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United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

In the matter of:

[redacted]

In removal proceedings

BRIEF BY *AMICI CURIAE* INTERNATIONAL AND COMPARATIVE LAW EXPERTS

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Amici Curiae in Support of Respondent

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SUMMARY OF ARGUMENT

The Board has invited amicus briefs on the issue of whether a social group based on family membership is sufficient to satisfy the nexus requirement without further analysis, or whether the initial family member must also have been targeted based on another protected ground.[1] Family membership without more has long been recognized as a particular social group by this Board, by the United Nations High Commissioner for Refugees (UNHCR), and by other jurisdictions around the globe. The latter approach would require asylum applicants to establish a nexus not only for themselves but for an individual who is not seeking protection thereby imposing an unfounded and erroneous burden. Moreover, it would contradict the Board's own precedents, decisions by the U.S. Circuit Courts of Appeals,[2] the rulings of many other jurisdictions, and the expert views and authority of the UNHCR.[3] Most importantly, this approach is inconsistent with United States' obligations under the *1951 Convention relating to the Status of Refugees,* July 28, 1951, 189 U.N.T.S. 150, 19 U.S.T. 6259 (*Convention)* and the *1967 Protocol relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267, 19 U.S.T. 6223 (*Protocol*).

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[1] The Board refers to the initially targeted family member as the "defining family member." This term is not clarified but suggests that the claim may be based on that family member rather than on the individual seeking protection. To distinguish the asylum applicant from the family member who was first targeted, this brief will use the term "initial family member" or "initially targeted family member."

[2] For a full discussion of the decisions by this Board and by the Circuit Courts of Appeals, see Brief by Amici Curiae Non-Profit Organizations and Law School Clinics.

[3] Discussion of the views of UNHCR in this brief comes from international legal principles and UNHCR publications. UNHCR is not a signatory to this amicus brief and has neither reviewed nor endorsed this analysis.

ARGUMENT

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

Article VI of the United States Constitution states that treaties the United States has acceded to "shall be the supreme law of the land." As such, courts are bound by U.S. treaty obligations and have a responsibility to construe federal statutes in a manner consistent with those international obligations to the fullest extent possible. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

The *Convention* and *Protocol* are the fundamental international instruments governing the protection of refugees. Article I(1) of the *Protocol* binds States parties to comply with the substantive provisions of Articles 2 through 34 of the *Convention*. The *Protocol* also removes from the refugee definition in Article 1A(2) and 1B of the *Convention* the geographical and temporal limitations to events that occurred in Europe before January 1, 1951, thereby universalizing the refugee definition. *Id.* art. I (2)–(3). The core of both the *Convention* and its *Protocol* is the obligation to provide protection to refugees and to safeguard the principle of non-refoulement--the obligation not to return any individual to any country where she or he would face threats to her or his life or freedom including serious human rights violations or other serious harm. *Convention* art. 33; *Protocol* art. I. In 1968, the United States acceded to the *Protocol*, thereby binding itself to the international refugee protection regime of both the *Protocol* and the *Convention*. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987).

In fulfilling its obligations under the *Protocol*, Congress enacted the 1980 Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (Refugee Act), which, among other provisions, defines

"refugee" and establishes a system for refugees to seek the protection of asylum in the U.S. and to be protected from return to a place where they would face danger. INA §101(a)(42) and § 208 and INA § 241(b)(3) respectively. As reiterated by the United States Supreme Court, when Congress enacted the Refugee Act, it made explicit its intention 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 (citing H.R. Rep. No. 96-608 at 9 (1979)); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) ("'[O]ne of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees . . .") (quoting *Cardoza-Fonseca*, 480 U.S. at 436-37).

