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FOR REFUGEES



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POUR LES REFUGIES

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9 January 2004

The Honorable Attorney General John Ashcroft  
Attorney General of the United States  
Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

**Re: *Matter of Rodi Alvarado Peña* (A73 753 922)  
Advisory Opinion on International Norms: Gender-Related Persecution and  
Relevance to “Membership of a Particular Social Group” and “Political  
Opinion”**

Dear Attorney General Ashcroft:

Please accept for your consideration UNHCR's Advisory Opinion regarding the above-noted case, attached. Please be advised that we have delivered copies of this opinion to the Assistant Attorney General (in triplicate) and to the parties to the matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'E. Arboleda', with a long horizontal flourish extending to the right.

Eduardo Arboleda  
Deputy Regional Representative  
Officer in Charge

Attachments: Advisory Opinion and UNHCR Guidelines



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Dear Attorney General Ashcroft:

The Office of the United Nations High Commissioner for Refugees (UNHCR) has been charged by the United Nations General Assembly with responsibility for providing international protection to refugees and other persons within its mandate and for seeking permanent solutions to the problems of refugees by assisting governments and private organizations.<sup>1</sup> As set forth in its Statute, UNHCR fulfills its international protection mandate by, *inter alia*, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”<sup>2</sup> UNHCR's supervisory responsibility is mirrored in Article II of the 1967 Protocol relating to the Status of Refugees (“1967 Protocol” or “Protocol”),<sup>3</sup> to which the United States has been a party since its accession in 1968. The 1967 Protocol incorporates the substantive provisions of the 1951 Convention relating to the Status of Refugees (“1951 Convention” or “Convention”).<sup>4</sup>

The views of UNHCR are informed by over 50 years of experience in international refugee law. In supervising the implementation by States of the international refugee instruments, UNHCR provides guidance in connection with the establishment and implementation of national procedures for refugee status determinations and the standards of treatment which should be afforded to refugees, and, in appropriate circumstances, also conducts

<sup>1</sup> See Statute of UNHCR, UN Doc. A/RES/428(V), Annex, at paras. 1, 6 (1950).

<sup>2</sup> *Id.*, at para. 8(a).

<sup>3</sup> 19 U.S.T. 6223 (1967), art. 2.

<sup>4</sup> 189 U.N.T.S. 2545, 137 (1951).

status determinations under its mandate. UNHCR is currently represented in more than 120 countries and thus has an intimate knowledge of the practice and jurisprudence regarding these issues in asylum States. UNHCR's interpretation of the provisions of the 1951 Convention and its 1967 Protocol are, therefore, both authoritative and integral to promoting consistency in the global regime for the protection of refugees. Under US jurisprudence, US courts have an obligation to construe US statutes in a manner consistent with US international obligations whenever possible.<sup>5</sup>

UNHCR welcomes this opportunity to submit its views regarding the eligibility of Ms. Rodi Alvarado Peña ("Ms. Alvarado") for refugee status based on international standards for the protection of refugees. Ms. Alvarado is a Guatemalan asylum claimant in the US who has suffered serious human rights abuses at the hands of her husband. Her case is significant both nationally and internationally, as it presents important issues of interpretation of the international criteria for refugee status in an area of the law which is experiencing rapid development. At bottom, the question is whether women who are fleeing gender-related persecution, particularly in the form of domestic violence, can fall within the internationally accepted definition of a refugee.

Persecution is not at issue in this case. Therefore, this Advisory Opinion focuses exclusively on whether the acknowledged persecution is for reasons of a 1951 Convention ground, specifically, (1) membership of a particular social group or (2) political opinion.

### **I. Facts of the Case**

The facts of the case are undisputed. Both the Immigration Judge<sup>6</sup> and the Board of Immigration Appeals (BIA)<sup>7</sup> found Ms. Alvarado to be credible and recognized that the abuse she suffered at the hands of her husband amounted to persecution. Both decisions also recognized that Guatemalan authorities failed to provide protection from this abuse. For purposes of this Advisory Opinion, UNHCR relies on the record established in the Government's decisions, including the findings by both the Immigration Judge and the BIA that Ms. Alvarado's testimony was credible, as UNHCR cannot make a credibility determination based on the paper record before it. UNHCR, therefore, bases this Advisory Opinion on the assumption that the facts as set out in the decisions are accurate.

