

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

GRACE, et al.,

Plaintiffs,

v.

JEFFERSON BEAUREGARD SESSIONS  
III, in his official capacity as Attorney  
General of the United States, et al.,

Defendants.

Civil Action No. 1:18-cv-01853-EGS

**Hon. Emmet G. Sullivan**

**BRIEF OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS  
AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY  
JUDGMENT**

ANA C. REYES (D.C. Bar No. 477354)  
XIAO WANG (D.C. Bar No. 1035487)  
YOULIN YUAN (D.C. Bar No. 1613542)  
WILLIAMS & CONNOLLY LLP  
*725 Twelfth Street, N.W.*  
*Washington, DC 20005*  
*(202) 434-5000*  
*(202) 434-5029 (fax)*

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### INTEREST OF AMICUS CURIAE<sup>1</sup>

The Office of the United Nations High Commissioner for Refugees (“UNHCR”)<sup>2</sup> has a direct interest in this matter as the organization entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees and others of concern and, together with national governments, for seeking permanent solutions to their problems. Statute of the Office of the UNHCR ¶ 1, U.N. Doc. A/RES/428(V) (Dec. 14, 1950). UNHCR fulfills its mandate by “[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 reflected in the Preamble and Article 35 of the *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137 (“1951 Convention”)<sup>3</sup> and Article 2 of the *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 (“1967 Protocol”).<sup>4</sup> Those instruments oblige states to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role. UNHCR’s guidance is relevant to this Court’s interpretation of the *1951 Convention* and its *1967 Protocol*, as implemented in section 101(a)(42) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101(a)(42) (2006).

UNHCR, which has won two Nobel Peace Prizes for its work, works in some 130 countries at a time when there are 68.5 million people affected by forced displacement worldwide. UNHCR,

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<sup>1</sup> Plaintiffs consent to the filing of the proposed amicus brief. Defendants consent to the filing of the proposed amicus brief provided that it does not refer to or seek to introduce non-record factual material. As UNHCR takes no position directly on the merits of Plaintiffs’ claims, the brief does not refer to any factual materials relating to Plaintiffs. No person or entity other than UNHCR and its outside counsel authored this brief or provided any funding related to it.

<sup>2</sup> This amicus brief 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* U.N. General Assembly, Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15, <http://www.refworld.org/docid/3ae6b3902.html>.

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

<sup>4</sup> <http://www.unhcr.org/3b66c2aa10.html>.



*Global Trends: Forced Displacement in 2017*, at 2 (June 25, 2018).<sup>5</sup> The views of UNHCR are informed by its more than six decades of experience supervising the treaty-based system of refugee protection. UNHCR's interpretation of the *1951 Convention* and its *1967 Protocol* is both authoritative and integral to promoting consistency in the global regime for the international protection of refugees. The Supreme Court has consistently turned to UNHCR for assistance in interpreting the United States' obligations under international refugee instruments. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 n.25 (1987); *INS v. Stevic*, 467 U.S. 407, 421 (1984).

UNHCR exercises its supervisory responsibility by issuing interpretative guidelines on the meaning of the *1951 Convention* and its *1967 Protocol* and other international refugee instruments, including the *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*<sup>6</sup> and the *Cartagena Declaration on Refugees*.<sup>7</sup> The *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, U.N. Doc. HCR/1P/4/ENG/REV.3 (1979, re-edited Jan. 1992; re-issued Dec. 2011) ("*Handbook*")<sup>8</sup> represents the first such comprehensive guidance. At the request of States, including the United States, the *Handbook* has subsequently been complemented by the *UNHCR Guidelines on International Protection* and various *Guidance Notes*.

UNHCR has a specific interest in this matter because the new policies<sup>9</sup> diverge from UNHCR guidance on the interpretation of (1) the standard to be applied in assessing whether states

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<sup>5</sup> <http://www.unhcr.org/5b27be547.pdf>.

<sup>6</sup> <http://www.refworld.org/docid/3ae6b36018.html>.

<sup>7</sup> <http://www.refworld.org/docid/3ae6b36ec.html>.

<sup>8</sup> <http://www.unhcr.org/3d58e13b4.html>.

<sup>9</sup> These new policies are reflected in *Matter of A-B-*, 27 I.&N. Dec. 316 (A.G. 2018), and USCIS's July 11, 2018 Guidance, USCIS Policy Memorandum, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*, July 11, 2018 (PM-602-0162) ("*USCIS Guidance*").

are “unable or unwilling” to provide effective protection against non-state agents of persecution, (2) the definition of a “particular social group,” and (3) the “nexus” requirement in relation to whether persecution by non-state actors may be “on account of” membership in a “particular social group.”

In addition, UNHCR has an interest in this matter because the new policies carry significant ramifications for the credible fear screening process. UNHCR’s responsibility for supervising the application of the *1951 Convention* and its *1967 Protocol* extends to guiding states on measures that help prevent the *refoulement* of asylum seekers or refugees, thus acknowledging that *non-refoulement* is a cornerstone of the international refugee law regime. UNHCR, *Declaration of States Parties to the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees* ¶ 4 (Jan. 16, 2002).<sup>10</sup> Access to fair and efficient asylum procedures is a foundational measure that prevents *refoulement*. While UNHCR recognizes that a State may establish accelerated processes, such processes must meet certain minimum standards to comply with international legal obligations.

UNHCR submits this brief to provide guidance to this Court on these obligations. Consistent with its approach in other cases, UNHCR takes no position directly on the merits of Plaintiffs’ claims but, through this brief, expresses its interest and concern with the interpretation and application of international refugee instruments as a matter of law and principle.

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<sup>10</sup> <http://www.refworld.org/docid/3d60f5557.html>.

## SUMMARY OF ARGUMENT

UNHCR has long held that violence perpetrated by non-state actors, including gang and domestic violence, may constitute persecution undergirding an asylum claim based upon membership in a particular social group. Other States with significant jurisprudence on refugee status determination, such as Canada, the United Kingdom, Australia, New Zealand, and all European Union member states have reached the same conclusion—as has the United States historically. The new policies at issue, however, state that violence by non-state actors generally does not constitute a basis for asylum—or even a “credible fear” of persecution—based on their approach to (a) assessing the inability or unwillingness of the state to protect a person from persecution; (b) the interpretation of what constitutes a “particular social group,” and (c) the nexus between fear of persecution and membership in a particular social group. As a result, many victims of violence by non-state actors may not even have a meaningful opportunity to apply for asylum. In reaching this outcome, the new policies have interpreted the refugee definition in a manner at variance with the United States’ international obligations on a number of fronts.

