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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:	)	
X	)	**File No.:**
In removal proceedings	)	

BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES IN SUPPORT OF RESPONDENT X

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INTEREST OF AMICUS CURIAE

The United Nations High Commissioner for Refugees [hereinafter UNHCR] has a direct interest in this matter as the organization entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees and others of concern, and together with Governments, for seeking permanent solutions for their problems. *Statute of the Office of the UNHCR*, U.N. Doc. A/RES/428(v), ¶ 1 (Dec. 14, 1950). According to its Statute, UNHCR fulfils its 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". *Statute of the Office of the UNHCR*, U.N. Doc. A/RES/428(v), ¶ 8 (Dec. 14, 1950). UNHCR's supervisory responsibility is also reflected in both the Preamble and Article 35 of the 1951 *Convention Relating to the Status of Refugees*, July 28, 1951, 19 U.S.T. 6259 [hereinafter 1951 *Convention*] and Article II of the 1967 *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 *Protocol*], obligating States to cooperate with UNHCR in the exercise of its mandate and to facilitate UNHCR's supervisory responsibilities.

In 1968, the United States acceded to the 1967 *Protocol*, which incorporates by reference all the substantive provisions of the 1951 *Convention*. Congress passed the 1980 Refugee Act with the explicit intention to bring the United States into compliance with its international obligations under the 1951 *Convention* and 1967 *Protocol*. United States courts have an obligation to construe federal statutes in a manner consistent with United States international obligations whenever possible. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

The views of UNHCR are informed by almost 60 years of experience supervising the treaty-based system of refugee protection established by the international community. UNHCR provides international protection and direct assistance to refugees throughout the world and has staff in some 120 countries. It has twice received the Nobel Peace Prize for its work on behalf of refugees. UNHCR's interpretation of the provisions of the 1951 *Convention* and its 1967 *Protocol* are both authoritative and integral to promoting consistency in the global regime for the protection of refugees.

This case involves the interpretation of the refugee definition in the 1951 *Convention* and its 1967 *Protocol* as implemented in United States law at section 101(a)(42) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(42). As such, it presents questions involving the essential interests of refugees within the mandate of the High Commissioner. Moreover, UNHCR anticipates that the decision in this case may influence the manner in which the authorities of other countries apply the refugee definition. The issue presented, the interpretation of "membership of a particular social group," is one of national significance and has been the subject of a number of high-profile immigration appeals. UNHCR has participated as Amicus Curiae in six such cases: *Granados Gaitan* (No. 10-1724) in the Eighth Circuit; *Gonzalez-Zamayoa v. Holder* (No. 09-3514) in the Second Circuit; *Orellana-Monson v. Holder* (No. 08-60394) in the Fifth Circuit; *Valdiviezo-Galdamez v. Holder* (No. 08-4564) and *S.E. T.-E. v. Holder* (No. 09-2161) in the Third Circuit; and *Doe v. Holder* (No. 09-2852) in the Seventh Circuit.

SUMMARY OF THE ARGUMENT

The Immigration Judge granted the claim below finding the Respondent had established membership in a particular social group including an express determination that the particular social group is "cognizable" in the society in question, "well-defined", and "not indeterminate or too vague." In its brief to the Board, the Department of Homeland Security ("DHS") challenges these conclusions by the Immigration Judge asserting that the group is not "socially visible," and relying for support of this view on *Matter of E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008). In *Matter of S-E-G-*, 24 I. & N. Dec. 579, 586, the companion case to *E-A-G-*, and several preceding decisions, in particular *Matter of C-A-*, 23 I&N Dec 951, 959 (BIA 2006), The Board inaccurately cited the *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*, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) ["*UNHCR Guidelines*" or "*Social Group Guidelines*"] in support of its "social visibility" requirement. *Matter of S-E-G-* at 586; *see also, e.g., Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006). In UNHCR's view, the Board's interpretation of the *Guidelines* is incorrect.