As summarised by the BIA, Ms. Alvarado had been the victim of extreme spousal violence for over ten years, beginning when she married in 1984 and continuing and escalating as time went on until she fled to the US in 1995:

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<sup>5</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 US Supreme Court found "abundant evidence" that Congress intended to conform the definition of refugee and the asylum law of the US "to the United Nation's (sic) Protocol to which the United States has been bound since 1968.").

<sup>6</sup> *Matter of R-A-* (A# redacted), (San Francisco, CA, Immigration Court, Sept. 20, 1996) (granting asylum to respondent).

<sup>7</sup> *In re R-A-*, 22 I&N Dec. 906 (BIA 1999) (reversing grant of asylum) *vacated* 22 I&N Dec. 1328 (AG 2001) *certified* to Attorney General Ashcroft for decision (2003).

Her husband would insist that the respondent accompany him wherever he went, except when he was working. He escorted the respondent to her workplace, and he would often wait to direct her home. To scare her, he would tell the respondent stories of having killed babies and the elderly while he served in the army. Oftentimes, he would take the respondent to cantinas where he would become inebriated. When the respondent would complain about his drinking, her husband would yell at her. On one occasion, he grasped her hand to the point of pain and continued to drink until he passed out. When she left a cantina before him, he would strike her. As their marriage proceeded, the level and frequency of his rage increased concomitantly with the seeming senselessness and irrationality of his motives. He dislocated the respondent's jaw bone when her menstrual period was 15 days late. When she refused to abort her 3- to 4-month-old fetus, he kicked her violently in her spine. He would hit or kick the respondent "whenever he felt like it, where he happened to be: in the house, on the street, on the bus." The respondent stated that "[a]s time went on, he hit me for no reason at all."<sup>8</sup>

The respondent's husband raped her repeatedly. He would beat her before and during the unwanted sex. When the respondent resisted, he would accuse her of seeing other men and threaten her with death. The rapes occurred "almost daily," and they caused her severe pain. He passed on a sexually transmitted disease to the respondent from his sexual relations outside their marriage. Once, he kicked the respondent in her genitalia apparently for no reason, causing the respondent to bleed severely for 8 days. The respondent suffered the most severe pain when he forcefully sodomized her. When she protested, he responded, as he often did, "you're my woman, you do what I say."<sup>9</sup>

Although Ms. Alvarado tried to run away, her husband always found her and the abuse continued: he beat and kicked her unconscious after she tried to escape; whipped her with an electrical cord; broke windows and a mirror with her head; pistol-whipped her; wielded a machete and threatened to deface her, cut off her arms and legs, and leave her in a wheelchair if she ever tried to leave him; and warned her that he would be able to find her wherever she was.<sup>10</sup> When she asked for his motivation, he would reply, "I can do it if I want to."<sup>11</sup> He said he was "going to hunt her down and kill her if she comes back to Guatemala."<sup>12</sup>

Her attempts to secure protection were futile:

Ms. Alvarado's pleas to Guatemalan police did not gain her protection. On three occasions, the police issued summonses for her husband to appear, but he ignored them, and the police did not take further action. Twice, she called the police, but they never responded. When she appeared before a judge, the judge told her that he would not interfere in domestic disputes. Her husband told her that, because of his former military service, calling the police would be futile as he was familiar with law enforcement officials. Ms. Alvarado knew of no shelters or other organizations in Guatemala that could protect her.<sup>13</sup>

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<sup>8</sup> *Id.* at 908.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 908-9.

<sup>11</sup> *Id.* at 909.

<sup>12</sup> *Id.* at 910.

<sup>13</sup> *Id.* at 909.