*First*, in assessing state protection, the new policies recast the “unable or unwilling” standard into one requiring a showing of “complete helplessness” or “condoned” action. *Second*, the new policies misconstrue the requirements for defining a particular social group, and further elevate a threshold that was already too high by international standards. *Third*, the new policies misapply the nexus requirement, creating an unjustified barrier to persons fleeing gang and domestic violence. *Fourth*, the new policies apply all of the aforementioned standards to the credible fear interview process—a process that should screen out only “clearly abusive” or “manifestly unfounded” claims. Imposing these standards at the initial screening stage jeopardizes the ability of decision-makers to recognize meritorious claims, thereby increasing the risk that the United States will be at variance with its obligation to *non-refoulement*.

## ARGUMENT

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

The *1951 Convention* and its *1967 Protocol* are the key international instruments governing the protection of refugees. These documents address who is a refugee, his or her rights and responsibilities, and the corresponding legal obligations of States. The *1967 Protocol* binds parties to comply with the substantive provisions of Articles 2 through 34 of the *1951 Convention* with respect to “refugees” as defined in Article 1A(2) of the *1951 Convention*. *1967 Protocol* art. 1(1)–(2). The *1967 Protocol* also removes the geographic and temporal limitations from the *1951 Convention* definition, thus universalizing the refugee definition. *Id.* art. 1(2)–(3). The core of both the *1951 Convention* and its *1967 Protocol* is the principle of *non-refoulement*, which obliges States not to return a refugee to any country where he or she would face persecution or a real risk of serious harm.<sup>11</sup> In 1968, the United States acceded to the *1967 Protocol*,<sup>12</sup> thereby binding itself to the international refugee protection regime and the definition of a refugee as contained in the *1951 Convention*.

Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), expressly to “bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees,” *Cardoza-Fonseca*, 480 U.S. at 436–37 n.19 (citing H.R. Rep. No. 96-781, at 19); *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). The

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<sup>11</sup> The prohibition of *refoulement* applies to all refugees, including those who have not formally been recognized as such, and to asylum-seekers whose status has not yet been determined. UNHCR, *Note on International Protection* ¶ 11, U.N. Doc. A/AC.96/815 (Aug. 31, 1993), <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol* ¶¶ 26–31 (Jan. 2007), <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

<sup>12</sup> H.R. Rep. No. 96-781, at 19 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 160, 160; S. Exec. Doc. No. 14, 90th Cong., 2d Sess. 4 (1968).

Refugee Act brings the United States into compliance with its international obligations under the *1967 Protocol* and, by extension, the *1951 Convention*. It should be interpreted and applied in a manner consistent with those instruments. *See Cardoza-Fonseca*, 480 U.S. at 437 (by enacting Refugee Act, Congress intended “that the new statutory definition of ‘refugee’ be interpreted in conformance with the Protocol’s definition”); *cf. Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 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.”).

## **II. AS RECOGNIZED BY U.S. AND FOREIGN COURTS, UNHCR PROVIDES AUTHORITATIVE GUIDANCE IN EVALUATING CLAIMS OF PERSECUTION BY NON-STATE ACTORS**

UNHCR exercises its supervisory responsibility by issuing interpretive guidance on the meaning of provisions contained in the *1951 Convention* and its *1967 Protocol*. The most authoritative of this guidance is the UNHCR *Handbook*, which was prepared in 1979 at the request of Member States, including the United States. Although the *Handbook* is not legally binding upon U.S. officials, it nevertheless provides “significant guidance” in construing the *1967 Protocol* and in giving content to the obligations established therein. *Cardoza-Fonseca*, 480 U.S. at 439 n.22; *see also Matter of S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1996) (en banc).

In 2002, UNHCR also began issuing a number of *Guidelines*,<sup>13</sup> which have been welcomed by the Executive Committee and the UN General Assembly.<sup>14</sup> The *Guidelines* complement and

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<sup>13</sup> UNHCR, *Agenda for Protection*, U.N. Doc. A/AC.96/965/Add.1 (June 26, 2002), <http://www.refworld.org/docid/3d4fd0266.html>.

<sup>14</sup> UNHCR’s governing Executive Committee was established by the United Nations’ Economic and Social Council in 1958. The Executive Committee functions as a subsidiary organ of the UN General Assembly and its report is submitted directly to the General Assembly for consideration. The Executive Committee’s functions include advising the High Commissioner in the exercise of his/her functions, and 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 UNHCR, General*

update the *Handbook* by drawing upon international legal standards, judicial decisions, Executive Committee Conclusions, academic literature, and UNHCR's views and experience. UNHCR also issues *Guidance Notes* to provide additional direction in specific areas. Courts have relied upon the *Guidelines* and *Guidance Notes* in assessing refugee claims, recognizing that UNHCR's "analysis provides significant guidance for issues of refugee law." *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1071 (9th Cir. 2017) (en banc).

Applied here, the *Handbook*, *Guidelines*, and *Guidance Notes* all affirm the well-settled principle that persecution by non-state actors may form the basis of an asylum claim. The *Handbook* expressly recognizes that asylum may be warranted by persecution "emanat[ing] from sections of the population . . . [whose] serious discriminatory or other offensive acts . . . are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." *Handbook* ¶ 65. Non-state agents include "paramilitary groups, militias, insurgents, bandits, pirates, criminal gangs or organizations," in addition to "neighbors, family members and other individuals." *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* ¶ 28, U.N. Doc. HCR/GIP/16/12 (Dec. 2, 2016) ("*Armed Conflict Guidelines*").<sup>15</sup>

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*Conclusion on International Protection No. 55 (XL)*, ¶ p (Oct. 13, 1989). ExCom Conclusions are adopted through 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, 102 states are Members of the Executive Committee, including the United States, which is one of the original members. UNHCR, *Executive Committee*, <http://www.unhcr.org/en-us/executive-committee.html>.

