.

<sup>57</sup> UNHCR, *Guidelines on Religion-Based Refugee Claims*, para. 13.

31. “Persecution does not cease to be persecution because those persecuted eliminate the harm by taking avoiding action.”<sup>58</sup> Adopting such an approach would undermine the protection foundations of the 1951 Convention. “If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion, nationality, membership of a social group or political opinion, then he is being required to surrender the very protection that the Convention is intended to secure for him’.<sup>59</sup>
32. When assessing the dangers arising from future behaviour of an applicant, it is important to assess whether the said behaviour is part of the applicant’s individual religious belief or identity, or fundamental to his or her way of life. If the behaviour cannot be interfered with in a justified manner as a matter of international human rights law, it cannot be expected that the applicant abstain from such behaviour. Likewise, if the religious practice protected by human rights is not of fundamental significance to the religion, but is nonetheless especially important for the individual, its restriction could still constitute persecution on the basis of his or her conscience or belief. Denying refugee status by requiring the individual to refrain from such protected practices or behaviour would not be compatible with protection principles underlying the 1951 Convention.<sup>60</sup>
33. This is supported by the relevant case law of the Court of Justice of the European Union (CJEU). As pointed out in *Y and Z (v. Germany)*<sup>61</sup>:

*78. None of those rules states that, in assessing the extent of the risk of actual acts of persecution in a particular situation, it is necessary to take account of the possibility open to the applicant of avoiding the risk of persecution by abstaining from the religious practice in question and, consequently, renouncing the protection which the Directive is intended to afford the applicant by conferring refugee status.*

*79. It follows that, where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status, in accordance with Article 13 of the Directive. **The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.** [emphasis added]*

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<sup>58</sup> See decisions in *HJ (Iran) v. Secretary of State for the Home Department*; *HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31, per Lord Hope, at para. 26 (United Kingdom Supreme Court); following *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs* [2003] 216 CLR 473, para. 39, per McHugh and Kirby JJ. (Australian High Court).

<sup>59</sup> *Ibid.* Sir John Dyson JSC at §110. See also, CJEU decision in *Minister voor Immigratie en Asiel v X, Y and Z* (Joined Cases C-199/12 to C-201/12), [2014] QB 1111 at §70; and in relation to political opinion *NACM v Minister for Immigration and Multicultural and Indigenous Affairs*, Federal Court of Australia, <http://www.refworld.org/pdfid/4f4e60c52.pdf>, [2003] FCA 1554 which held that “The only way to avoid (in this case, to have avoided) the persecution would be to deny oneself the expression of the political opinion. But that is to ask of a committed person that he or she deny what accepted notions of human dignity assert need not be denied. Such is exactly what international human rights law seeks to guard against. The right to hold an opinion is nothing if there is no right lawfully to express it, including by acting on it”, para. 57.

<sup>60</sup> UNHCR, *Guidelines on Religion-Based Refugee Claims*, para. 16

<sup>61</sup> Court of Justice of the European Union, *Bundesrepublik Deutschland v. Y (C-71/11), Z (C-99/11), C-71/11 and C-99/11*, 5 September 2012, [http://www.refworld.org/cases\\_ECJ\\_505ace862.html](http://www.refworld.org/cases_ECJ_505ace862.html).

34. These same considerations are equally valid if the asylum claim is based on one of the other grounds enshrined in the refugee definition of the 1951 Convention.<sup>62</sup>
35. In the case X, Y and Z (v. The Netherlands)<sup>63</sup> the CJEU ruled in the context of sexual orientation claims, as follows:

*75. It follows that the person concerned must be granted refugee status, in accordance with Article 13 of the Directive, where it is established that on return to his country of origin his homosexuality would expose him to a genuine risk of persecution within the meaning of Article 9(1) thereof. The fact that he could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect.*

