

UNHCR Asylum Lawyers Project  
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## UNHCR's Views on Gender Based Asylum Claims and Defining "Particular Social Group" to Encompass Gender

### *Using international law to support claims from women seeking protection in the US*

The United Nations High Commissioner for Refugees (UNHCR) has long recognized the special protection needs of women and girls in refugee and asylum procedures. UNHCR has developed authoritative commentary on determining refugee status with specific consideration of gender.<sup>1</sup> The purpose of this note is to summarize UNHCR's views on gender-based asylum claims, with a focus on the "particular social group" ground for seeking asylum, as relevant to pursuing asylum claims in the U.S. The accompanying materials in this packet expand on this discussion.

In addition, at this particular time, UNHCR is aware of and has worked to understand escalating levels of violence faced by women fleeing from Central America, and specifically from El Salvador, Guatemala, Honduras and Mexico.<sup>2</sup> Recognizing that many of these women are in need of international protection, UNHCR has taken the view that that the refugee definition, found in Article 1 of the 1951 Convention relating to the Status of Refugees and Article 1 of the 1967 Protocol relating to the Status of Refugees,<sup>3</sup> may, depending on the circumstances of each case, encompass claims from Central American women facing gender-based violence.

#### I. Relevance of International Refugee Law in the United States

The 1951 Convention and its 1967 Protocol are the key international instruments governing the protection of refugees. The U.S. is a party to the 1967 Protocol<sup>4</sup> and has incorporated the substantive provisions of the Protocol into U.S. domestic law.<sup>5</sup>

U.S. courts have expressly relied on UNHCR interpretations and especially the Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter Handbook)<sup>6</sup> in assessing refugee claims, and

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<sup>1</sup> See, e.g., *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 (2002)*, HCR/GIP/02/01 [hereinafter *Gender Guidelines*].

<sup>2</sup> *UNHCR, Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico (2015)*, available at <http://www.unhcrwashington.org/womenontherun>.

<sup>3</sup> UN General Assembly, *Convention relating to the Status of Refugees*, GA Res. 429 (V), UN GAOR, 5th Sess., UN Doc. A/RES/429 (14 Dec. 1950) [hereinafter *1951 Convention*]; UN General Assembly, *Protocol relating to the Status of Refugees*, GA Res. 2198 (XXI), UN GAOR, 21st Sess., UN Doc. A/RES/2198 (6 Dec. 1966) [hereinafter *1967 Protocol*].

<sup>4</sup> 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* universalizes the refugee definition in Article 1 of the *1951 Convention*, removing the geographical and temporal limitations. *Id.*, ¶¶ 2–3. The United States acceded to the *1967 Protocol* in 1968, thereby binding itself to the international refugee protection regime and the definition of a refugee in the *1951 Convention*. H.R. Conf. Rep. No. 96–781, at 19 (1980), reprinted in 1980 U.S.C.C.A.N. 160; H.R. Rep. No. 96-608, at 9 (1979); S. Exec. Rep. No. 14, 90th Cong., 2d Sess., 4 (1968).

<sup>5</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

<sup>6</sup> The UNHCR *Handbook* was prepared by this Office at the request of the Member States of the Executive Committee of the High Commissioner's Programme, including the United States, in order to provide guidance to governments in applying the terms of the Convention and Protocol. See *Handbook*, 1 para. IV.

have recognized that UNHCR’s “analysis provides significant guidance for issues of refugee law.”<sup>7</sup> The U.S. Supreme Court has “consistently turned [to UNHCR] for assistance in interpreting our obligations under the Refugee Convention.”<sup>8</sup> In addition, under U.S. jurisprudence, U.S. courts have an obligation to construe U.S. statutes in a manner consistent with U.S. international obligations whenever possible.<sup>9</sup>

International law can be a helpful tool to support an individual’s claim to refugee status. However, in order for international law to be considered, it must be part of the record. Therefore, please be advised to submit documentation of international law, such as UNHCR’s *Guidelines on International Protection* or *Eligibility Guidelines*,<sup>10</sup> before the record when applicable to your client’s case.

## II. UNHCR Handbook

The Handbook<sup>11</sup> offers the general position that a particular social group normally comprises persons of similar background, habits or social status.<sup>12</sup> UNHCR recommends consideration of the following issues as well in deciding whether a particular case falls within the social group category:

- (1) The group in question must be both distinct as an entity within the broader society and definable in terms of non-arbitrary characteristics shared by its members;
- (2) The characteristics might be innate (such as sex, caste, color, family background), shared past experiences (such as former military or political leadership), or shared values, attitudes or behaviors (such as sexuality);
- (3) The integrity of the group must exist in the perceptions of group members (i.e. it is internally cohesive) and/or from the viewpoint of the particular society, or segments therein (e.g. the government or other authorities) to which the group relates. External perception of the group is likely to be particularly important in asylum claims;
- (4) The characteristics which define the group will exist independently of the fact of persecution but must nevertheless play a role in the persecution of group members (i.e. the members of the group will be persecuted on account of these characteristics);
- (5) The historical, social, legal and political realities of the particular society to which the group relates will be relevant in identifying both the group’s existence and the persecution which its members suffer or are likely to suffer;
- (6) An applicant will need to demonstrate the risk of individual persecution. The existence and persecution of the group and attachment to it will be evidence, although not necessarily conclusive, of the risk to the individual in question;

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<sup>7</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, N. 22 (1987).