<sup>15</sup> <http://www.refworld.org/docid/583595ff4.html>.

Additionally, “rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking” may also constitute persecution “whether perpetrated by State or private actors.” *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* ¶ 9, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) (“*Gender Guidelines*”).<sup>16</sup> UNHCR also recognizes potential asylum claims for individuals persecuted by “family members, neighbors, or the broader community,” in, for example, cases of LGBTI people;<sup>17</sup> by Al Shabaab in Somalia;<sup>18</sup> by Boko Haram in Nigeria;<sup>19</sup> and by the Taliban in Afghanistan.<sup>20</sup>

Consistent with UNHCR’s position, parties to the *1951 Convention* and its *1967 Protocol* have recognized valid asylum claims stemming from persecution by non-state actors, including persecution stemming from gang and domestic violence. *See, e.g.*, Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689 (Can.) (persecution by non-state paramilitary group);<sup>21</sup> Tobias Gomez v. Canada (Citizenship and Immigration), 2011 F.C. 1093 (Can.) (gang violence);<sup>22</sup> Narvaez c.

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<sup>16</sup> <http://www.refworld.org/docid/3d36f1c64.html>.

<sup>17</sup> 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* ¶¶ 34–37, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012), <http://www.refworld.org/docid/50348afc2.html> (“*Sexual Orientation Guidelines*”).

<sup>18</sup> UNHCR, *Position on Returns to Southern and Central Somalia (Update I)* ¶¶ 16–19, 23 (May 2016), <http://www.refworld.org/docid/573de9fe4.html>.

<sup>19</sup> UNHCR, *International Protection Considerations with Regard to People Fleeing Northeastern Nigeria (the States of Borno, Yobe and Adamawa) and Surrounding Region—Update I* ¶ 11 (Oct. 2014), <http://www.refworld.org/docid/5448e0ad4.html>.

<sup>20</sup> UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* (Aug. 30, 2018), <http://www.refworld.org/docid/5b8900109.html>.

<sup>21</sup> [http://www.refworld.org/cases,CAN\\_SC,3ae6b673c.html](http://www.refworld.org/cases,CAN_SC,3ae6b673c.html).

<sup>22</sup> [http://www.refworld.org/cases,CAN\\_FC,56e6e5e14.html](http://www.refworld.org/cases,CAN_FC,56e6e5e14.html).

Canada (Citoyenneté et de l'Immigration), [1995] 2 F.C. 55 (Can.) (domestic violence);<sup>23</sup> Islam (A.P.) v. Sec'y of State for the Home Dep't, and R. v. Immigration Appeal Tribunal & Another Ex Parte Shah (A.P.) [1999] UKHL 20, [1999] 2 AC (HL) 629 (appeal taken from Eng.) (domestic violence);<sup>24</sup> AZ (Trafficked Women) Thailand v. Sec'y of State for the Home Dep't [2010] UKUT 118 (IAC) (human trafficking by criminal gangs);<sup>25</sup> *Minister for Immigration & Multicultural Affairs v Khawar* [2002] HCA 14 (Austl.) (domestic violence);<sup>26</sup> AB (Slovakia), AF (Czech Republic) [2015] NZIPT 800734-738 (N.Z.) (skinhead group violence);<sup>27</sup> *Refugee Appeal No. 71427/99* [2000] NZAR 545 (N.Z.) (domestic violence).<sup>28</sup>

Nearly every U.S. circuit court has likewise recognized that violence by non-state actors may undergird a valid asylum claim. *See, e.g., Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) (gang violence); *Pavlova v. INS*, 441 F.3d 82, 91 (2d Cir. 2006) (persecution by Russian Neo-Nazi group); *Garcia v. U.S. Att'y Gen.*, 665 F.3d 496, 503 (3d Cir. 2011) (gang violence); *Crespin-Valladares v. Holder*, 632 F.3d 117, 128–29 (4th Cir. 2011) (gang violence); *Eduard v. Ashcroft*, 379 F.3d 182, 190 (5th Cir. 2004) (persecution by anti-Christian Islamist groups); *Kamar v. Sessions*, 875 F.3d 811, 819 (6th Cir. 2017) (honor killing by family members); *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014) (persecution by drug trafficking organizations); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036 (8th Cir. 2008) (forced marriage by family members); *Doe v. Holder*, 736 F.3d 871, 878 (9th Cir. 2013) (violence toward homosexuals by classmates); *Niang v. Gonzales*, 422 F.3d 1187, 1191–92, 1201–02 (10th Cir. 2005) (female genital mutilation by

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<sup>23</sup> [http://www.refworld.org/cases,CAN\\_FC,3ae6b6e61c.html](http://www.refworld.org/cases,CAN_FC,3ae6b6e61c.html).

<sup>24</sup> [http://www.refworld.org/cases,GBR\\_HL,3dec8abe4.html](http://www.refworld.org/cases,GBR_HL,3dec8abe4.html).

<sup>25</sup> [http://www.refworld.org/cases,GBR\\_UTIAC,4bd58d912.html](http://www.refworld.org/cases,GBR_UTIAC,4bd58d912.html).

<sup>26</sup> [http://www.refworld.org/cases,AUS\\_HC,3deb326b8.html](http://www.refworld.org/cases,AUS_HC,3deb326b8.html).

<sup>27</sup> [http://www.refworld.org/cases,NZ\\_IPT,55c868b54.html](http://www.refworld.org/cases,NZ_IPT,55c868b54.html).

<sup>28</sup> [http://www.refworld.org/cases,NZL\\_RSAA,3ae6b7400.html](http://www.refworld.org/cases,NZL_RSAA,3ae6b7400.html).



tribal members); *Lopez v. U.S. Att’y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007) (persecution by anti-government guerillas).

### **III. VIOLENCE BY NON-STATE ACTORS—IN PARTICULAR, GANG VIOLENCE AND DOMESTIC VIOLENCE—CAN FORM THE BASIS FOR ASYLUM**

The USCIS Guidance emphasizes that, “[i]n general, . . . claims based on membership in a putative particular social group defined by the members’ vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum [or] refugee status.” USCIS Guidance at 6; *accord Matter of A-B-*, 27 I.&N. Dec. at 320. That directive diverges from the UNHCR guidance, international case law, and U.S. precedent concerning non-state actors discussed above. Departure from this well-settled and foundational legal principle is due to erroneous interpretations of (a) the “unable or unwilling” standard, (b) the “particular social group” definition, and (c) the nexus requirement. The elevated standards in these areas form an impermissible obstacle for victims of persecution seeking to obtain asylum, particularly since the standards must—under the new policies—all be applied at the outset, at an individual’s credible fear interview. We discuss these various erroneous interpretations in turn.