The Board has also explicitly recognized this fundamental purpose of the Refugee Act. *See, e.g., Matter of S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996) ("Congress sought to bring the [Refugee] Act's definition of 'refugee' into conformity with the United Nations Convention and Protocol Relating to the Status of Refugees and, in so doing, give 'statutory meaning to our national commitment to human rights and humanitarian concerns.'") (citing S. Rep. No. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A.N. 141, 144); *Matter of S-A-*, 22 I. & N. Dec. 1328, 1334 (BIA 2000) ("When adjudicating an alien's eligibility for relief, we are mindful of 'the fundamental humanitarian concerns of asylum law.'") (citing, *inter alia*, *Matter of S-P-* and the UNHCR Handbook).

Consistent with the *Protocol*, the Refugee Act defines "refugee" in significant part to include any person outside his or her country of nationality who is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of "race, religion, nationality, membership in a particular social group

or political opinion."[4] INA § 101(a)(42). The Refugee Act thus serves to bring the United States into compliance with its international obligations under the *Convention* and *Protocol* and as such it must be interpreted and applied in a manner consistent with these instruments to the fullest extent possible.

II. UNHCR PROVIDES AUTHORITATIVE GUIDANCE IN INTERPRETING THE REFUGEE DEFINITION.

The United Nations High Commissioner for Refugees (UNHCR) is the international United Nations agency entrusted by the U.N. General Assembly with the responsibility of ensuring international protection be provided to refugees and, together with governments, to seek permanent solutions to their problems. Statute of the Office of the UNHCR ¶ 1 U.N. Doc. A/RES/428(V) (Dec. 14, 1950).[5] According to its Statute, UNHCR fulfills its mandate by, *inter alia*, supervising State parties' compliance with the obligations under the *Convention* and *Protocol*. *Id.* ¶ 8(a). UNHCR's supervisory responsibility is also reflected in Article II of the *Protocol*, which obligates States to cooperate with UNHCR in the exercise of its mandate as well as to facilitate its supervisory role in both the Preamble and Article 35 of the *Convention*.

Over the course of its more than six decades of experience, UNHCR has published interpretive guidance for assessing protection claims. The most authoritative among these instruments are the UNHCR *Handbook and Guidelines on Procedures and Criteria for*

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[4] The Refugee Act definition differs only slightly from that contained in the *Convention* art. 1A(2) as amended by the *Protocol* art. I(2)–(3), which uses "for reasons of" rather than "on account of" and "membership *of* a particular social group" rather than membership in a particular social group. Although not explicitly stated in the *Convention* or the *Protocol*, past persecution is widely recognized as a basis for seeking and obtaining refugee protection, including by UNHCR. *See, e.g., UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* ¶ 45, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979; re-edited Jan. 1991; reissued Dec. 2011), available at http://www.unhcr.org/refworld/docid/4f33c8d92.html, formerly entitled *Handbook on Procedures and Criteria for Determining Refugee*.

[5] Available at http://www.unhcr.org/3b66c39e1.html.

Determining Refugee Status (*Handbook and Guidelines*).[6] UNHCR's interpretation of the provisions of the *Convention* and *Protocol* are recognized by the international community and in jurisdictions around the world as authoritative and integral to promoting consistency in the global regime for the protection of refugees. The U.S. Supreme Court has found that although the *Handbook* is not legally binding, it provides "significant guidance in construing the Protocol and giving content to the obligations established therein." *Cardoza–Fonseca*, 480 U.S. at n.22 (citations omitted). *See also, e.g., Negusie v. Holder*, 555 U.S. 511, 537 (2009) (stating that "the Court has looked [to the Handbook] for guidance"). The Board agrees with the importance of UNHCR's views in interpreting the refugee definition under U.S. law. *See, Matter of S-P-* 21 I. & N. Dec. at 489 (citing the *Handbook* with favor). Given this widespread recognition of the significance of UNHCR's guidance, the Board should look to UNHCR's views in its interpretation of family membership as a basis of refugee protection.