## II. Country of Origin Information

Human rights reports covering the years during which Ms. Alvarado was abused describe a State that fails to protect women who suffer abuse at the hands of their husbands and an official policy of discrimination against women:

Documentation from a range of sources established a bleak picture regarding the status of women in Guatemala. During the relevant time period, there was *de jure* gender discrimination reflected in the Guatemalan civil code, which recognized the "male as the married couple's legal representative; the female [as] in charge of child care and other domestic responsibilities." The civil code also provided that the husband could "legally forbid his wife to engage in activities outside the home; and accorded to the husband "the primary authority in disposing of joint property." Such provisions, which denied women equality under the law, prompted the UN Committee on the Elimination of Discrimination [Against Women] to express "increased . . . concern at the discrimination institutionalized in Law." Domestic violence in Guatemala was pervasive, reflected entrenched cultural attitudes, and resulted in a failure of adequate response by the police and courts.<sup>14</sup>

Recent country reports confirm that domestic violence in Guatemala remains pervasive and, despite efforts to address this problem, in 2003 "violence against women, including domestic violence, remained common among all social classes."<sup>15</sup> Although a 1996 Law on Domestic Violence provides for the receipt of complaints of domestic violence and the issuance of restraining orders against alleged aggressors, and obligates the National Civilian Police to intervene, statistics show that there are a growing number of incidents of domestic violence: A study completed in December 2001 "found that 77 of every 100 women suffer some form of domestic violence, and that the majority of women are not familiar with the laws that protect them and the institutions that can provide them with assistance. . . . [there are] estimates that for every reported case, there are 10 more that are not reported."<sup>16</sup> Reports issued in 2003 indicated that, "in many cases the police do not respond to calls for help . . . [and] officers who do arrive often chastise female victims for behavior that provokes their husbands' ire."<sup>17</sup>

From such reports it appears that the conclusions of the BIA in 1999 remain valid today:

. . . [W]e agree with the Immigration Judge that the severe injuries sustained by the respondent rise to the level of harm sufficient (and more than sufficient) to constitute

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<sup>14</sup> Karen Musalo, 52 *DePaul Law Review* 777, 802 (2003), citing Karen Musalo, *Matter of R-A-: An Analysis of the Decision and Its Implications*, 75 INTERPRETER RELEASES 1177, 1179 (1999). These articles refer to evidence of relevant country conditions submitted to the BIA, including testimony by expert witness Dr. Doris Bersing; Research Directorate of the Documentation, Information and Research Branch of the Immigration and Refugee Board of Canada, Human Rights Brief, "Domestic Violence in Guatemala," Nov. 1994; Tisdale, "Abuse of Women in Today's Guatemala," 10 *Guatemala Bulletin*, No. 4 (1992).

<sup>15</sup> US Department of State, *Country Reports on Human Rights Practices for 2002* (released Mar. 31 2003) <<http://www.state.gov/g/drl/rls/hrrpt/2002/18333pf.htm>>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

"persecution." We also credit the respondent's testimony in general and specifically her account of being unsuccessful in obtaining meaningful assistance from the authorities in Guatemala. Accordingly, we find that she has adequately established on this record that she was unable to avail herself of the protection of the Government of Guatemala in connection with the abuse inflicted by her husband.<sup>18</sup>

### III. Analysis

In analyzing claims to refugee status, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ("*Handbook*") is internationally recognized as the key source of interpretation of international refugee law. The *Handbook* was prepared by UNHCR in 1979 at the request of Member States of the Executive Committee of the High Commissioner's Programme,<sup>19</sup> including the US, to provide guidance to governments in applying the terms of the Convention and Protocol. At the time it was written, the guidance provided in the *Handbook* was based on the knowledge accumulated by the Office over the years since its inception, taking into account the practice of States, exchanges of views between the Office and competent authorities of States party to the international refugee instruments, as well as the literature devoted to the subject.<sup>20</sup> The *Handbook* was re-edited in 1992. The US Supreme Court has determined that, although the *Handbook* is not legally binding on US officials, it nevertheless provides "significant guidance" in construing the Protocol and in giving content to the obligations established therein.<sup>21</sup>

States also generally rely in their practice on a number of other documents, including Executive Committee ("ExCom") Conclusions,<sup>22</sup> and in particular UNHCR Guidelines on International Protection which are issued by UNHCR to complement and update the *Handbook*. Of specific relevance to this particular case are Guidelines that address gender-related persecution<sup>23</sup> and "membership of a particular social group."<sup>24</sup> UNHCR issued these

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<sup>18</sup> *In re R-A-*, 22 I&N Dec. at 914.

<sup>19</sup> The Executive Committee of the High Commissioner's Programme is an intergovernmental body currently comprised of 64 Member States, one of which is the United States. Its main functions, *inter alia*, are to review the use of funds and UNHCR's programs, as well as to advise the High Commissioner and the international community at large on international refugee protection matters.