#### **A. The New Policies Erroneously State that Gang Violence and Domestic Violence Claims Do Not Meet the “Unable or Unwilling” Standard**

For violence perpetrated by non-state actors to constitute persecution, an individual must demonstrate that the state is “unable or unwilling” to provide adequate protection to victims. *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* ¶ 25 (Mar. 2010) (“*Gang Note*”);<sup>29</sup> *see Gender Guidelines* ¶ 19; *Armed Conflict Guidelines* ¶ 30. Such a determination requires a “holistic and integrated analysis” and “judicious balancing” of several factors, including “the general state of law, order and justice in the country, and its effectiveness,

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<sup>29</sup> <http://www.refworld.org/docid/4bb21fa02.html>.

including the resources available and the ability and willingness to use them properly and effectively to protect residents.” UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* ¶¶ 7, 15 (Apr. 2001) (“*Interpreting 1951 Convention*”).<sup>30</sup>

The new policies upend this holistic analysis. They require asylum-seekers to show that “the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim.” USCIS Guidance at 6; *Matter of A-B-*, 27 I.&N. Dec. at 337. “The mere fact that a country . . . has problems effectively policing certain crimes, like domestic violence or gang-related activities . . . cannot, by itself, establish eligibility for asylum.” USCIS Guidance at 6. In other words, under the new policies, occasional, piecemeal, or partial protection by a state will negate an asylum claim, even if that state is unable or unwilling to prevent violence in the vast majority of cases. As examined below, this unduly narrow construction of the “unable or unwilling” standard significantly diverges from the United States’ international obligations.

### **1. The New Policies Are Inconsistent with the Settled Meaning of the “Unable or Unwilling” Standard**

The hallmark of state protection is the state’s ability to provide *effective* protection, which requires *effective* control of non-state actors. *See Handbook* ¶ 65 (acts constitute persecution “if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable to offer effective protection”); *Gang Note* ¶ 25 (harm can constitute persecution when the state is “unable to provide effective protection”). State protection is ineffective where “the police fail to respond to request for protection or the authorities refuse to investigate, prosecute or punish (non-state) perpetrators of violence . . . with due diligence.” *Sexual Orientation Guidelines* ¶¶ 34–37.

Merely enacting a law prohibiting persecutory practices is not enough: “Even though a particular State may have prohibited a persecutory practice (e.g., female genital mutilation), the

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<sup>30</sup> <http://www.refworld.org/docid/3b20a3914.html>.

State may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively.” *Gender Guidelines* ¶ 11. Despite best intentions and efforts, there may be an incongruity between avowed commitments and reality on the ground. Effective protection depends on both de jure and de facto capability by the authorities. For example, in determining whether a state offers effective protection for human trafficking, UNHCR notes:

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

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* ¶ 22, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006) (“*Trafficking Guidelines*”);<sup>31</sup> see also *Interpreting 1951 Convention* ¶ 15 (ability to offer effective protection requires examining “the general state of law, order and justice in the country, and its effectiveness, including the resources available and the ability and willingness to use them properly and effectively to protect residents”).

Consistent with UNHCR’s interpretation, other parties to the *1951 Convention* and its *1967 Protocol* do not require complete helplessness, and recognize violence perpetrated by non-state parties as persecution whenever state protection is ineffective. Canada instructs decision-makers to “carefully assess . . . the degree of actual implementation, the effectiveness, and the durability of . . . legislative or other achievements” in determining the adequacy of state protection. Immigration and Refugee Board of Canada, *Chairperson’s Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* ¶ 8.6 (May 1, 2017).

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<sup>31</sup> <http://www.refworld.org/docid/443679fa4.html>.

Similarly, the United Kingdom embraces a “practical standard” that examines actual practices and requires protection to be “meaningful, accessible, effective, and available to a woman regardless of her culture and position.” United Kingdom Immigration Appellate Authority, *Asylum Gender Guidelines* ¶¶ 2B.2–3 (Nov. 1, 2000).<sup>32</sup>

Turning the “unable or unwilling” into a “condoned” or “complete helplessness” requirement is a significant departure from this settled international standard. The new policies make the “unable or unwilling” prong harder to meet—an intention without support in international law. A state does not have to “condone” private violence to be “unwilling” or “unable” to offer protection, nor does a victim need to show the state’s “complete helplessness” for state protection to be unavailable or ineffective.

## **2. Gang Violence and Domestic Violence Claims Can Meet the “Unable or Unwilling” Standard**

The new policies’ erroneous approach towards the “unable or unwilling” standard becomes all the more pronounced in the gang and domestic violence context. As noted, the new policies state that gang and domestic violence generally will not form the basis for a meritorious asylum claim because victims of such violence cannot demonstrate that the state was completely helpless or condoned private action. That directive runs counter to UNHCR’s on-the-ground experience.

To exercise its supervisory responsibility effectively, UNHCR has field offices in the vast majority of originating countries for asylum seekers, including El Salvador, Guatemala, and Honduras. Relying on in-depth research from these offices, material from independent country specialists, and other sources, UNHCR has carefully compiled country-specific *Eligibility*

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<sup>32</sup> <http://www.refworld.org/docid/3ae6b3414.html>.