III. FAMILIES REPRESENT THE "CLASSIC EXAMPLE" OF A PARTICULAR SOCIAL GROUP UNDER THE REFUGEE DEFINITION.

UNHCR has long held the view that a family unit represents a classic example of a "particular social group." The fundamentality of family is recognized under principles of international law. Article 16 (c) (3) of the Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (UDHR), provides that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and

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[6] *See UNHCR Handbook*, *supra* note 4. UNHCR prepared the *Handbook* in 1979 at the request of Member States of the Executive Committee of the High Commissioner's Programme, which then and now includes the United States, to provide guidance to governments in applying the terms of the *Convention* and *Protocol*; *see also Guidelines on International Protection* are endorsed by the Executive Committee, UNHCR Executive Committee, *General Conclusion on International Protection*, Oct. 8, 2002, No. 92 (LIII) – 2002, *available at* http://www.unhcr.org/refworld/docid/3dafdce27.html, as well as by the U.N. General Assembly, UN General Assembly, Office of the UNHCR, *Resolution Adopted by the General Assembly*, Feb. 6, 2003, A/RES/57/187, ¶ 6, *available at* http://www.unhcr.org/refworld/docid/3f43553e4.html.

the State." International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, *entered into force* 23 March 1976, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 UNTS 171, Article 23(1) (ICCPR) (same); International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, *entered into force* 3 Jan. 1976, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 993 UNTS 3, Article 10(1) (ICESCR) (same). These instruments also prohibit discrimination based, *inter alia,* on "birth or other status." *See* UDHR, Article 2; ICCPR, Article 2(1); ICESCR, Article 2(1).

The Board first established that family constitutes a particular social group in its landmark decision *Matter of Acosta*, ruling that "[t]he shared characteristic might be an innate one such as sex, color, or kinship ties." 19 I. & N. Dec. 211, 233 (BIA 1985), and has affirmed this ruling many times since that decision. *See, e.g., Matter of C-A-*, 23 I. & N. Dec. 951, 959 (BIA 2006).

IV. UNHCR HAS INTERPRETED FAMILY MEMBERSHIP AS A BASIS FOR REFUGEE PROTECTION WITHOUT REGARD TO THE REASONS FOR TARGETING THE INITIAL FAMILY MEMBER.

Article I paragraphs 2 and 3 of the *Protocol,* amending Article I of the *Refugee Convention* provides that to satisfy the refugee definition an individual must establish a well-founded fear of persecution "for reasons of" race, religion, nationality, membership of a particular social group, or political opinion.[7] UNHCR has made clear that "[i]t is sufficient that the Convention ground be a relevant factor contributing to the well-founded fear of persecution." UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* ¶ 23 (Apr. 2001).

The UNHCR Handbook spells out more specifically that refugee status determinations call for "specialized knowledge, training and experience and -- *what is more important -- an*

[7] Available at http://www.unhcr.org/refworld/docid/3b20a3914.html.

understanding of the particular situation of the applicant and of the human factors involved." *Handbook* ¶ 222. In the words of UNHCR, the salient consideration should be "*what predicament the applicant would face* if he or she were returned to the country of origin . . . [and] requires a fact-specific examination of what may happen . . . ." 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* ¶ 32, HCR/GIP/12/01 (Oct. 23, 2012) (emphasis added).[8]

The authorities discussed above make it clear that, in UNHCR's view, the assessment of asylum eligibility must focus on the situation of and potential harm to the individual asylum seeker without more, stating unequivocally that the applicant need only establish that the fear of persecution is due to one of the five protected grounds. There is nothing to suggest that if eligibility for asylum is established due to a particular social group based family membership any further inquiry into the basis of the persecution of the initially targeted family member is required or even appropriate.