<sup>20</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva 1979 (Reedited Geneva, January 1992) [hereinafter *Handbook*] at 1, para. V.

<sup>21</sup> *Cardoza-Fonseca*, 480 U.S. at 439 n.22.

<sup>22</sup> In addition to its role of overseeing the operations and finances of the Office, in the exercise of its terms of reference the Executive Committee adopts Conclusions on the International Protection of Refugees addressing particular aspects of international protection. While the Conclusions are not formally binding, they represent agreed approaches to the interpretation and application of the international refugee protection regime. Conclusions of the Committee constitute expressions of opinion which are broadly representative of the views of the international community. The specialised knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight.

<sup>23</sup> UNHCR, 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 (HCR/GIP/02/01, 7 May 2002) [hereinafter *Gender Guidelines*].

<sup>24</sup> UNHCR, Guidelines on International Protection: "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 (HCR/GIP/02/02, 7 May 2002) [hereinafter *Social Group Guidelines*].

Guidelines<sup>25</sup> in 2002 pursuant to its mandate, particularly its supervisory role as set forth in paragraph 8 of the UNHCR Statute in conjunction with Article 35 of the Convention and Article II of the Protocol. They, like the *Handbook* which they supplement in developing areas of international refugee law, are intended to provide legal interpretative guidance for governments, legal practitioners and decision-makers, including the judiciary.

These Guidelines have been informed by and represent one of the outcomes of the process of Global Consultations on the International Protection of Refugees launched by UNHCR in 2000.<sup>26</sup> In fact, the Agenda for Protection, which was endorsed by the Executive Committee and welcomed by the General Assembly in 2002, specifically tasks UNHCR with the production of such complementary guidelines to its Handbook.<sup>27</sup> The topics of gender-related persecution and membership of a particular social group were discussed at an expert round table meeting in San Remo in September 2001. The meeting was part of the “second track” of the Global Consultations, dedicated to analysing and discussing diverging views on the interpretation of certain aspects of the 1951 Convention.<sup>28</sup> The San Remo seminar, like others discussing interpretive issues, enjoyed broad participation by governments, the International Association of Refugee Law Judges, other legal practitioners, non-governmental organisations and academia and was built around background studies commissioned from experts. The purpose was to take stock of the state of law and practice in these areas, to consolidate the various positions taken and to develop concrete recommendations on the way forward to achieve more consistent understandings of these various interpretative issues. Particularly relevant in the development of these guidelines have been developments in State practice more generally and in international human rights law which recognise and provide protection for women.<sup>29</sup>

The internationally accepted definition of a refugee is found at Article 1A(2) of the 1951 Convention. As modified by its 1967 Protocol, the definition is: “[A]ny person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . .” In Ms. Alvarado's case, questions have arisen as to whether she falls within this definition (A) because she is a member of a particular social group and, if so, whether the persecution she suffered and fears is for reasons of this membership; and (B) whether she has demonstrated a

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<sup>25</sup> See attached.

<sup>26</sup> For information on the Global Consultations on International Protection, including the “first track” ministerial meeting of December 2001 and the “third track” Executive Committee meetings, please consult the Global Consultations page of UNHCR’s website at <www.unhcr.ch>.

<sup>27</sup> See U.N. Doc. A/AC.96/965/Add.1, Goal 1, objective 6.

<sup>28</sup> In total, nine topics were identified for discussion in the “second track”: i) cessation (Article 1C); ii) exclusion (Article 1F); iii) supervision of the 1951 Convention (Article 35); iv) the scope and the content of the principle of *non-refoulement* (Article 33); v) gender-related persecution; vi) internal protection/relocation/flight alternative as an aspect of refugee status determination; vii) membership of a particular social group; viii) family unity; and ix) non-penalisation, detention and prosecution (Article 31).