*Guidelines*. The *Eligibility Guidelines* rigorously analyze factors relevant to asylum determinations, including the effectiveness of state protection.<sup>33</sup>

Based on its decades-long presence in countries affected by gang violence, UNHCR encourages decision-makers to examine “efforts to reform and expand the criminal justice system[,] establish[] witness protection programmes,” and—conversely—the “lack of measures to ensure security to individuals at risk of harm by gangs.” *Gang Note* ¶ 28. “The [s]tate [may] prove unable to provide effective protection, especially when certain gangs . . . yield considerable power and capacity to evade law enforcement or when the corruption is pervasive.” *Id.* ¶ 25. Likewise, the state “may be unwilling to protect a particular individual, for instance, because of their own financial interest in the gang activities or because they consider the person associated with or targeted by the gangs unworthy of protection.” *Id.*

In El Salvador, for example, gangs “exercise extraordinary levels of social control over the population of their territories.” UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador* at 12, U.N. Doc. HCR/EG/SLV/16/01 (Mar. 15, 2016) (“*El Salvador Guidelines*”).<sup>34</sup> Despite the formal existence of an anti-gang legal framework, “weakness and corruption” in the police and judiciary “contribute to creating a high level of impunity for crimes in El Salvador.” *Id.* at 23; *see also* U.S. State Dep’t, *El Salvador 2017 Human Rights Report* at 15 (“U.S. State Dep’t, *El Salvador Report*”). In gang-controlled territories, “the police—even the elite Anti-Gang Unit in high-profile cases—are usually not seen as offering a sufficient form of protection . . . , since their presence is only temporary and gangs

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<sup>33</sup> For a detailed explanation of the methodology used, see Affidavit of Janice Lyn Marshall, *Staten v/Utlendingsnemnda (Regjeringsadvokaten) v. A, B, C, D*, Oct. 26, 2015 (Nor.), <http://www.refworld.org/docid/5b8900109.html>.

<sup>34</sup> <http://www.refworld.org/docid/56e706e94.html>.

will return once the police move on after a few hours or days.” *El Salvador Guidelines* at 24; see U.S. State Dep’t, *El Salvador Report* at 19 (“The major gangs controlled their own territory. Gang members did not allow persons living in another gang’s controlled area to enter their territory.”). Gangs have their own infiltrators in the police and military, who warn about anti-gang operations and have access to weapons and uniforms. *El Salvador Guidelines* at 23.

Gangs’ “extraordinary levels of social control” and the state’s corresponding ineffectiveness in combating gang-related crimes are also pervasive in other Central American countries. See UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras* at 18–19, 38–39, U.N. Doc. HCR/EG/HND/16/03 (July 27, 2016) (“*Honduras Guidelines*”) (police are “not usually seen as offering a sufficient form of protection for residents who are threatened by gangs” and are “reported to acknowledge their fear at the inability of the State to protect them from assassination when they are off duty”);<sup>35</sup> UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala* at 34, U.N. Doc. HCR/EG/GTM/18/01 (Jan. 2018)<sup>36</sup> (“[I]n certain parts of the country the Government has lost effective control to gangs and other organized criminal groups and is unable to provide protection to inhabitants.”).

Equally, domestic violence victims also often do not receive effective protection from the state. In some Central American societies, “[i]mpunity for violence against women and girls remain a serious problem.” *Honduras Guidelines* at 39. The high impunity rate contributes to the victims’ “lack of confidence in . . . an ineffective and unsupportive justice system,” thus preventing them from even reporting domestic violence incidents to the authorities. *El Salvador Guidelines*

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<sup>35</sup> <http://www.refworld.org/docid/579767434.html>.

<sup>36</sup> <http://www.refworld.org/docid/5a5e03e96.html>.

at 25. The state’s ineffective protection against domestic violence is often exacerbated by its inability to protect against gang violence. In a study of 160 women from El Salvador, Guatemala, Honduras, and Mexico, UNHCR found that women “consistently stated that police and state law enforcement authorities were unable to provide sufficient protection from [] violence.” UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* at 4 (Oct. 26 2015).<sup>37</sup> Many of the women’s partners were gang members or associates. *Id.* at 25. “[B]ecause these [criminal] groups were often [regarded as] the highest power in the neighborhoods, [the women] did not believe the government could protect them.” *Id.*; see also U.S. State Dep’t, *El Salvador Report* at 23; U.S. State Dep’t, *Guatemala 2017 Human Rights Report* at 17.

The above evidence reflects that—at least in some countries and in some instances—states may be unable or unwilling to offer effective protection to persons who have been persecuted by non-state actors. The new policies therefore err by directing that gang and domestic violence claims generally do not meet the “unable or unwilling” standard when assessing asylee’s application.

#### **B. The New Policies Err in Their Particular Social Group Analysis**

The new policies also change the approach to asylum claims based upon “membership in a particular social group,” elevating the standard far beyond the international threshold. To be sure, although “membership in a particular social group” has long been an ambiguous legal term, *Matter of A-B-*, 27 I.&N. Dec. at 326, jurisprudence and commentary have over time helped clarify its meaning. UNHCR’s *Social Group Guidelines* adopt two approaches to defining a particular social group:

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<sup>37</sup> <http://www.refworld.org/docid/56307e2a4.html>.

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted [the “protected characteristics” approach], or who are perceived as a group by society [the “social perception” approach]. 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.

*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* ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) (“*Social Group Guidelines*”) (emphasis added).<sup>38</sup> A particular social group must be identifiable through one of the approaches, not both. *Gang Note* ¶ 35. Several States have endorsed the “protected characteristics” approach without requiring social perception. See *Ward*, [1993] 2 S.C.R. at 689 (Can.); *Islam and Shah*, [1999] UKHL at 20; *Sec’y of State for the Home Dep’t v. K (FC)*, and *Fornah (FC) v. Sec’y of State for the Home Dep’t* [2006] UKHL 46, [2007] 1 A.C. (HL) 412 (appeal taken from Eng.);<sup>39</sup> *Refugee Appeal No. 1312/93 Re GJ* [1995] 1 NLR 387 (N.Z.).<sup>40</sup>

This either/or approach—first delineated in *Matter of Acosta*, 19 I.&N. Dec. 211, 233 (B.I.A. 1985), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I.&N. Dec. 439 (B.I.A. 1987)—also guided U.S. asylum decisions until the Board of Immigration Appeals diverged in 2008 by requiring asylum-seekers to prove “social perception” and “particularity,” in addition to “protected characteristics.” *Matter of S-E-G-*, 24 I.&N. Dec. 579, 582, 589 (B.I.A. 2008). As UNHCR has noted, imposing these additional, heightened requirements is contrary to the object and purpose of the *1951 Convention*, *1967 Protocol*, and *Social Group Guidelines*.<sup>41</sup>

<sup>38</sup> <http://www.refworld.org/docid/3d36f23f4.html>.