The requirement of "social visibility" to identify a social group is not in accordance with the text, context or object and purpose of the 1951 *Convention* and its 1967 *Protocol*, nor with the *UNHCR Guidelines.* Significantly, the Board's imposition of the requirement of "social visibility" may result in refugees being erroneously denied international protection and subjected to *refoulement*—return to a country where their

"life or freedom would be threatened"—in violation of United States' obligations under Article 33 of the 1951 *Convention*.[1]

As articulated in the *UNHCR Guidelines*, there are two separate, alternative tests for defining a particular social group: the "protected characteristics" approach and the "social perception" approach. The "protected characteristics" approach reflects the Board's longstanding test first articulated in *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled in part on other grounds*, *Matter of Mogharrabi*, 19 I. &. N. Dec. 439, 447 (BIA 1987), and examines whether the social group members share a common characteristic that is either immutable or so fundamental to their identity or conscience that they should not be required to change it. The "social perception" analysis is an alternative approach to be applied *only if a determination is made that the group does not possess any immutable or fundamental characteristics* and examines whether the social group is nevertheless cognizable in the society in question. Neither approach requires that members of a particular social group be "socially visible" or, in other words, visible to society at large. In any event, the proposed social group in this case may very well meet the "particular social group" ground under either approach.

In this brief, UNHCR will address the legal basis for establishing eligibility for refugee protection based on membership of a particular social group.[2]

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[1] The United States' obligations under Article 33 of the 1951 *Convention* derive from Article I(1) of the 1967 *Protocol*, which incorporates by reference Articles 2 through 34 of the 1951 *Convention*. For the text of Article 33, see note 5, *infra*.

[2] UNHCR submits this brief amicus curiae to provide guidance to the Court on the relevant international standards and not to offer an opinion on the merits of the applicant's claim.

ARGUMENT

I. THE U.S. 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, the courts are bound by United States 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."); *Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.").

The United States acceded to the 1967 *Protocol*, which incorporates Articles 2 – 34 of the 1951 *Convention*, *Protocol* Art. I ¶1 and amends the definition of "refugee" by removing the temporal and geographic limits found in Article 1 of the 1951 *Convention*.[3] 1967 *Protocol* art. I ¶¶ (2) and (3).

The United States Supreme Court has recognized that when Congress enacted the Refugee Act of 1980, it made explicit its intention to "bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of

[3] The 1951 *Convention* definition of a refugee, as amended by the 1967 *Protocol*, states, in relevant part: "[T]he term 'refugee' shall apply to any person who: (2) 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 [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country . . .." For the definition of "refugee" under United States law, see note 4, *infra*.

Refugees." [4] *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (citing H.R. Rep. No. 96-608 at 9 (1979)).

"'[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, to which the United States acceded in 1968." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987)) (additional citation omitted). The obligations to provide refugee protection and not to return a refugee to any country where she or he would face danger lay at the core of the 1951 *Convention* and 1967 *Protocol*.

In fulfilling these requirements, Congress provided a path for refugees to seek asylum in the U.S., 8 U.S.C. §§1101(a)(42) and 1158, and expressed its intent that the provisions of the Refugee Act obligating the Attorney General to refrain from returning refugees to a place where they would face danger "[conform] to the language of Article 33" of the 1951 Convention.[5] *INS v. Stevic*, 467 U.S. 407, 421 (1984) (discussing 8

[4] The refugee definition is provided in 8 U.S.C. Section 1102(a)(42) and states in relevant part: "The term 'refugee' means (A) any person who is outside any country of such person's nationality . . . and is unable or unwilling to return to, and 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 . . .." *Cf* 1951 *Convention* definition as amended by the 1967 *Protocol* provided in note 3, *supra*.

[5] Article 33 of the Refugee Convention addresses the fundamental principle of *non-refoulement* or no return, stating in relevant part: "No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion." This principle is reflected in U.S. law under 8 U.S.C. §1231 (b)(3), 8 I.N.A. §241 (b)(3): "[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."

U.S.C. § 1253(h) (1976), now codified at 8 U.S.C. § 1231(b) (3)). The 1980 Refugee Act thus serves to bring the United States into compliance with its international obligations under the 1951 *Convention* and 1967 *Protocol* and so it must be interpreted and applied in a manner consistent with these instruments.

II. THE REQUIREMENT OF "SOCIAL VISIBILITY" IS INCONSISTENT WITH THE OBJECT AND PURPOSE OF THE 1951 *CONVENTION* AND 1967 *PROTOCOL* AND THE *UNHCR GUIDELINES*.

