

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

NO. 09-2878 (A098-962-408)

ERLIN BUESO-AVILA,

Petitioner,

v.

**ERIC H. HOLDER, Jr.
ATTORNEY GENERAL, U.S.A.**

Respondent,

On Petition for Review of a Decision of the Board of Immigration Appeals

**BRIEF OF THE UNITED NATIONS HIGH COMMISSIONER FOR
REFUGEES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER**

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INTEREST OF *AMICUS CURIAE**

The United Nations High Commissioner for Refugees [“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* ¶ 1, U.N. Doc. A/RES/428(v) (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* ¶ 8, U.N. Doc. A/RES/428(v) (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 [“1951 Convention”] and Article II of the 1967 *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 [“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.

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 here, the interpretation and application of establishing nexus or a causal link

between the well-founded fear of persecution and one or more of the Convention grounds, is one of national significance and has been the subject of a number of high-profile immigration appeals. UNHCR submits this *amicus curiae* brief in order to provide guidance to the court on the relevant international standards and not to offer an opinion directly on the merits of the applicants' claim.

SUMMARY OF ARGUMENT

In order to qualify as a refugee, it must be established that the well-founded fear of persecution is “for reasons of” race, religion, nationality, membership of a particular social group or political opinion. 1951 *Convention* art. 1(A) as amended by 1967 *Protocol* art. I ¶¶ (2) and (3); *see also*, *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ¶ 66, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979, re-edited Jan. 1992) (“*UNHCR Handbook*”), available at <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.¹

¹ The *UNHCR Handbook* is internationally recognized as an important source of interpretation of international refugee law. The *UNHCR Handbook* was prepared by the UNHCR in 1979 at the request of Member States of the Executive Committee of the High Commissioner's Programme, including the United States, to provide guidance to governments in applying the terms of the Convention and Protocol. The United States Supreme Court has determined that, although the *UNHCR Handbook* is not legally binding on United States officials, it nevertheless provides “significant guidance” in construing the Protocol and in giving content to the obligations established therein. *See Cardoza-Fonseca*, 480 U.S. at 439 n.22; *see also*, *In re S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996)(noting that in

The refugee definition does not require that a Convention ground be the sole or dominant cause for the well-founded fear of persecution, but a relevant contributing factor. United States law is consistent with this standard. 8 U.S.C. § 1158(b)(1) (B)(i) (stating that a Convention ground must be “one central reason” for the persecution).

In the view of UNHCR, in analyzing the causal link between the persecution feared and the Convention ground, the focus is on the reasons for the applicant’s predicament. Although U.S. law requires an analysis of the persecutor’s motive, it acknowledges the difficulty of this requirement, and that, in light of this, the adjudicator should consider all available evidence, both direct and circumstantial. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). US law also recognizes that there may be multiple reasons for persecution and that these may include Convention and non-Convention reasons.

The causal link may be satisfied where there is a risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, or 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 a Convention reason.

adjudicating asylum cases the BIA must be mindful of “the fundamental humanitarian concerns of asylum law,” and referencing the *UNHCR Handbook*).

In situations of widespread violence, nexus should be assessed in the same manner as other claims. Certain individuals may still be targeted because of a Convention ground.

The nexus analysis is a case-by-case determination and must be assessed in light of the object and purpose of the 1951 *Convention* and 1967 *Protocol*. Deviation from these principles could lead to refugees being erroneously denied international protection and subjected to *refoulement*, that is return to a country where their “life or freedom would be threatened,” in violation of United States’ obligations under Article 33 (1) of the 1951 *Convention*.

In the current case before the Court, the Board found that the “threats and attacks by gang members stemmed from the efforts of the gang members to forcibly recruit” the applicant and held that there was insufficient evidence “linking the alleged harm to the respondent’s religion or to his membership in an evangelical Christian youth group”. 2010 Board Decision at 2. On remand, the Board recognized this Court’s ruling that social visibility should not be required to establish membership in a particular social group, but, nevertheless, denied the claim finding that the applicant failed to establish past persecution on account of any protected statutory ground.

In this brief, UNHCR presents its views on establishing a connection or “nexus” between the well-founded fear of persecution and one or more of the

grounds contained in the 1951 *Convention*. It also examines the link between the persecution by gang members of the applicant in this case and the Convention grounds of religion and membership of a particular social group.