36. In addition to the CJEU judgments quoted above, the principle that a person in need of international protection cannot be required to conceal their protected identity has been upheld by a number of superior and national Courts internationally, in the context of sexual orientation claims,<sup>64</sup> political opinion (including having no political opinion)<sup>65</sup> and imputed political opinion claims on the basis of the applicant's profession (or membership of a particular social group).<sup>66</sup>

**IV. Whether women who have assumed “a western lifestyle” / women who do not adhere to prevailing cultural/religious norms may have a well-founded fear of persecution and a real risk of analogous treatment in violation of Article 3 ECHR upon return to Afghanistan or Somalia**

37. UNHCR is of the view that women who assert their human rights, including such rights as freedom of religion and freedom of expression, and who in doing so are seen as not adhering to prevailing cultural and/or religious norms (or who have adopted “a western lifestyle”) may

<sup>62</sup> UNHCR, *Statement on religious persecution and the interpretation of Article 9(1) of the EU Qualification Directive*, 17 June 2011, C-71/11 & C-99/11, <http://www.refworld.org/docid/4dfb7a082.html>, p. 13.

<sup>63</sup> Court of Justice of the European Union, *X, Y, Z v Minister voor Immigratie en Asiel*, C-199/12 - C-201/12, 7 November 2013, <http://www.refworld.org/cases,ECJ,527b94b14.html>.

<sup>64</sup> See, *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia: High Court, 9 December 2003, [http://www.refworld.org/cases,AUS\\_HC,3fd9eca84.html](http://www.refworld.org/cases,AUS_HC,3fd9eca84.html); *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010, [http://www.refworld.org/cases,UK\\_SC,4c3456752.html](http://www.refworld.org/cases,UK_SC,4c3456752.html); *Fosu Atta v. Canada (Citizenship and Immigration)*, 2008 FC 1135, Canada: Federal Court, 8 October 2008, [http://www.refworld.org/cases,CAN\\_FC,5a8da8e54.html](http://www.refworld.org/cases,CAN_FC,5a8da8e54.html).

<sup>65</sup> See, *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012, [http://www.refworld.org/cases,UK\\_SC,500fdacb2.html](http://www.refworld.org/cases,UK_SC,500fdacb2.html).

<sup>66</sup> See, *MSM (Somalia) v. Secretary of State for the Home Department*, C5/2015/3380, United Kingdom: Court of Appeal, 12 July 2016, [http://swigea56.hcrnet.ch/refworld/cases,GBR\\_CA\\_CIV,578780534.html](http://swigea56.hcrnet.ch/refworld/cases,GBR_CA_CIV,578780534.html). See also, *Minister for Immigration and Border Protection v SZSCA*, where the Australian Federal Court decided in that an individual cannot be required to change his or her profession in order to avoid persecution by reason of imputed political opinion: [2013] FCAFC 155 (10 December 2013), [http://www.refworld.org/cases,AUS\\_FC,531998214.html](http://www.refworld.org/cases,AUS_FC,531998214.html).

have a well-founded fear of persecution in Afghanistan or Somalia, on grounds of membership of a particular social group, religion or political opinion or on account of all three categories. Such persons may then be at risk of analogous harm that is prohibited under the scope of Article 3 ECHR and would be entitled to international protection. This view is supported by UNHCR's 2016 *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* and UNHCR's *International Protection Considerations with Regard to people fleeing Southern and Central Somalia*, excerpts of which follow.<sup>67</sup>

### Afghanistan

38. UNHCR states in its *Afghanistan Eligibility Guidelines* the following on women and men who are perceived as contravening social mores:

*Despite Government efforts to promote gender equality, women continue to face pervasive social, political and economic discrimination due to persistent stereotypes and customary practices that marginalize them.<sup>[401]</sup> Women who are perceived as transgressing social norms continue to face social stigma, general discrimination and threats to their safety, particularly in rural areas and in areas under the control of AGEs.<sup>[402]</sup> Such norms include requirements that restrict women's freedom of movement, such as the requirement to be accompanied by a male relative chaperone when appearing in public.<sup>[403]</sup>*