<sup>8</sup> *N-A-M v. Holder*, 587 F.3d 1052, 1061-62 (10th Cir. 2009) (Henry, C.J. concurring) (citing cases).

<sup>9</sup> *Murray v. The Charming Betsy*, 6 US 64, 80 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”). See also *INS v. Cardoza-Fonseca*, 480 US 421, 436-7 (1987) (The U.S. Supreme Court found “abundant evidence” that Congress intended to conform the definition of refugee and the asylum law of the U.S. “to the United Nation’s (sic) Protocol to which the United States has been bound since 1968.”).

<sup>10</sup> See e.g., UNHCR, *Gender Guidelines*; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, March 2016, available at <http://www.refworld.org/docid/56e706e94.html>.

<sup>11</sup> The UNHCR Handbook serves as an interpretive guide for the application of the definition of refugee found in Article 1 of the 1951 Convention (incorporated by reference in Article 1 of the 1967 Protocol).

<sup>12</sup> Handbook at para. 77.

- (7) There will be many instances where the ground of social group membership will overlap with one or other of the more precise grounds of persecution (particularly persecution on account of political opinion).

While the focus of this note is on social group claims, such claims “may frequently overlap with a claim on other grounds,” such as political opinion or religion.<sup>13</sup> Further, any of the Convention grounds may be applicable to gender-based claims.

### III. Analysis of Gender Based Asylum Claims

The above considerations explicitly identify “sex” as an “innate characteristic” on which a social group claim might be based. Indeed, UNHCR’s *Guidelines on Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (hereinafter *Gender Guidelines*) state “[W]omen [are] a clear example of a social subset defined by innate and immutable characteristics...and who are frequently treated differently than men.”<sup>14</sup> UNHCR began issuing *Guidelines on International Protection* in 2002 to complement the interpretive guidance in the *Handbook*. The *Gender Guidelines* are part of this series and offer substantive and procedural guidance on the interpretation of the refugee definition from a gender perspective.<sup>15</sup>

Nevertheless, it is also important to recognize, as articulated in the sixth consideration, that mere membership in the group will not itself establish a valid claim to refugee status; the applicant must also demonstrate that she is specifically at risk because of such membership.

It is our view 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 Convention and Article 1 of the 1967 Protocol.<sup>16</sup> Women who transgress social mores may also be viewed in some societies as having made a religious or political statement. Thus, persecution in such settings might effectively be linked to religion or political opinion, actual or imputed, as well as membership in a particular social group.

In order to assist governments in carrying out refugee status determinations, UNHCR issued Guidelines on the Protection of Refugee Women.<sup>17</sup> UNHCR advises that “special efforts may be needed to resolve problems faced specifically by refugee women,”<sup>18</sup> and has urged that refugee status determination officials be given training regarding the claims of women asylum-seekers.<sup>19</sup> UNHCR also worked directly

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<sup>13</sup> *Id.*

<sup>14</sup> *Gender Guidelines*, ¶130.

<sup>15</sup> U.S. courts have expressly relied on these interpretations as “provid[ing] significant guidance for issues of refugee law.” *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005).

<sup>16</sup> See, e.g., UNHCR ExCom Conclusion No. 39 (1985), *Conclusion on Refugee Women and International Protection*.

<sup>17</sup> UNHCR, *Guidelines on the Protection of Refugee Women* (1991), available at <http://www.unhcr.org/3d4f915e4.html>.

<sup>18</sup> *Id.* at para. 4.

<sup>19</sup> *Id.* at para. 75.

with the Immigration and Naturalization Service (INS), which issued its own guidelines on gender-based asylum claims in 1995.<sup>20</sup>

United States jurisprudence, for the most part, supports defining “particular social group” to encompass gender. Several federal courts have held that gender itself can define “particular social group,”<sup>21</sup> and U.S. administrative authorities (whose guidance notes play a normative role in the development of US refugee law) instruct that “women hold a significantly different position in many societies than men....Women may suffer harm solely because of their gender.”<sup>22</sup> One court found that as a result of pervasive, targeted violence, “Guatemalan women” generally constituted a particular social group.<sup>23</sup>