Most importantly in the context of the question posed by the Board, UNHCR has made explicit its view that there is no requirement that the initially harmed or threatened family member must have been targeted due to a protected ground for an applicant to qualify for asylum based on family membership. Protection claims based on blood feuds provide an important example of this principle. In this context, the initial family member generally is not targeted based on a protected ground under the refugee definition. Rather,

> a blood feud involves the members of one family killing members of another family in retaliatory acts of vengeance which are carried out according to an ancient code of honour and behaviour [and] . . . can be triggered by murders, but also by other offences,

[8] Available at http://www.unhcr.org/refworld/docid/50348afc2.html.

> such as the infliction of permanent, serious injury, the kidnapping or violation of married women, or unresolved disputes over land, access to water supplies or property.

UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan at 70, 6 August 2013, HCR/EG/AFG/13/01 (citations omitted) (*Afghanistan Eligibility Guidelines*).[9] UNHCR takes the firm view that not only might the principal target of a blood feud be eligible for refugee status, but that "[d]epending on the specific circumstances of the case, family members, partners or other dependants (*sic*) of individuals involved may also be in need of international protection on the basis of their association with the individuals at risk." *Id.* at 71.

In 2006, UNHCR issued a position on refugee claims based on family or clan membership in the context of blood feud. *UNHCR Position on Claims for Refugee Status Under the 1951 Convention relating to the Status of Refugees Based on a Fear of Persecution Due to an Individual's Membership of a Family or Clan Engaged in a Blood Feud*, 17 March 2006, (*Family and Blood Feud Position*).[10] The *Family and Blood Feud Position* states unequivocally that "'*the reason for the animosity towards [the initially targeted family member] that led to the harm to the family . . . is not relevant, what is critical is that the harm suffered by the [applicants] was on account their membership in a protected group.*'" *Id.* ¶12 (emphasis added) (quoting *Thomas v. Gonzales*, 409 F.3d 1177, 1188 (9th Cir. 2005), *vacated on other grounds by Gonzales v. Thomas*, 547 U.S. 183 (2006)).[11] The *Family and Blood Feud Position* further states that "individuals fearing persecution in a blood feud scenario are not targeted because of their own actions but because of responsibilities viewed as having been incurred by

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[9] Available at http://www.refworld.org/docid/51ffdca34.html.
[10] Available at http://www.refworld.org/docid/44201a574.html.
[11] In the *Thomas* decision, the court further stated that it "decline[s] to hold . . . that a family can constitute a particular social group only when the alleged persecution is intertwined with one of the other four [protected] grounds . . . ." *Id.*

their (living or dead) family members." *Id.* ¶14. This language further underscores that the reason the initial family member was targeted is not a relevant consideration in determining a family-based social group claim.

V. THE BIA SHOULD CONSIDER HOW OUR SISTER SIGNATORIES TO THE PROTOCOL HAVE INTERPRETED FAMILY AS A PARTICULAR SOCIAL GROUP.

Since the refugee definition in INA § 101(a)(42) incorporates the Protocol, the Board should construe this definition according to the general rules of treaty interpretation, including examining the interpretations of other States parties. The Supreme Court has adhered to this principle of applying the rules of treaty interpretation to an incorporative statute. *See, e.g., Cardoza-Fonseca,* 480 U.S. at 437-40 (analyzing the text and negotiating history of Article 1(2) of the Convention in construing the statutory phrase "well-founded fear"); *Vimar Seguros y Reaseguros v. M/V Sky Reefer,* 515 U.S. 528, 536-37 (1995) (adopting an interpretation of a statute consistent with the interpretation of parties to the treaty on which the statute is based). As Justice Stevens has explained, "[w]hen we interpret treaties, we consider the interpretations of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty's language." *Negusie,* 555 U.S. at 537 (Stevens J, joined by Breyer J, concurring in part and dissenting in part).