<sup>29</sup> Examples of key developments in recognising the specific vulnerability of women’s human rights and the problems of their protection include the adoption of the *Convention on the Elimination of All Forms of Discrimination Against Women* U.N.G.A. Res. 34/180, GAOR 34<sup>th</sup> Session, Agenda Item 75, U.N. Doc. A/Res/34/180 in 1980; the adoption of ExCom Conclusion No. 39, and particularly its paragraph (k), in 1985 (36<sup>th</sup> session); and the adoption of the *Declaration on the Elimination of Violence Against Women* U.N.G.A. Res. 48/104, U.N. GAOR, 48<sup>th</sup> Sess., Agenda Item 11, U.N. Doc. A/Res/48/104, in 1994, where domestic violence was specifically condemned as a violation of human rights.

political opinion and, if so, whether the persecution she suffered and fears is for reasons of her political opinion.

In answering these questions, and as an overriding principle, UNHCR's analysis and recommendations promote the adoption of a gender-sensitive interpretation of the international refugee instruments and national laws that incorporate the principles of these instruments and protect refugees. Historically, the refugee definition has been interpreted through a framework of male experiences; in the past decade, however, the analysis and understanding of sex and gender in the refugee context have advanced substantially in case law, in State practice, in academic writing and concomitantly in developments in international human rights law and standards.<sup>30</sup>

Of utmost significance to gender-related claims in general, and specifically present in this case, is discrimination by the State in failing to extend protection to individuals against certain types of harm. "If the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution. Particular cases of domestic violence, or of abuse for reasons of one's differing sexual orientation, could, for example, be analysed in this context."<sup>31</sup> Ms. Alvarado's attempts to seek protection from the police and the legal system were to no avail; and country conditions reports confirm the official tolerance of domestic violence in Guatemala. These facts and the need to analyse the persecution suffered by Ms. Alvarado in this context underscore how important it is to interpret the refugee definition -- whether it be in the 1951 Convention or national laws -- from a gender perspective, both to ensure that proper consideration is given to women claimants and that gender-related claims are recognized as such.

### **III. A. Particular Social Group**

#### **Is Ms. Alvarado a member of a particular social group?**

As noted above, "membership of a particular social group" is one of the five grounds enumerated in the 1951 Convention/1967 Protocol definition of a refugee.<sup>32</sup> It is being invoked with increasing frequency in determinations of refugee status, with States having recognized as members of a particular social group women, families, tribes, occupational groups, and homosexuals.<sup>33</sup> There is no "closed list" of what groups may constitute a "particular social group" within the meaning of Article 1A(2) of the 1951 Convention. It is recommended, rather, that the term "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>34</sup>

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<sup>30</sup> *Gender Guidelines*, *supra* note 23, para. 5. *See also supra* note 29 and *infra* note 54.

<sup>31</sup> *Id.*, para. 15.

<sup>32</sup> Article 1A(2) of the 1951 Convention.

<sup>33</sup> *Social Group Guidelines*, *supra* note 24, para. 1.

<sup>34</sup> *Id.*, para. 3.

States have used varying interpretations of what constitutes a social group. Two approaches have dominated decision-making in common law jurisdictions.<sup>35</sup> The first, the "protected characteristics" approach (sometimes referred to as the "immutability" 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; it 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).<sup>36</sup> The second approach examines whether or not a group shares a common characteristic that makes it a cognizable group or sets it apart from society at large, sometimes referred to as the "social perception" approach. Again, women, families and homosexuals have been recognized under this analysis.<sup>37</sup> Given the varying approaches, and the protection gaps which can result, UNHCR has reconciled the two approaches, adopting a single standard incorporating the dominant approaches:

"A particular social group is a group of persons who share a common characteristic other than a 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>38</sup>

If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable nor fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. Such an analysis, however, would not be relevant in a social group based in whole or part on gender, as gender is immutable.<sup>39</sup>

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, and who are frequently treated differently than men.<sup>40</sup> Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries.<sup>41</sup> 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."<sup>42</sup>

The size of the group has sometimes been used as a basis for refusing to recognize "women" generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by questions of size. There should equally be no requirement that the particular social group be cohesive or that members of it voluntarily associate, or that

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<sup>35</sup> *Id.*, para. 5. In civil law jurisdictions, there is more emphasis on whether a risk of persecution exists than on the standard for defining a particular social group. *Id.*, para. 8.

<sup>36</sup> *Id.*, para. 6.

<sup>37</sup> *Id.*, para. 7.

<sup>38</sup> *Id.*, para. 11; *Gender Guidelines*, *supra* note 23, para. 29.