Of the five grounds for refugee protection, that pertaining to "membership of a particular social group" has posed the greatest challenges with regard to its interpretation. Neither the 1951 *Convention* nor 1967 *Protocol* provides a definition for this category nor does the drafting history specify its exact meaning[6], but over time expert commentary and international jurisprudence have clarified the meaning of this phrase.

In 2000, UNHCR launched the Global Consultations on the International Protection of Refugees, a consultative process that enjoyed broad participation by governments, including representatives of the United States government, the International Association of Refugee Law Judges, other legal practitioners, non-governmental organizations, and academia. The purposes of the Global Consultations were to take stock of the state of law and practice in several areas of refugee status adjudication, to consolidate the various positions taken and to develop concrete recommendations to

[6] The term "membership of a particular social group" was added near the end of the deliberations on the draft *Convention* and all that the drafting records reveal is the Swedish delegate's observation: "[E]xperience has shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included." *Summary Record of the Third Meeting, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, at 14, U.N. Doc. A/Conf.2/SR.3 (July 3, 1951).

achieve more consistent understandings of these interpretative issues.[7] The *UNHCR Guidelines* are a product of the Global Consultations and were issued to provide guidance to States on interpreting the social group ground. Among the understandings reached by the participants, as reflected in the *UNHCR Guidelines*, are that this ground refers to a broad spectrum of groups for which no specific list exists and that such groups may change over time or even differ from one society to another. *UNHCR Guidelines* ¶ 3. Another key understanding reached is that the "membership of a particular social group" ground should be read in an evolutionary manner without rendering the other elements of the refugee definition superfluous. *Id*. ¶¶ 2, 3.

A. Under the *UNHCR Guidelines*, the "protected characteristics" and "social perception" approaches to defining social group membership are alternate approaches rather than dual requirements.

Based on a survey of common law jurisdiction decisions, UNHCR concluded that there are two dominant approaches to defining a social group: "protected characteristics" and "social perception". *UNHCR Guidelines* ¶¶ 6-7. The "protected characteristics" approach, embodied by the Board's seminal and highly influential *Acosta* decision,[8]

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[7] For a compilation of a number of key background documents prepared for the Global Consultations, *see* ERIKA FELLER, VOLKER TÜRK & FRANCES NICHOLSON, EDS., REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS IN INTERNATIONAL PROTECTION (2003).

[8] As T. Alexander Aleinikoff noted in "Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group,'" reprinted in ERIKA FELLER, VOLKER TÜRK & FRANCES NICHOLSON, EDS, REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS IN INTERNATIONAL PROTECTION 275 (2003): "The BIA's approach in *Acosta* has been highly influential. It was cited with approval and largely followed in the Canadian Supreme Court's Ward decision [*Canada v. Ward* [1993] 2 S.C.R. 689 (Can.)] and has been widely cited in cases arising in other jurisdictions as well." *See, e.g.*, *Islam v. Secretary of State for the Home Department and Regina v. Immigration Appeal Tribunal and Another, Ex Parte Shah*,

involves assessing whether the common attribute of a group is either: 1) innate and thus unchangeable, 2) based on a past temporary or voluntary status that is unchangeable because of its historical permanence, or 3) so fundamental to human dignity that group members should not be compelled to forsake it. *UNHCR Guidelines* ¶ 6. The "social perception" approach, established in *Applicant A and Another v. Minister for Immigration and Ethnic Affairs*, 190 C.L.R. 225 (1997), by the High Court of Australia, the only common law country to emphasize this approach, "examines whether or not a group shares a common characteristic which makes them a *cognizable* group or *sets them apart* from society at large." *UNHCR Guidelines* ¶ 7 (emphasis added). In civil law jurisdictions, the social group ground is generally less well developed but both the protected characteristics and the social perception approaches have received mention. *Id*. ¶ 8.

The *UNHCR Guidelines* give validity to both approaches and recognize that they may often overlap because groups whose members are targeted based on a common immutable or fundamental characteristic are also often perceived as a social group in their societies. The Department of Homeland Security ["DHS"] itself has addressed the overlap of the two approaches and has recognized that, while social perceptions may provide evidence of immutability or the fundamental nature of a protected characteristic, heightened *social perception is merely an "indicator"* of the social group's existence *rather than an additional factor*. *Department of Homeland Security's Position on*

[1999] 2 A.C. 629; *Secretary of State for the Home Department v. K (FC) and Fornah (FC) v. Secretary of State for the Home Department* [2006] 1 A.C. 412.