In interpreting any treaty, "the opinions of our sister signatories . . . are entitled to considerable weight." *Abbott v. Abbott,* 560 U.S. 1, 16 (2010) (internal quotation marks omitted). This principle "applies with special force" where "'uniform international interpretation of the Convention' is part of the Convention's framework." *Id.; see also, Sanchez-Llamas v. Oregon,* 548 U.S. 331, 343-44 (2006) (highlighting the views of sister signatories in interpreting the Vienna Convention on Consular affairs). In view of these Supreme Court precedents, as well as

under Articles 31 and 32 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (VCLT), the Board should consider the views of other signatories to the Protocol in interpreting the meaning of a "particular social group" based on family relationships.[12]

A. A Number of Common Law Jurisdictions Have Held that Family Constitutes a Particular Social Group When the Initial Family Member Has Not Been Targeted for a Convention Reason.

1. The UK House of Lords Has Held that the Initial Family Member Need Not Have Been Targeted for a Convention Reason.

The UK House of Lords addressed whether a secondary nexus is required for family to constitute a particular social group in *Sec'y of State for the Home Dep't v. K and Fornah v. Sec'y of State for the Home Dep't,* [2006] UKHL 46, [2007] 1 A.C. 412 (H.L.) [hereinafter *K and Fornah*]. K's case concerned a woman who was raped, and her son threatened by Iranian government agents after her husband was arrested and imprisoned for unknown reasons. She based her claim on her membership in the particular social group of her husband's family. *Id.* at 434, para. 19. In reviewing K's case, the House of Lords held that when a claimant asserts persecution for reasons of family membership, she does not have to establish that the initial family member was also persecuted for a Convention reason. *Id.* at 437, paras. 23-24.

In reaching this conclusion, Lord Bingham found persuasive the reasoning in *R v. Immigration Appeal Tribunal, Ex parte De Melo* [1997] Imm AR 43, 49-50, which addressed this issue in dicta, explaining: "The original evil which gives rise to persecution against an

[12] Article 31 of the VCLT requires consideration of the "subsequent practice" of States parties, while Article 32 permits use of "supplemental means" when under Article 31 the meaning of the provision in question is ambiguous or leads to an unreasonable result. Although the United States is not a signatory to the VCLT, it is considered part of customary international law and as such, Courts consider "'the postratification (*sic*) understanding' of signatory nations" when interpreting a treaty. *Medellin v. Texas*, 552 U.S. 491 507 (2008).

individual is one thing; if it is then transferred so that a family is persecuted, on the face of it that will come within the Convention." *K and Fornah*, [2007] 1 A.C. at 435, ¶ 20 (quoting *De Melo*). Lord Hope of Craighead further found that requiring the initial family member to have been persecuted for a Convention reason would treat the particular social group ground different from any of the other protected grounds. He explained, "*[p]ersecution of a person simply because he is a member of the same family as someone else is as arbitrary and capricious, and just as pernicious, as persecution for reasons of race or religion.*" *K and Fornah*, [2007] 1 A.C. at 445, para. 45 (emphasis added). As Lord Rodger of Earlesferry stressed, "there is nothing in the wording of the Convention to support that narrow interpretation" requiring the initial family member to have been targeted for a Convention reason. In fact, doing so "would mean that, despite the Home Secretary's acceptance that fear of persecution for reasons of membership of a family could be a ground for granting asylum, in practice a claim on that basis could hardly ever arise." *K and Fornah*, [2007] 1 A.C. at 452, ¶ 64. Finally, the Baroness Hale of Richmond noted that the idea of imposing a secondary nexus for family-based groups has its roots in "sexist reasoning," stressing that "[i]t is necessary to look at the claimant in her own right, not as the adjunct or dependent of someone else" and that failing to do so discriminates against women, who are particularly targeted for this type of persecution. *Id.* at 465, paras. 105-106. The Board should follow the well-reasoned analysis of the U.K. House of Lords.