<sup>39</sup> *Social Group Guidelines*, *supra* note 24, para. 13. The BIA incorrectly included this step in its analysis of Ms. Alvarado's claim. See *In Re R-A-* at 918.

<sup>40</sup> *Gender Guidelines*, *supra* note 23, para. 30. See also Summary Conclusions of the Expert Roundtable on Gender-Related Persecution, San Remo, 6-8 September 2001, no. 5.

<sup>41</sup> *Id.*

<sup>42</sup> ExCom Conclusion No. 39, Refugee Women and International Protection, 1985.

every member of the group be at risk of persecution.<sup>43</sup> Though it is well-accepted that it should be possible to identify the group independently of the persecution, persecution, including in the form of discrimination, may be a relevant factor in determining the visibility of the group in a particular context.<sup>44</sup>

In this case, therefore, Ms. Alvarado's particular social group can be defined by her sex,<sup>45</sup> her marital status, and her position in a society that condones discrimination against women. In Guatemalan society, women are a social subset defined by innate and immutable characteristics (their sex) and they are treated differently than men. Their civil status (married) also identifies them as a group in society, subjecting them to different treatment and standards, both in the law and in practice. Their being married women in Guatemala makes them subject to particularly discriminatory treatment according to Guatemalan law, its implementation and societal norms. That Ms. Alvarado protested against her husband's violence and sought the protection of State authorities also marks her as a person who has transgressed the social mores of her society, which condone and institutionalise discrimination against women. Women are expected to accept their "fate" without protest and without involving the authorities at all. This is another element identifying her as part of a particular social group.<sup>46</sup>

**Is the persecution Ms. Alvarado suffered and fears for reasons of her membership in a particular social group?**

Persecution often relates to acts by the authorities of a country. However, where serious discriminatory acts or human rights abuses are committed by segments of the population or private individuals, these acts will also amount to persecution if the government knowingly tolerates the behaviour, or if it is unwilling or unable to provide protection to the individuals affected.<sup>47</sup> As noted above, the facts in Ms. Alvarado's case indicate that Guatemalan authorities knowingly tolerated the abuses that she suffered at the hands of her husband, and failed to provide legal remedies. With this in mind, it can be concluded that the Ms. Alvarado's "well-founded fear of persecution" was for persecutory acts that were a combination of abuse by her husband (a non-State actor) that he could inflict because she was his wife and that he could inflict with impunity because of State inaction and tolerance in a culture of discriminatory treatment of women and failure to protect them.

Ms. Alvarado clearly established a well-founded fear of being persecuted. This fear, however, must be related to one or more of the Convention grounds, *i.e.*, there must be a causal link to fulfil the "for reasons of" requirement in the refugee definition.<sup>48</sup>

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<sup>43</sup> *Gender Guidelines*, *supra* note 23, para 31. The BIA incorrectly used cohesiveness and voluntary association as factors for consideration in Ms. Alvarado's case. See *In Re R-A-* at 918.

<sup>44</sup> *Id.*, para 31; *Social Group Guidelines*, *supra* note 24, para. 14. See also Summary Conclusions of the Expert Roundtable on Membership of a Particular Social Group, San Remo, 6-8 September 2001, no. 6.

<sup>45</sup> It is important to distinguish between the terms "gender" and "sex." Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender-related claims have typically encompassed acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals. See *Social Group Guidelines*, *supra* note 24, para. 3.

<sup>46</sup> See discussion *infra* Part III.B. Political Opinion.

<sup>47</sup> *Handbook*, *supra* note 20, para. 65.

<sup>48</sup> *Gender Guidelines*, *supra* note 23, para. 20.

The Convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause. In many jurisdictions the causal link ("for reasons of") must be explicitly established (e.g. some Common Law States) while in other States causation is not treated as a separate question for analysis, but is subsumed within the holistic analysis of the refugee definition. In many gender-related claims, the difficult issue for a decision-maker may not be deciding upon the applicable ground, so much as the causal link: that the well-founded fear of being persecuted was for reasons of that ground. Attribution of the Convention ground to the claimant by the State or non-State actor of persecution is sufficient to establish the required causal connection.<sup>49</sup>

In cases where there is a risk of being persecuted at the hands of a non-State actor (e.g. husband, partner or other non-State actor) for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, 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, the causal link is also established.<sup>50</sup>