<sup>39</sup> [http://www.refworld.org/cases,GBR\\_HL,4550a9502.html](http://www.refworld.org/cases,GBR_HL,4550a9502.html).

<sup>40</sup> [http://www.refworld.org/cases,NZL\\_RSAA,3ae6b6938.html](http://www.refworld.org/cases,NZL_RSAA,3ae6b6938.html).

<sup>41</sup> See UNHCR *Amicus Curiae* Br. in Support of Resp’t, *Valdiviezo-Galdamez v. Holder* (3d Cir. Apr. 14, 2009), <http://www.refworld.org/docid/49ef25102.html>.



The new policies fail to correct this error. Instead, they maintain the additional, heightened requirements delineated in *Matter of S-E-G-*, and apply these requirements in a flawed manner to the facts at hand. These missteps compound one another, resulting in a position that is even further from the international consensus. *Matter of A-B-*, 27 I.&N. Dec. at 319, 335 (rejecting asylum for “[s]ocial groups defined by their vulnerability to private criminal activity,” including “groups comprising persons who are ‘resistant to gang violence’ and susceptible to violence from gang members on that basis”). UNHCR maintains that the U.S. approach—i.e., requiring protected characteristics, social visibility, and particularity—is inconsistent with international law. Even under a correct application of the heightened U.S. standard, however, UNHCR observes that people at risk of gang violence and domestic violence—both categories of victims of non-state persecution—may nonetheless constitute members of a particular social group.

### 1. Protected Characteristics

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.” *Social Group Guidelines* ¶ 6.

As to gang violence, victims resisting forced recruitment may share innate or immutable characteristics, such as age, gender, and social status. *Gang Note* ¶ 36. To this point, a USAID study on Central American gangs found that youth between the ages of 8 and 18 were particularly vulnerable to recruitment. USAID, *Central America and Mexico Gang Assessment Report* 15 (Aug. 2006).<sup>42</sup> UNHCR likewise notes that young people are more susceptible to recruitment because of their “age, impressionability, dependency, poverty and lack of parental guidance.” *Gang Note* ¶ 36; *Honduras Guidelines* at 15, 16. Additionally, “[p]ast actions or experiences, such

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<sup>42</sup> [https://pdf.usaid.gov/pdf\\_docs/PNADG834.pdf](https://pdf.usaid.gov/pdf_docs/PNADG834.pdf).

as refusal to join a gang, may be considered irreversible and thus immutable.” *Id.* ¶ 37; *Social Group Guidelines* ¶ 6; *Matter of S-E-G-*, 24 I.&N. Dec. at 584 (“[Y]outh who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed.”).

Consistent with this interpretation, parties to the *1951 Convention* and its *1967 Protocol*—including the United States—have held that gang violence victims or resisters to gang recruitment may form particular social groups under the protected characteristics approach. *See Tobias Gomez*, 2011 F.C. at 1093 (innate characteristics and shared past experience); *AZ*, [2010] UKUT at 118 (shared past experience); *Valdiviezo-Galdamez v. U.S. Att’y Gen.*, 502 F.3d 285, 291 (3d Cir. 2007) (remanding to BIA to consider whether “young Honduran men who have been actively recruited by gangs and who have refused to join the gangs” constitute particular social group; noting that group “shares the characteristics of other groups that the BIA has found to constitute a ‘particular social group’”).

As to domestic violence, the particular social group applicable to such cases may be defined by gender alone, or by gender in combination with other characteristics related to relationship status. Both groups qualify under the “protected characteristics” approach. In UNHCR’s view, “sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics.” *Social Group Guidelines* ¶ 12; *Gender Guidelines* ¶ 30; *see also Ward*, 2 S.C.R. at 739 (contemplating a particular social group encompassing all women); *VM (FGM-risks-Mungiki-Kikuyu/Gikuyu) Kenya v. Sec’y of State for the Home Dep’t* [2008] UKAIT 00049 (recognizing a particular social group of “women (girls) in Kenya”).<sup>43</sup>

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<sup>43</sup> <http://www.refworld.org/docid/484d4a222.html>.

Alternatively, particular social groups may be defined by gender in combination with other factors. *See, e.g., Niang*, 422 F.3d at 1199. These other factors include relationship status, which may be unchangeable because of external religious, cultural, or legal constraints. *Cf. U.N. Centre for Soc. Dev. & Humanitarian Affairs, Violence Against Women in the Family* 33, U.N. Doc. ST/CSDHA/2 (1989) (“*Violence Against Women*”) (noting that men in Guatemala and El Salvador societies view “the women they live with [as] their possessions or chattels”).

The new policies erroneously hold that the proposed group in *Matter of A-B-*, “married women in Guatemala who are unable to leave their relationship,” is defined circularly by a fear of being subject to domestic violence. While a particular social group cannot be defined “exclusively by the persecution . . . or by a common fear of being persecuted,” “persecutory action toward a group may be a relevant factor” in determining the contours of that group. *Social Group Guidelines* ¶ 14; *accord A v Minister for Immigration & Ethnic Affairs* [1997] HCA 4 (Austl.).<sup>44</sup> Inability to leave a relationship may be caused by factors apart from the threat of harm from a domestic partner—because of, say, cultural or religious reasons. Among other things, women in domestic relationships in Guatemala and El Salvador are considered subordinate to, and under the control of, their male partners. *Violence Against Women* at 33. By assuming that “unable to leave their relationship” is equivalent to being “subject to domestic violence,” the new policies improperly conflate wider sociocultural norms that subordinate women to men in Central American societies.

## 2. Social Perception

The social perception approach examines whether group members share a common characteristic that makes them a cognizable group or that sets them apart from society at large.

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<sup>44</sup> <http://www.refworld.org/docid/3ae6b7180.html>.

*Social Group Guidelines* ¶ 7; *see also A v Minister for Immigration & Ethnic Affairs* [1997] HCA 4 (Austl.).