The claims of women asylum seekers may also present questions regarding the interpretation of the persecution component of the refugee definition. The Handbook provides that a threat to life or freedom or other serious human rights violation on account of race, religion, nationality, political opinion or membership of a particular social group constitutes persecution. Certain harms committed against women such as rape and other forms of sexual violence are serious human rights violations and should thus be considered persecution.<sup>24</sup> The UNHCR Executive Committee has issued a conclusion which “strongly condemns persecution through sexual violence” and “supports the recognition as refugees of persons whose claim to refugee status is based upon a well-founded fear of persecution, through sexual violence, for reasons of race, religion, nationality, membership of a particular social group or political opinion.”<sup>25</sup>

It is also the case that severe or cumulative discrimination against women may amount to persecution.<sup>26</sup> This may be so when the combined effect of the measures of discrimination lead to consequences of a “substantially prejudicial nature, e.g. restrictions on the right to earn a livelihood, the right to practice religion, or on one’s access to normally available educational facilities.”<sup>27</sup> Other examples of measures that would be “substantially prejudicial” to women might include severe restrictions on dress, travel, property rights, inheritance rights, or the right to marry.

In considering claims for refugee status, UNHCR advises asylum adjudicators to evaluate thoroughly the situation in the country from which a refugee claimant has fled. Paragraph 42 of the Handbook provides:

The applicants statements cannot, however, be viewed in the abstract, and must be viewed in the context of the relevant background situation. . . . In general an applicant’s fear should be

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<sup>20</sup> INS Office of International Affairs, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women*, Memorandum to all INS Asylum Officers, HQASM Coordinators (26 May 1995), available at <http://www.unhcr.org/refworld/docid/3ae6b31e7.html>.

<sup>21</sup> See, e.g., *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) (finding that gender was a “prototypical immutable characteristic”); See also *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005) (recognizing social group defined by gender and tribal membership); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (noting that gender itself could be the defining characteristic of a particular social group).

<sup>22</sup> Asylum Officer Basic Training Course, Female Asylum Applications and Gender-Related Claims, pp. 5-6 (12 Mar. 2009) available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf>.

<sup>23</sup> *Perdomo v. Holder*, 611 F. 3d 662 (9th Cir. 2010).

<sup>24</sup> See UNHCR, *Note on Certain Aspects of Sexual Violence against Refugee Women* (1993), EC/1993/SCP/CRP.2.

<sup>25</sup> UNHCR ExCom No. 73 (1993), *Conclusion on Refugee Protection and Sexual Violence*.

<sup>26</sup> Handbook at para 54; UNHCR, *Note on Refugee Women and International Protection* (1990), EC/SCP/59.

<sup>27</sup> *Id.*

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.

In particular, UNHCR recommends that asylum adjudicators, prior to deciding a gender-related claim, become familiar with the status and experiences of women in the country from which an asylum-seeker has fled. Among the issues of which officers should be aware are:

- The position of women before the law, including their standing in court, the right to lay a complaint and give evidence, divorce and custody law, the right to own property, the right to have or refuse an abortion;
- The political rights of women, including the right to vote, to hold office and to belong to a political party;
- The social and economic rights of women, including the right to marry the person of her choice, the right to an education, a career, and a job or other remunerated activities, the status of a widow or divorcee, and the freedom of dress;
- The incidence of reported violence against women, the forms it takes (such as sexual assaults, “honour” killings, and bride burnings). Protection available to women and the sanctions or penalties on those who perpetrate the violence; and
- The consequences that may befall a woman on her return in light of the circumstances described in her claim.<sup>28</sup>

UNHCR has recognized that although the burden of proof in principle lies with the applicant, “the duty to ascertain and evaluate all relevant facts is shared between the applicant and the examiner.”<sup>29</sup>

#### **IV. Overview of other issues and materials in this packet**

- For a discussion of gender based claims and other protection grounds, see:
  - *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (Gender Guidelines)*, ¶¶20-34
- For a discussion of UNHCR’s views on claims involving domestic violence, as well as an advisory opinion analyzing particular facts under international law, see:
  - *Matter of A-R-C-G- et al, Amicus Curiae Brief, United Nations High Commissioner for Refugees in Support of Respondents*
  - *Matter of Rodi Alvarado Peña, Advisory Opinion on International Norms: Gender-Related Persecution and Relevance to “Membership of a Particular Social Group” and “Political Opinion”*
- For a discussion of the well-founded fear analysis in the context of gender based claims, see:
  - *Gender Guidelines*, ¶¶9-19

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<sup>28</sup> *Guidelines on the Protection of Refugee Women* at para 73.

<sup>29</sup> *Handbook* at para. 196.

- For a discussion of specific considerations to be taken into account in conducting the refugee status determination of gender-related claims, see:
  - *Gender Guidelines*, ¶¶35-36
  - *Guidelines on the Protection of Refugee Women*, ¶¶58-61, 72
  
- For a discussion of the specific protection issues, problems and risks facing refugee women, see generally:
  - *Guidelines on the Protection of Refugee Women*
  
- For a discussion of the reasons why women are fleeing El Salvador, Guatemala, Honduras, and Mexico, see:
  - UNHCR Report, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico (2015)*