There may . . . arise situations where a claimant may be unable to show that the harm inflicted or threatened by the non-State actor is related to one of the five grounds. For example, in the situation of domestic abuse, a wife may not always be able to establish that her husband is abusing her based on her membership in a social group, political opinion or other Convention ground. Nonetheless, if the State is unwilling to extend protection based on one of the five grounds, then she may 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.<sup>51</sup>

In Ms. Alvarado's case, though her husband may have been abusing her in part for purely personal reasons, because he was drunk or irrational or had been abused himself, the facts show that he also abused her because she was a woman, his wife (over whom he thought he had the right to exercise full power and control), and he knew that he could do so with impunity in Guatemala. He also escalated his attacks against her when she protested his treatment. When she went outside the home to seek protection, she showed her opposition to domination by her husband and to the social mores of Guatemalan society, which condones such domination. The Convention ground -- her particular social group as defined above -- was, therefore, a relevant contributing factor, sufficient to fulfil the causal link.

The persecution Ms. Alvarado suffered at the hands of her husband (the non-State actor) and the fear of being persecuted by him in the future are for reasons of her social group, thus establishing the causal link regardless of the absence of State protection. It is also clear from the

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*, para. 21. See also *Michigan Guidelines on Nexus*, 23 *Michigan Journal of International Law* 207 (2002) at para. 8. This analysis has been termed "the bifurcated nexus" to a Convention ground by some refugee law experts. See, e.g., Musalo, 52 *DePaul Law Review* 777 (2003).

<sup>51</sup> *Social Group Guidelines*, *supra* note 24, para. 22.

facts of this case, moreover, that the absence of State protection was for reasons of a Convention ground. There is ample evidence that the State discriminates against women and tolerates male dominance and abuse of married women by their husbands. Police and judicial inaction and criticism of Ms. Alvarado for having transgressed social mores (that is, no longer tolerating abuse by her husband and trying to involve the authorities to protect her) is further evidence of this.

### **III. B. Political Opinion**

#### **Did Ms. Alvarado demonstrate a political opinion?**

As noted above, to be considered a refugee, a person must show well-founded fear of persecution for one of the 1951 Convention/1967 Protocol reasons. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them, and often the applicant is not aware of the reasons for the persecution feared. It is not, however, the duty of the applicant to analyse his or her case to such an extent as to identify the reasons in detail.<sup>52</sup>

Gender-related claims have often been analysed within the parameters of "membership of a particular social group." In some cases, however, the emphasis given to the social group ground has meant that the other applicable grounds, such as religion or political opinion, have been over-looked. In this case, the Convention ground of "political opinion" is also relevant.

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 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. 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 inherently non-political activity, but the context of the case should determine its nature. 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>53</sup>

In Ms. Alvarado's case, her opinion as to gender roles in Guatemala were evident through her numerous attempts to leave her husband and to seek to have him punished or restrained by Guatemalan authorities. As in the analysis for "particular social group," women asylum-seekers

<sup>52</sup> *Handbook, supra* note 20, para. 66.

<sup>53</sup> *Gender Guidelines, supra* note 23, para. 32.

who face torture, or harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may also be considered to be demonstrating a political opinion. In the context of Guatemalan society, which allows *de jure* and *de facto* discrimination against women, Ms. Alvarado's responses to her husband's attempts to dominate and abuse her could be seen as a transgression of social mores, in this case the socially -- and legally -- sanctioned domination of men over their wives. In Guatemala, these actions implicitly criticise State "policies, traditions or methods" and represent "opinions not tolerated by the authorities."

#### **Is the persecution Ms. Alvarado suffered and fears for reasons of her political opinion?**

Ms. Alvarado lived in a society of official tolerance of domestic abuse. Neither the police nor the courts supported her or protected her or punished her abuser. The authorities -- both official and in the person of her husband -- were well aware of her views that she should not have to continue to be dominated and abused by her husband. In fact, she was criticised for complaining and protesting. Her husband was free to act with impunity.