2. New Zealand's Refugee Status Appeals Authority Has Followed the UK House of Lords' Interpretation.

New Zealand's Refugee Status Appeals authority also addressed whether the initial family member must have been targeted for a Convention reason in Refugee Appeal No. 76585 (2010). There, the appellants were a couple and their five-year-old son who feared being murdered in Colombia by members of the paramilitary group as retribution for the wife's failure

to co-operate with them. There was no evidence suggesting that the wife's decision not to cooperate with the paramilitaries was based on political opinion; she was simply worried that if she started cooperating, they would never leave her alone. *Id.* at para. 74. In analyzing this case, the Refugee Status Appeals Authority found that the House of Lords' decision in *K and Fornah* "represents a correct interpretation of the particular social group ground with respect to family members." *Id.* at para. 83. In particular, the Authority found the reasoning of Lord Bingham and Lord Hope, discussed above, to be persuasive, concluding that, "although it is clear that the primary family member (the wife) does not face a risk of being persecuted for a Convention reason, the sole reason for the risk faced by the husband and the child is their relationship to the wife's family." *Id.* The Appeals Authority concluded that husband and child established eligibility for asylum based on their family membership as particular social group without regard to the reasons the wife had been targeted. Like the Appeals Authority, the Board should follow the U.K.'s approach.

3. The High Court of Ireland Has Followed the UK House of Lords' Interpretation.

Most recently, in *AVB v. Refugee Appeals Tribunal*, [2015] IEHC 13, the High Court of Ireland addressed whether the initial family member must have been targeted for a Convention reason. The case involved an ethnic Albanian Muslim family born in Kosovo that feared persecution due to a blood feud. *Id.* ¶¶. 3-4. In analyzing the case, the High Court of Ireland found persuasive the UK House of Lord's decision in *K and Fornah,* as well as the decision of the UK Upper Tribunal (Immigration and Asylum Chambers) in *EH (blood feuds) Albania CG* [2012] UKUT 00348 (IAC), which rejected the argument that members of families or clans involved in blood feuds do not constitute a particular social group. The Upper Tribunal found this position inconsistent with *K and Fornah*, quoting Lord Hope's reasoning that it is just as

pernicious to persecute someone because of family membership as for reasons of race or religion. *Id.* at paras. 60-71. The High Court of Ireland agreed, concluding that, "the tribunal member fell into an error of law in finding that feuds among family members did not have a convention nexus and that the decision in *Fornah* was incorrectly applied." *AVB*, [2015] IEHC 13, para. 27. In addition, the High Court found that "[t]he tribunal member further erred in law and in fact in finding that the applicants did not constitute members of a particular social group, i.e. being part of a family which was involved in a blood feud with the family of [the father's] brother-in-law." *Id.* at para. 28. The High Court therefore overruled the tribunal member's decision and remanded the case.

4. The Federal Court of Australia Has Held That the Initial Family Member Need Not Have Been Targeted for a Convention Reason, But that Interpretation Was Superseded by Legislation for Policy Reasons.

In *Sarrazola v. Minister for Immigration and Multicultural Affairs* (No 3) [2000] FCA 919, the Federal Court of Australia held that an asylum seeker can establish a well-founded fear of persecution for reasons of a family relationship even if the initial family member is not targeted for a Convention reason. That case involved a Columbian woman who had been threatened with death if she did not repay a debt contracted to "underworld figures" by her brother. The court found that she could be seen as being persecuted for a Convention ground, based membership of a particular social group composed of her family. Drawing on international human rights principles, Judge Madwick reasoned, "It is commonplace that society may discriminate against a person because of his or her family membership (this is, an aspect of his or her 'birth or . . . status'). . . . It is reasonable to say that the inclusion of the reference to 'birth or other status' in the UDHR was some recognition of this kind (among other kinds) of discriminatory tendency." *Id.* at para. 33. Former UNHCR Deputy High Commissioner T.