*Women without male support and protection, including widows, are at particular risk. They generally lack the means of survival, given existing social norms imposing restrictions on women living alone, including limitations on their freedom of movement and on their ability to earn a living.<sup>[404]</sup> Detention for breaches of customary or Sharia law is reported to disproportionately affect women and girls,<sup>[405]</sup> including detention on the ground of perceived "moral crimes" such as being improperly unaccompanied,<sup>[406]</sup> refusing marriage,<sup>[407]</sup> engaging in sexual intercourse outside of marriage (which is considered adultery)<sup>[408]</sup> or "running away from home"<sup>[409]</sup> (including in situations of domestic violence).<sup>[410]</sup> Over half of the girls and women detained in the country have been charged with "moral crimes".<sup>[411]</sup> Since accusations of adultery and other "moral crimes" may elicit "honour killings",<sup>[412]</sup> in some instances the authorities are reported to have sought to justify the detention of women accused of such acts as a protective measure.<sup>[413]</sup>*

*Men who are perceived to be acting contrary to prevailing customs may also be at risk of ill-treatment, particularly in situations of accusations of adultery and sexual relations outside of marriage.<sup>[414]</sup>*

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<sup>67</sup> Please note that the footnote numbers that appear in square brackets correspond to the original footnote numbers in UNHCR's *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, and UNCHR's *International Protection Considerations with Regard to people fleeing Southern and Central Somalia*.

*In areas under the effective control of the Taliban and other AGEs, women and men accused of immoral behaviour risk being tried by these AGEs' parallel justice structures and being given harsh sentences, including lashings and death.<sup>[415] 68</sup>*

39. UNHCR states in the same guidelines the following on women's rights in Afghanistan:

*The deterioration of the security situation in some parts of the country has undone some of the earlier progress in relation to women's human rights.<sup>[360]</sup> Deep-rooted discrimination against women remains endemic.<sup>[361]</sup> Violence against women and girls remains widespread and is reported to be on the rise;<sup>[362]</sup> impunity in relation to such violence is reportedly common.<sup>[363]</sup> Women are said to continue to face serious challenges to the full enjoyment of their economic, social and cultural rights.<sup>[364]</sup>*

40. In its *Afghanistan Eligibility Guidelines*, UNHCR also observes the following about individuals perceived as "westernized":

*Anti-Government Elements (AGEs) reportedly target individuals who are perceived to have adopted values and/or appearances associated with Western countries, due to their imputed support for the Government and the international community.<sup>[255]</sup> There are reports of individuals who returned from Western countries having been tortured or killed by AGEs on the grounds that they had become "foreigners" or that they were spies for a Western country.<sup>[256] 69</sup>*

## Somalia

41. UNHCR has, in its *International Protection Considerations with regard to people fleeing Southern and Central Somalia* (7 January 2014), determined that individuals, and in particular women, (perceived as) contravening Islamic Sharia and decrees imposed by Al-Shabaab, including converts from Islam, other "apostates" [...] are part of a risk profile in Central and Southern Somalia.<sup>70</sup>

42. UNHCR refers in the same guidelines to "systematic constraints on participation in public life, including in particular for women"<sup>71</sup> and notes the following on the situation of women in Somalia:

*In the areas under its control, Al-Shabaab continues to impose a severe interpretation of Sharia law which prohibits the exercise of various types of freedoms and rights, especially*

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<sup>68</sup> UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 19 April 2016, HCR/EG/AFG/16/02, <http://www.refworld.org/docid/570f96564.html>, pp. 62-64 (footnotes suppressed).

<sup>69</sup> *Ibid.*, p. 41.

<sup>70</sup> UNHCR, *International Protection Considerations with Regard to people fleeing Southern and Central Somalia*, 17 January 2014, HCR/PC/SOM/14/01, <http://www.refworld.org/docid/52d7fc5f4.html>, p. 10.