Because it occurs in the privacy of the home it is not possible to know for certain the basis for domestic violence. Ms. Alvarado's opinion, which she manifested, that she should be free from her husband's dominance and abuse and that the State should protect her, may or may not have been at the root of, or contributed to, her husband's initial attacks. Once she protested, however, and sought outside help and tried to leave her husband, it is clear that subsequent attacks were exacerbated or provoked by these actions, actions which clearly demonstrated her refusal to acquiesce in society's acceptance of abuse. The facts indicate that some of her husband's attacks were meant to punish her for these actions, for example, he beat and kicked her unconscious after she tried to escape; threatened to maim her if she tried to leave him again and, after she left Guatemala, to kill her if she returned.

Given the power her husband had over her and would have over her in the future, and the continued lack of State protection in cases of domestic violence in Guatemala, it is clear that the consequences for Ms. Alvarado, should she be forced to return to Guatemala, would be extremely serious. This consideration, added to the facts surrounding the abuse she has suffered, support the conclusion that Ms. Alvarado has demonstrated a well-founded fear of persecution on account of her political opinion.

#### **IV. Conclusion**

Awareness of gender-related persecution underlies a developing area of international refugee law which has found recognition relatively recently. Great strides have been made in recent years in the protection of individuals threatened on account of their gender. Parallel developments have occurred in international human rights law. The UNHCR Guidelines cited extensively in this opinion, and the developments on which they are based, reflect this progress.<sup>54</sup>

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<sup>54</sup> Jurisprudence and guidelines from Australia, Canada, Sweden, the United Kingdom, the United States and other jurisdictions have recognised that victims of domestic violence may, in certain circumstances, qualify as refugees according to the international criteria. See for example *Lazo-Majano v. INS*, 813 F.2d 1432 (US Court of Appeals 9<sup>th</sup> Cir. 1987), *Mayers v. Canada*, 97 D.L.R. 4<sup>th</sup> 729 (C.A. 1992), *Islam (A.P.) v. Secretary of State for the Home*

Having compared the circumstances of Ms. Alvarado to the criteria for refugee status, taking into account the guidance offered in the various sources of international standards and interpretation referred to in this opinion, UNHCR is of the view that Ms. Alvarado should be recognized as a refugee. Accepting as accurate the agreed factual background as set out in the earlier decisions, Ms. Alvarado has demonstrated that she has not only suffered persecution as a result of her membership in a particular social group and her political opinion, but that she also has a well-founded fear of being persecuted for those reasons in the future.

It may be assumed that a person has a well-founded fear of being persecuted in the future if, as is the case for Ms. Alvarado, she has already been the victim of persecution for reasons of a Convention ground.<sup>55</sup> Based on current country conditions reports, there have been no fundamental and durable changes in Guatemala since she left in 1995 regarding the treatment of victims of domestic violence, and, in Ms. Alvarado's case, her husband is apparently determined to do her harm.<sup>56</sup>

We hope the above analysis is useful to Government authorities considering Ms. Alvarado's case.

Sincerely,



Eduardo Arboleda  
Deputy Regional Representative  
Officer in Charge

Attachments: UNHCR Guidelines

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*Dept.* [1999] 2 AC 629, [1999] 2 All ER 545 (25 Mar 1999) and *Minister for Immigration & Multicultural Affairs v. Khawar* [2002] HCA 14 S128/2001 (High Court of Australia). See also Immigration & Refugee Board of Canada, *Guideline 4 Women Refugee Claimants Fearing Gender-Related Persecution: Update 3* (1996); U.K. Immigration Appellate Authority, *Asylum Gender Guidelines* (2000); US Immigration & Naturalization Service, Office of International Affairs, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (1995); and Swedish Migration Board, Legal Practice Division, *Gender-Based Persecution: Guidelines for Investigation and evaluation of the needs of women for protection* (2001).

<sup>55</sup> *Handbook*, *supra* note 20, para. 45.

<sup>56</sup> If it is established, however, that conditions have changed in Guatemala to the extent that Ms. Alvarado could find protection if she returned there, there is a fundamental humanitarian principle that would need to be taken into account in this case. It is reflected in Article 1 C (5) of the 1951 Convention and provides that if the circumstances in connection with which a person has been recognised as a refugee have ceased to exist, that person's refugee status ceases, "[p]rovided that this . . . shall not apply to a refugee . . . who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality." This important exception recognises that a person who has suffered under atrocious forms of past persecution, such as that suffered by Ms. Alvarado, should retain refugee status and not be expected to repatriate. See *Handbook*, *supra* note 20, paras. 135-6.

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