Alexander Aleinikoff, commenting on *Sarrazola,* concluded that "[t]his seems a sensible result. It is the family as such that is being targeted; it is a status that cannot be escaped, and the State is unable to provide protection from the persecution."[13]

In response to *Sarrazola*, however, the Australian legislature passed the Migration Legislation Amendment Act (No 6) of 2001. Section 91S of this Act specifically imposes a secondary nexus requirement for family-based claims, stating that protection responsibilities are not owed to a person whose claim derives from an association with another person who would not be a Convention refugee. The Minister for Immigration and Multicultural Affairs made it clear that the motivation behind section 91S was to "*remove a potential avenue for criminal families to claim protection on the basis of gang wars – not those that the government would see as warranting international protection.*" *STCB v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2006] JCA 61 (2006), at para. 18 (quoting the Minister's speech) (emphasis added). In affirming the application of section 91S to a case involving Albanian blood feuds, the High Court of Australia observed that "[g]ang wars have resemblances with blood feuds, and *it is plain that the Minister's intention was to restrict the capacity to claim visas on grounds of these kinds.*" *Id.* at para. 19 (emphasis added).

Critically, section 91S reflects an explicit *policy decision* not to extend refugee status to so-called "criminal families." This type of policy decision is distinct from a judicial interpretation of the language of the Refugee Convention and, more specifically, the particular social group ground. In *Sarrazola,* the Federal Court of Australia provided an interpretation of the Refugee Convention that is consistent with the interpretation of the UK House of Lords, High

[13] T. Alexander Aleinikoff, "Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership of a Particular Social Group," *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 306 (Erika Feller, Volker Türk Frances Nicholson, eds., 2003).

Court of Ireland, New Zealand Refugee Appeals Authority, and several U.S. Courts of Appeals. The BIA should focus on these judicial interpretations of the language of the Convention, rather than a legislative action motivated by an inappropriate intention to per se exclude certain categories of people.

5. The Federal Court of Canada's Requirement that the Initial Family Member Be Targeted for a Convention Reason is Inconsistent with the Supreme Court of Canada's Seminal Decision in *Ward* and is Based on Unpersuasive Reasoning.

The Supreme Court of Canada's decision in *Ward v. Canada (Minister of Employment & Immigration)*, [1993] 2 S.C.R. 689, explained that "[t]he meaning assigned to 'particular social group' . . . should take into account the general underlying themes of the defence of human rights and antidiscrimination that form the basis for the international refugee protection initiative." Based on *Ward*, numerous decisions by the Federal Court of Canada have held that family constitutes a particular social group and that "[i]n determining whether or not membership in the social group of the family can constitute nexus, the relevant question is whether or not the claimants experience persecution *because of their status as a members of the family*." *Sebok v. Canada (Citizenship and Immigration)*, 2012 FC 1107, at para. 10 (emphasis added); *see also Llorens Farfan v. Canada (Citizenship and Immigration)*, 2011 FC 123, at para. 18. The Court has explained that there must be "some proof that the family in question is itself, as a group, the subject of reprisals and vengeance or, in other words, *that the applicants are targeted and marked simply because they are members of the family*." *Granada v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1766, at para. 16 (emphasis added). These decisions make clear that the reason the initial family was targeted is irrelevant to eligibility for asylum based on family membership.

A few decisions of the Federal Court of Canada, however, have misapplied *Ward* in requiring a secondary nexus to establish family as a particular social group. *See, e.g., Klinko v. Canada (Minister for Citizenship & Immigration)* (1998), 148 F.T.R. 69 (Fed. T.D.) (holding that "'when the primary victim of persecution does not come within the definition of a Convention refugee, any derivative refugee claims based on family group cannot be sustained.'");[14] *Bojaj v. Canada* (Minister of Citizenship and Immigration), [2000] F.C.J. No. 154, para. 15 (quoting *Klinko*); *Zefi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 636, [2003] F.C.J. No. 812, at para. 41 (same).