Respondent's Eligibility for Relief, 25 (Feb. 19, 2004) (emphasis added) ["*DHS Position*"], submitted in *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. 2005).[9]

UNHCR concluded that the two dominant approaches needed to be reconciled and has adopted a standard definition which incorporates both:

> [A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.

Guidelines ¶ 11 (emphasis added).

In UNHCR's view, and as articulated in the *Social Group Guidelines*, the first step in any social group analysis is to determine whether the group in question is based on an immutable or fundamental characteristic. If, at the end of this assessment, the group is found *not* to share a characteristic that can be defined as either innate or fundamental, "further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society." *Id*. ¶ 13. This second inquiry is an alternative to be considered only if it is determined that the group characteristic is neither immutable nor fundamental. In other words, if the defining characteristic of a social group is determined to be either innate or fundamental to an individual's identity, conscience, or human rights, membership of a particular social group has been established.

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[9] *Available at* http://cgrs.uchastings.edu/ documents/legal/dhs_brief_ra.pdf. In an unreported decision in 2009, the respondent in *R-A-* was granted asylum by an immigration judge and no appeal was taken by either party. *Matter of R-A-*, A# 073753922 (EOIR San Francisco, CA Dec. 14, 2009).

B. There is no requirement that a particular social group be visible to society at large.

Under the "social perception" analysis, the focus is on whether the members share a common attribute that is understood to exist in the society or that in some way sets them apart or distinguishes them from the society at large. "Social perception" neither requires that the common attribute be literally visible to the naked eye nor that the attribute be easily identified by the general public. Further, "social perception" does not mean to suggest a sense of community or group identification as might exist for members of an organization or association. Thus, members of a social group may not be recognizable even to each other. Rather, the determination rests on whether a group is "cognizable" or "set apart from society" in some way.

The use of the term "social visibility" to mean a group or characteristic that could be identified visually may reinforce a finding that an applicant belongs to a particular social group; but in UNHCR's view it is not a pre-condition for recognition of the group. In fact, a group of individuals may seek to avoid visibility in society precisely to avoid attracting persecution.[10]

C. The Board's characterization of the *UNHCR Guidelines* as supporting its "social visibility" requirement is inaccurate.

The Board has cited the *UNHCR Social Group Guidelines* as authority for its social visibility requirement and characterized them as "endors[ing] an approach in which

[10] The 7th Circuit Court of Appeals has recently made this same observation. *See*, *e.g.*, *Gatimi v. Holder*, 578 F.3d 611 at 615 (7th Cir. 2009)(stating that the social visibility criterion "makes no sense . . . If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be 'seen' by other people in the society 'as a segment of the population.'").

an important factor is whether the members of the group are 'perceived as a group by society.'" *Matter of S-E-G-*, 24 I. & N. Dec. at 586 (quoting *Matter of C-A-*, 23 I. & N. Dec. at 956). This characterization is inaccurate. The *UNHCR Guidelines* do address "visibility," stating that: "[P]ersecutory action toward a group may be a relevant factor in determining the *visibility* of a group in a particular society." *UNHCR Guidelines* ¶ 14 (emphasis added). *See also, UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, ¶ 35, ("the fact that members of a group have been or are being persecuted may serve to illustrate the potential relationship between persecution and a particular social group.") (citation omitted).[11] However, this language relates to the role of persecution in defining a particular social group and is meant to illustrate how being targeted can, under some circumstances, lead to the identification or even the creation of a social group by its members being set apart in a way that renders them subject to persecution.

This illustration of the potential relationship between persecution and the social group is neither intended to modify or develop the "social perception" approach nor to define this approach as requiring "visibility" rather than "perception". Further, it is not intended to establish or support "social perception" or "social visibility" as a decisive requirement that must be met in every case in order to demonstrate membership of a social group. In short, nothing in the *UNHCR Guidelines* or the 1951 *Convention* or 1967 *Protocol* supports the imposition or use of a "visibility" test to make a social group determination.