Gang violence victims may constitute a particular social group under such an approach. In a society “where it is risky for people to oppose gangs, often in closely knitted neighborhoods that are effectively controlled by gangs, gang resisters may be set apart in society.” *Gang Note* ¶ 41. This situation is common in Central America, where gangs exert extraordinary social control. *El Salvador Guidelines* at 12; *Honduras Guidelines* at 18, 38. For example, in El Salvador, “[p]ersons who resist the authority of the local gang . . . are reportedly subject to swift and brutal retaliation from the gang.” *El Salvador Guidelines* at 13. Similar circumstances affect Hondurans. *Honduras Guidelines* at 18 (“Many gangs are reported to forbid inhabitants to show ‘disrespect’ for the gang [which can] encompass arguing with a gang member or refusing a request.”).

A particular social group of domestic violence victims can also satisfy the social perception requirement. *See Social Group Guidelines* ¶ 7 (“[W]omen . . . have been recognized under [the social perception analysis] as particular social groups.”). Being female “identif[ies] them as a group in society, subjecting them to different treatment and standards in some countries.” *Gender Guidelines* ¶ 30; *see also Khawar*, [2002] HCA 14, ¶ 35 (“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.”). Moreover, in certain Central American countries, the intersection of gender and relationship status also identifies a socially distinct group. Women in domestic relationships are considered subordinate to, and under the control of, their male partners—a view that contributes to the serious problem of domestic violence in Guatemala and El Salvador. This in turn reinforces for men that “the women they live with are their possessions or chattels that they can treat as they wish and as they consider

appropriate.” *Violence Against Women* at 33. A woman’s subordinate status places her in a segment of society that is not accorded protection from harm by a domestic partner.

### 3. Particularity

As to “particularity,” the new policies assert that “[s]ocial groups defined by their vulnerability to private criminal activity likely lack . . . particularity [because] . . . broad swaths of society may be susceptible to victimization.” *Matter of A-B-*, 27 I.&N. Dec. at 335. Gang violence victims do not form a particular social group because they “are too diffuse” and “often come from all segments of society.” *Id.* (internal quotation marks omitted).

However, under prevailing international standards, the size and diffusiveness of a proposed group are irrelevant. *Social Group Guidelines* ¶ 18 (“The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2).”); *id.* ¶ 15 (“It is widely accepted in State practice that . . . there is no requirement that the group be ‘cohesive.’”).

Looking outside the particular social group context, and towards the other protected grounds, broad swaths of society—“perhaps even . . . a majority of the population”—may share religious or political ideologies that are suppressed by the state. *Id.* ¶ 18. “[M]embers of a religion or holders of a political opinion” may likewise come from all segments of society. *Id.* ¶ 15. In short, there is no size or diffusiveness requirement for those seeking asylum on account of race, religious, nationality, or political opinion. It makes little sense to impose a set of *more* demanding requirements for asylum on account of membership in a particular social group, particularly as international guidance and U.S. case law embraces a “flexible” approach towards this protected ground. *Id.* ¶ 3 (“[M]embership in a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of group in various societies and evolving human

rights norms.”); *Rios v. Lynch*, 807 F.3d 1123, 1124 (9th Cir. 2015) (particular social group is an “inherently flexible term”); *Ruiz-Cabrera v. Holder*, 748 F.3d 754, 757 (7th Cir. 2014) (same).

### C. The New Policies Err in Their Nexus Analysis

Under the INA, asylum seekers must demonstrate that a protected ground “was or will be at least one central reason for” the alleged persecution—a provision commonly known as the nexus requirement. 8 U.S.C. § 1158(b)(1)(B)(i); *Cruz v. Sessions*, 853 F.3d 122, 127–28 (4th Cir. 2017). On this point, the USCIS Guidance asserts that “when a private actor inflicts violence based on a personal relationship with the victim, the victim’s membership in a larger group often will not be ‘one central reason’ for the abuse.” USCIS Guidance at 6; *Matter of A-B-*, 27 I.&N. Dec. at 338–39. According to the new policies, gang and domestic violence victims are targeted not because of their membership in a social group, but because of their “preexisting personal relationship” with the persecutors. *Id.* at 339. These instructions misapply the nexus requirement.

Pursuant to 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; *Trafficking Guidelines* ¶ 29. Nexus is established when “the harm is being visited upon the victim for reasons of a Convention ground.” *Social Group Guidelines* ¶ 21. When the persecutor is a non-state actor, 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. UNHCR recognizes these as separate ways to establish nexus: targeting by the private actor or non-protection by the government.

As to gang violence, the necessary link between membership in a particular social group and persecution can be established by the “strategies, tactics or means and methods of [violence]

of the persecutor.” *Armed Conflict Guidelines* ¶ 32; *Gang Note* ¶ 65. Because some Central American gangs exercise “extraordinary levels of social control over the population of their territories,” they do not tolerate “‘disrespect’ for the gang.” *El Salvador Guidelines* at 13. A key strategy to maintaining control is “swift and brutal retaliation” against any person who “resist[s] the authority of the local gang.” *Id.* at 13–14. For these gangs, a victim’s membership in a particular social group clearly serves as a contributing factor to persecution.

In the context of domestic violence, “if the State is unwilling to extend protection based on one of the five grounds, then she may [nonetheless] be able to establish a valid claim for refugee status: the harm visited upon her by her husband is based on the State’s unwillingness to protect her for reasons of a Convention ground.” *Social Group Guidelines* ¶ 22. Moreover, perpetrators in societies that oppress women often abuse their victims precisely because they are in a domestic relationship and unable to leave, a point previously acknowledged. *See DHS’s Position on Respt’s Eligibility for Relief, Matter of R-A-, A 73 753 922, at 27 (A.G. Feb. 19, 2004) (“DHS R-A- Brief”)* (“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 his corresponding belief in his right to control and abuse her, which society affirms. *See Special Rapporteur on Violence Against Women, its Causes and Consequences, Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission* ¶¶ 27, 53, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996);<sup>45</sup> *Violence Against Women* at 33. Evidence of this nexus may come directly from the abuser and/or from circumstantial evidence (such as country condition information) that domestic

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<sup>45</sup> <http://undocs.org/E/CN.4/1996/53>.

violence against women is accepted or supported by a state. A gendered social and cultural value system may implicate the state's inability or unwillingness to protect domestic violence victims.