<sup>71</sup> *Ibid.*, p. 10.

affecting women. These include forcing women to wear veils and preventing them from working and travelling without a male relative. <sup>[19] 72</sup>

V. **Whether an applicant is required to be “convincingly persuasive” for the establishment of a well-founded fear of persecution (in the context of the forward looking nature of the 1951 Convention definition of a refugee)**

43. The refugee definition in Article 1A(2) of the 1951 Convention is forward-looking. The wording “well-founded fear” does not require past persecution, although absence a relevant change of circumstances, persons having suffered persecution in the past would be assumed to be at continued risk of persecution.<sup>73</sup> International refugee protection is preventive in its nature and therefore a person does not need to wait until she or he has been detected and persecuted before she or he can claim refugee status. As pointed out in the UNHCR *Handbook*:

42. *As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin –while not a primary objective – is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.*<sup>74</sup>

45. *[A]n applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has a well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word “fear” refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.*<sup>75</sup>

44. On indicators for assessing well-foundedness of fear, UNHCR’s *Note on Burden and Standard of Proof in Refugee Claims* states:

18. *While by nature, an **evaluation of risk of persecution is forward-looking** and therefore inherently somewhat speculative, such an evaluation should be made based on factual considerations which take into account the personal circumstances of the*

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<sup>72</sup> *Ibid*, p. 4 (footnotes suppressed).

<sup>73</sup> 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*, 2 December 2016, HCR/GIP/16/12, <http://www.refworld.org/docid/583595ff4.html>, para. 24.

<sup>74</sup> UNHCR, *Handbook*, para. 42; see also UNHCR, *Advisory Opinion on the Interpretation of the Refugee Definition*, 23 December 2004, <http://www.refworld.org/docid/4551c0374.html>, p. 5.

<sup>75</sup> UNHCR, *Handbook*, para. 45.

*applicant as well as the elements relating to the situation in the country of origin.*

*19. The applicant's personal circumstances would include his/her background, experiences, personality and any other personal factors which could expose him/her to persecution. In particular, whether the applicant has previously suffered persecution or other forms of mistreatment and the experiences of relatives and friends of the applicant as well as those persons in the same situation as the applicant are relevant factors to be taken into account. Relevant elements concerning the situation in the country of origin would include general social and political conditions, the country's human rights situation and record; the country's legislation; the persecuting agent's policies or practices, in particular towards **persons who are in a similar situation as the applicant**, etc. **While past persecution or mistreatment would weigh heavily in favour of a positive assessment of risk of future persecution, its absence is not a decisive factor.***

### **C. Conclusions**

45. In UNHCR's view, women who assert their human rights, including such rights as freedom of expression and freedom of thought, conscience and religion, and who in doing so are seen as not adhering to prevailing cultural and/or religious norms (by for example, having adopted "a western lifestyle") can be considered a particular social group within the meaning of Article 1A(2) of the 1951 Convention (and meet the definition of a social group contained in Article 10(1)(d) of the Qualification Directive).
46. In addition, women who claim refugee status based on the assumption of "a western lifestyle"/ who do not adhere to prevailing cultural and religious norms may be in need of international protection based on their "political opinion" and/or "religion". A holistic analysis is advised based on objective and reliable country of origin information, which includes information on the cultural and social mores of the country and consequences for non-adherence. In the context of Afghanistan and Somalia, UNHCR considers women who are perceived as contravening social mores (see paras 34-38) may be in need of international protection under one or more of the 1951 Convention grounds as they risk persecutory harm.
47. Moreover, an individual cannot be required to take steps or abstain from behaviour relating to protected rights under the 1951 Convention and which persons should be at liberty to enjoy unless they may be restricted for legitimate reasons. Their curtailment otherwise amounts to persecution and requiring persons to abstain from expressing those rights to avoid persecution would deprive them of the very protection that the Convention is intended to secure.
48. Lastly, in light of the forward-looking nature of the definition, there is no requirement for an applicant to be "convincingly persuasive" for the establishment of a well-founded fear of persecution if past persecution is absent.

**UNHCR**  
**28 February 2018**