[11] *Available at:* http://www.unhcr.org/refworld/docid/4bb21fa02.html.

III. THE BOARD'S LONG-STANDING AND WELL-RESPECTED APPROACH TO SOCIAL GROUP UNDER *ACOSTA* IS CONSISTENT WITH THE 1951 *CONVENTION* AND 1967 *PROTOCOL* AND *UNHCR GUIDELINES* AND SHOULD BE MAINTAINED.

The definition of membership in a particular social group set by the Board in *Matter of Acosta* twenty-five years ago has long since become the standard-bearer in the United States as well as internationally. That definition provides that membership of a particular social group refers to "a group of persons all of whom share a common, immutable characteristic [that] . . . might be an innate one such as sex, color, or kinship ties, or . . . a shared past experience . . . . The [characteristic] must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Acosta* at 433.

The Board's well-formulated and widely accepted *Acosta* standard for particular social group claims has guided decisions by Immigration Judges, the Board, the Circuit Courts and many international courts for 25 years. Significantly, the *Acosta* standard is consistent with the 1951 *Convention* and 1967 *Protocol* as well as the *Social Group Guidelines*, to the extent that it assesses the immutability or fundamentality of the characteristic without requiring more. UNHCR cautions against adopting a requirement of "social visibility" in this and other cases, as such an approach may disregard members of groups the 1951 *Convention* and 1967 *Protocol* are designed to protect.

In fact, many social groups recognized by the Board under the *Acosta* analysis would be unlikely to establish the factors which the Board's current approach subsumes under the label of "social visibility." For instance, the general population in Cuba would likely not recognize all homosexuals on sight, *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990), and although they are certainly a category of persons that the society is

aware of, average Salvadorans may not recognize former members of the national police, *Matter of Fuentes*, 19 I. & N. Dec. 658 (BIA 1988). Similarly, a typical Togolese tribal member would not necessarily be aware of young women who opposed female genital mutilation but had not been subjected to the practice, *Matter of Kasinga*, 21 I. & N. Dec. 357, 366 (BIA 1996).

In UNHCR's view, the only requirements to establish a "particular social group" are those in the "protected characteristics" approach or, in the event these are not met, those in the "social perception" approach. To require more is likely to lead to erroneous decisions and a failure to protect refugees in contravention of the 1951 *Convention* and its 1967 *Protocol*.

IV. YOUNG FEMALE MEMBERS OF THE BULU TRIBE WHO OPPOSE FORCED POLYGAMOUS MARRIAGE MAY CONSTITUTE A PARTICULAR SOCIAL GROUP UNDER EITHER THE "PROTECTED CHARACTERISTIC" OR THE "SOCIAL PERCEPTION" APPROACH.

Women who oppose polygamy and refuse or resist being forced into a polygamous marriage may establish eligibility for protection based on membership of a particular social group. *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*, U.N. Doc. HCR/GIP/02/01 (7 May 2002), ¶ 29 ("*UNHCR Gender Persecution Guidelines*"). Such claims could satisfy both the "fundamental or immutable characteristic" and the alternative "social perception" approaches for determining the existence of a particular social group. *Id.*

A. The "protected characteristics" approach.

"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." *Id.* ¶ 30. This Board has likewise identified sex as an immutable characteristic. *Matter of Acosta* at 233 ("The shared characteristic might be an innate one such as sex, color, or kinship ties …."); *Matter of Kasinga*, 21 I. & N. Dec. 357, 366 (BIA 1996) (concluding that "[t]he characteristics of being a 'young woman' and a 'member of the Tchamba-Kunsuntu Tribe' cannot be changed."); *see also, DHS Position* at 20 (Feb. 19, 2004) ("Under this [*Acosta*] approach, gender is clearly an immutable trait.").

A number of circuit courts of appeals have recognized that sex alone or in combination with other factors can constitute a particular social group for purposes of asylum eligibility. *See, e.g., Mohammed v Gonzales,* 400 F 3d 785 (9th Cir. 2005) (holding that "young girls in the Benadiri clan" and "Somalian females" each constitute a particular social group); *Hong Ying Gao v. Alberto Gonzales*, 440 F.3d 62, 70 (2d Cir. 2006) (recognizing that the issue of gender as the sole identifying characteristic need not be addressed because the petitioner "belongs to a particular social group that shares more than a common gender. [It] consists of women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable.")