The new policies assert that domestic violence cases are not on account of the victims' membership in a particular social group because the persecutors only target their partners, and do not "b[ear] any particular animosity toward women who were intimate with abusive partners." *Matter of A-B-*, 27 I.&N. Dec. at 339. But whether or not the persecutors target female domestic partners of *other* men is irrelevant. 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. 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. 1328, 1336 (B.I.A. 2000) (Islamic father persecuted daughter on account of her liberal beliefs, even though there was no evidence that he would persecute liberal daughters of other fathers). This point was made well in *Matter of R-A-*, where an analogy was drawn to a slave owner who beats his own slave but has neither the inclination nor the opportunity to beat his neighbor's slave. It would still be reasonable under such circumstances to conclude that the beating was on account of the victim's status as a slave. *See DHS R-A-* Brief at 34.

#### **IV. RAISING THE CREDIBLE FEAR THRESHOLD RUNS COUNTER TO INTERNATIONAL LAW**

UNHCR recognizes "that national procedures for the determination of refugee status may usefully include [a] special provision for dealing in an expeditious manner with applications" that are "clearly abusive" or "manifestly unfounded." UNHCR Exec. Comm., *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30 (XXXIV)*



(1983, revised 2009) (“UNHCR Exec. Comm., *Manifestly Unfounded or Abusive Applications*”).<sup>46</sup> However, any such procedures must, taking into account “the grave consequences of an erroneous decision,” be “accompanied by appropriate procedural guarantees.” *Id.* “[T]he criteria for making . . . a determination should be defined in such a way that no application will be treated as manifestly unfounded or abusive unless its fraudulent character or its lack of any connection with the relevant criteria is truly free from doubt.” UNHCR, *Follow-up on Earlier Conclusions of the Sub-Committee on the Determination of Refugee Status with Regard to the Problem of Manifestly Unfounded or Abusive Applications* ¶ 19, U.N. Doc. EC/SCP/29 (Aug. 26, 1983).<sup>47</sup> The underlying purpose behind such procedural provisions is to safeguard *non-refoulement*, a foundational principle of the *1951 Convention* and recognized as a norm of customary international law. UNHCR, *Declaration of States Parties to the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees* ¶ 4 (Jan. 16, 2002).<sup>48</sup>

Congress established the credible fear screening process to comport with *non-refoulement*. In the course of enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Congressman Henry Hyde emphasized that expedited removal would be accompanied by “major safeguards”—most notably the credible fear process—that would protect “against returning persons who meet the refugee definition to conditions of persecution.” 142 Cong. Rec. H11071, H11081 (daily ed. Sept. 25, 1996). Other representatives echoed this sentiment. *See* 142 Cong. Rec. H11054, H11066–67 (daily ed. Sept. 25, 1996) (“It is . . . important . . . that the process be fair [and] . . . not result in sending genuine refugees back to persecution.”).

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<sup>46</sup> <http://www.unhcr.org/en-us/excom/exconc/3ae68c6118/problem-manifestly-unfounded-abusive-applications-refugee-status-asylum.html>.

<sup>47</sup> <http://www.unhcr.org/en-us/excom/scip/3ae68cd30/follow-up-earlier-conclusions-sub-committee-determination-refugee-status.html>.

<sup>48</sup> <http://www.refworld.org/docid/3d60f5557.html>.

Case law and statutory text further confirm that “credible fear” is an intentionally low threshold, which seeks only to extricate claims that clearly lack merit. *See, e.g., Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312, 10320 (Mar. 6, 1997) (“The credible fear standard sets a low threshold of proof of potential entitlement to asylum.”). The credible fear interview is “not designed to elicit all the details of an alien’s claim, but rather only to determine whether there is a significant possibility that the alien could establish eligibility for asylum.” *Zhang v. Holder*, 585 F.3d 715, 724 (2d Cir. 2009) (ellipses and internal quotation marks omitted) (citing 8 U.S.C. § 1225(b)(1)(B)(ii)); *see also id.* at 718 (“The purpose of this interview is to determine whether you *may* be eligible for asylum.”) (emphasis added).

Under the new policies, asylum officers “must factor the above standards”—i.e., the impermissibly high standards on “unable or unwilling,” particular social group, and nexus—into their credible fear determinations. USCIS Guidance at 9. Accordingly, “few gang-based or domestic-violence claims involving particular social groups defined by the members’ vulnerability to harm [will] . . . pass the ‘significant possibility’ test in credible fear screenings.” *Id.* at 10.

This process diverges from UNHCR’s view that, even in expedited removal, only “manifestly unfounded or abusive” applications should be initially excluded. UNHCR Exec. Comm., *Manifestly Unfounded or Abusive Applications*. As discussed above, violence by non-state actors—including gang and domestic violence—can, in fact, undergird a valid asylum claim; such claims are therefore not categorically “manifestly unfounded or abusive.”

Although the USCIS Guidance notes that asylum officers must “consider the totality of the circumstances” and must bear in mind “whether the alien’s case presents novel or unique issues,” USCIS Guidance at 7, 9, the Guidance provides none of the “appropriate procedural guarantees,”

UNHCR Exec. Comm., *Manifestly Unfounded or Abusive Applications*, to ensure that meritorious claims are heard rather than excluded at the credible fear stage. The lack of such safeguards jeopardizes the U.S. commitment to *non-refoulement*, and will only increase the risk that meritorious asylum seekers are returned to their country of origin.

**V. CONCLUSION**

For the foregoing reasons, UNHCR submits that the new policies at issue are at variance with the United States' international obligations under the *1951 Convention* and its *1967 Protocol*.

Respectfully submitted,

/s/ Ana Reyes

ANA C. REYES (D.C. Bar No. 477354)

XIAO WANG (D.C. Bar No. 1035487)

YOULIN YUAN (D.C. Bar No. 1613542)

WILLIAMS & CONNOLLY LLP

725 Twelfth Street, N.W.

Washington, DC 20005

(202) 434-5000

(202) 434-5029 (fax)

**CERTIFICATE OF SERVICE**

I hereby certify that on September 28, 2018, I filed this Motion with the United States District Court for the District of Columbia using the CM/ECF system, which will cause it to be served on all counsel of record.

Dated: September 28, 2018

Respectfully submitted

/s/ Ana Reyes

ANA C. REYES (D.C. Bar No. 477354)

WILLIAMS & CONNOLLY LLP

*725 Twelfth Street, N.W.*

*Washington, DC 20005*

*(202) 434-5000*

*(202) 434-5029 (fax)*