These decisions are inconsistent with *Ward* because they fail to recognize that persecution based as family membership is as pernicious under human rights principles as persecution based on religion, race, and the other Convention grounds. In *Zefi*, for example, the Federal Court reasoned that "[r]evenge killing in a blood feud has nothing to do with the defence of human rights – quite to the contrary, such killing constitutes a violation of human rights." [2003] F.C.J. No. 812, at para. 41. This reasoning is deeply flawed because the court failed to recognize the way blood feuds undercut the right to life and the special protection accorded family relationships in the human rights framework, which are essential aspects of the defense of human rights as articulated in *Ward*. In addition, the applicants seeking asylum in *Zefi* feared being killed because they had *refused* to engage in a revenge killing after a family member was murdered. Insofar as the Federal Court expressed concern in *Bojaj* about "'the anomaly of derivative claims being allowed but primary claims being denied,'" [2000] F.C.J. No. 1524, at para. 15 (quoting *Klinko*), this also overlooks the relevance of the human rights and non-

[14] A second, and critical concern with this holding is the reference to a particular social group based on family membership as a "derivative" claim. Despite this ruling, the Convention, Protocol and U.S. law firmly and unquestionably state that family membership as a social group is an independent basis for asylum and is in no way a derivative claim.

discrimination principles emphasized by *Ward*. When someone is persecuted because of a family relationship, there is a pernicious reason for the harm that undercuts human rights, but if the initial family member is not targeted based on a protected ground, then human rights norms are not implicated in that person's situation, so there is no anomaly in granting refugee status to the former but not the latter.

The BIA should reject the Canadian decisions that are not in accord with the principles set forth in *Ward* and follow those that are consistent with *Ward* by recognizing family membership, without more, as a protected ground.

B. Civil Law Countries Have Granted Asylum in Cases Where the Initial Family Member was Not Targeted for a Convention Reason.

In addition to the common law countries discussed above, numerous civil law countries have granted asylum in cases involving blood feuds, which, as discussed in Point IV above, provides a clear illustration of the situation where the applicant's claim is based on family as a "particular social group," but the initial family member was not targeted for a Convention reason. The European Asylum Support Office reports that, "in recent years, most of the *positive decisions* for Albanians in Belgium, as well as over 60% in France, have been, according to estimations by the respective authorities, related to [blood feuds]."[15] (emphasis added). In fact, across the European Union, Albanians are granted refugee status under the Convention more often than citizens of any other Western Balkan countries.[16] In Belgium, Hungary, and Switzerland, the consequences of parallel social systems "manifested in hostile acts such as blood feuds" were the reason for seeking asylum in over 80% of the applications from the Western Balkans, and Albanians from the northern parts of Albania and Kosovo comprised a

[15] European Asylum Support Office, *Asylum Applicants from the Western Balkans: Comparative Analysis of Trends, Push-Pull Factors and Responses* 41 (2013), http://www.refworld.org/pdfid/53218ead4.pdf.
[16] *Id.* at 26, Figure 17.

large portion of the case-load.[17] Finland, Luxembourg, Slovenia, and Denmark also noted blood feuds "as a reason for many (30% to 80%) of the applications," primarily among ethic Albanians from Kosovo and Albania.[18] These statistics clearly indicate that a number of European countries do not require the initial family member to have been persecuted for a Convention reason; they treat particular social group claims based on family membership the same as any other Convention ground without imposing a secondary nexus requirement. The Board should take the rulings of these Civil Law countries into account.

CONCLUSION

For all the foregoing reasons, *amici* urge the Board to follow the authoritative views of UNHCR, rulings by sister signatories to the Convention and Protocol, and its own precedents by holding that where an asylum applicant has demonstrated persecution on account of his or her membership in a particular social group comprised of the applicant's family, the nexus requirement has been met.

[17] *Id.* at 40.
[18] *Id.* at 40.

PROOF OF SERVICE

On March 5, 2016, I, Fatma Marouf, mailed by courier three copies of the Brief of *Amici Curiae* International and Comparative Law Experts to the following address:

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