As the Board has recognized, membership in a specific tribe or clan is also a protected characteristic. *Matter of Kasinga* at 366*; see, also, e.g. Matter of H*, 21 I. & N. Dec.337 (BIA 1996) (ruling that members of the Marehan clan in Somalia constitute a particular social group based on their kinship and linguistic commonalities).

In the context of this case, the social group of women of the Bulu tribe who oppose forced polygamous marriage shares more than sex, gender or tribal membership

in common. The social group also shares characteristics that are so fundamental to the identity, conscience or dignity of its members, including resistance to social or religious norms, that they should not be forced to forego or change them. *See, UNHCR Gender Persecution Guidelines* ¶ 23 ("transgression of social or religious norms may be analysed in terms of . . . membership of a particular social group.").

The right to enter into a marriage of one's own choosing is recognized as a fundamental a right. *See, e.g., International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, art. 23 *("ICCPR")* ("No marriage shall be entered into without the free and full consent of the intending spouses."); *Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000)* ¶23 ("*General Comment 28*") ("States are required to treat men and women equally in regard to marriage in accordance with article 23 [of the ICCPR] . . . Men and women have the right to enter into marriage only with their free and full consent, and States have an obligation to protect the enjoyment of this right on an equal basis."); *Convention on the Elimination of All Forms of Discrimination against Women*, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981, art. 16.1 (b) ("*CEDAW*") ("States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women . . . the same right freely to choose a spouse and to enter into marriage only with their free and full consent."). The United Nations recognizes forced marriage as a form of contemporary slavery, trafficking and

sexual exploitation. *See, e.g. Report of the Working Group on Contemporary Forms of Slavery on its 28th Session*, 27 June 2003, E/CN.4/Sub2/2003/31.

In further elaboration of the right to marry freely and with full consent, polygamous marriage is seen as a violation of women's fundamental right to dignity and as impermissible discrimination against them. *General Comment 28* ¶ 24 ("equality of treatment with regard to the right to marry [under the ICCPR] implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist."). The Committee on the Elimination of Discrimination against Women has also affirmed in its *CEDAW General Recommendation No. 21 Equality in Marriage and Family Relations, 1994, (contained in Document* A/49/38) ¶ 14, that polygamy violates Article 5 of the *CEDAW*, which provides that "States Parties shall take all appropriate measures … to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes…."

Given the basic nature of the right to a fully consensual marriage of one's own choosing and the right not to engage in the practice of polygamy, resistance or refusal to enter into a forced polygamous marital relationship constitutes a characteristic that is so fundamental to identity, conscience and human dignity that one should not be compelled to change or forsake it. As such, the social group of female members of the Bulu tribe who oppose forced polygamous marriage is defined by both immutable and fundamental characteristics.

B. The "social perception" approach.

The characteristics discussed above could also serve as the basis of certain individuals in a given society being perceived as members of a particular social group. Sex or gender is certainly a category that virtually all societies recognize. Likewise, tribal or clan membership would be known and recognized as social groups within the society or community in which they exist.

Individuals within a particular tribe or community who oppose cultural, customary or religious practices engaged in by other members of that society, including those who resist forced polygamous marriage, are likely to be a cognizable group known precisely because they seek to deviate from practices of the group as a whole. Resistance to or refusal to comply with this kind of social norm would clearly be perceived or recognized as setting individuals apart and, as such, the group members would satisfy the "social perception" approach to particular social group determinations.

CONCLUSION

For all the foregoing reasons, UNHCR respectfully urges the Board to affirm the Immigration Judge's grant of asylum and to consider the relevant international standards and the views of UNHCR when determining a framework for examining claims based on membership of a particular social group to ensure that the United States fulfills its obligations under the 1951 *Convention* and its 1967 *Protocol*.

Respectfully submitted,

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AMICUS CURIAE IN SUPPORT OF RESPONDENT

Dated: August 17, 2010

CERTIFICATE OF SERVICE

I certify that on August 17, 2010, a true and correct copy of this Brief of the United Nations High Commissioner for Refugees as *Amicus Curiae* in Support of Respondent was served by regular mail on the following counsel:

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Dated: August 17, 2010