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, 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*, 1967 *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*. 1967 *Protocol* art. I ¶¶ (2) - (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 Refugees.” *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 [] Protocol Relating to the Status of Refugees” *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (quoting *Cardoza-Fonseca*, at 436-37) (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 obligations, Congress provided a path for refugees to seek asylum in the U.S., 8 U.S.C. §1101(a)(42) and §1158, and to be protected from return to a place where they would face danger. 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 NEXUS OR CAUSAL LINK SHOULD BE INTERPRETED IN LIGHT OF WELL-ESTABLISHED INTERNATIONAL STANDARDS INCLUDING THE 1951 *CONVENTION* AND THE 1967 *PROTOCOL*

A. Determining Nexus: Whether a Well-Founded Fear of Persecution is “for reasons of” a Convention Ground

In order to qualify for protection under the 1951 *Convention* as amended by the 1967 *Protocol*, 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. 1951 *Convention* art. I; 1967 *Protocol* art. I ¶¶ (2)-(3). The existence of a nexus or causal link must be assessed in the light of the text, context, and object and purpose of the Refugee Convention and Protocol.

It is sufficient that the Convention ground be a relevant factor contributing to the well-founded fear of persecution; it is not necessary that it be the sole, or even dominant, cause. *See, e.g.,* UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* ¶ 23 (Apr. 2001) (“*Interpreting Convention Article 1*”), available at <http://www.unhcr.org/refworld/docid/3b20a3914.html>; UNHCR *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* ¶ 29 (Mar. 31, 2010) (“*UNHCR Gang Guidance Note*”), available at <http://www.unhcr.org/refworld/docid/4bb21fa02.html>; 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 ¶ 20 ,
U.N. Doc. HCR/GIP/02/01 (7 May 2002), available at
<http://www.unhcr.org/refworld/docid/3d36f1c64.html>; see also, *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant) and Fornah (Appellant) v. Secretary of State for the Home Department (Respondent)*, (2006) 2006 UKHL 46 ¶ 17. (U.K.) (stating that the ground on which a “claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that [it] is an effective reason.”); University of Michigan Law School, *The Michigan Guidelines on Nexus to a Convention Ground*, 23 Mich. J. of Int’l Law 207, ¶ 13 (2002) (“[a] Convention ground will be a contributing cause if its presence increases the risk of being persecuted.”) (“*Michigan Guidelines*”), available at <http://www.unhcr.org/refworld/docid/3dca7b439.html>.

This position is reflected in United States law. Under the 1996 amendments to the 1980 Refugee Act, an asylum seeker is not required to demonstrate that the persecution was *solely* on account of a Convention ground, so long as the Convention ground was at least one central reason for the persecution. 8 USC §1158 (b) (1) (B) (i); INA §208 (b) (1) (B) (i). This Court has explicitly agreed with this interpretation, ruling that “persecution ‘on account of’ one of the specified grounds does not mean persecution solely on account of one of those grounds.” See, e.g., *Mohideen v. Gonzales*, 416 F.3d 567, 570 (7th Cir. 2005).

Moreover, more than one ground may apply in any given case. The Convention grounds may, and frequently will, overlap. *UNHCR Handbook* ¶¶ 66-67; *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* ¶ 4, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) (“*UNHCR Social Group Guidelines*”), available at <http://www.unhcr.org/refworld/docid/3d36f23f4.html>.

Where the risk of persecution derives from a non-State actor, the causal link may be satisfied “(1) where there is a risk of persecution at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) where the risk of persecution 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 a Convention reason.” *UNHCR Gang Guidance Note* ¶ 29. See also, *UNHCR Gender-related Persecution Guidelines* ¶ 21; *UNHCR Social Group Guidelines* ¶ 23; *Michigan Guidelines* ¶ 8.

B. Establishing the Motive of the Persecutor When Determining Nexus.

In UNHCR’s view, when analyzing the causal connection between a Convention ground and the applicant’s well-founded fear, the focus should be on the reasons for the applicant’s predicament. *UNHCR Guidance Note on Refugee*

Claims Relating to Sexual Orientation and Gender Identity ¶ 28 (Nov. 21, 2008).

The causal link between the applicant's predicament and a Convention ground will be revealed by either direct or circumstantial evidence of the reasons which led either to the infliction or threat of a relevant harm, or which caused the applicant's country of origin to withhold effective protection in the face of a privately inflicted risk.

In some jurisdictions, such as the United States, the causal link must be separately established, while in other States, causation is not treated as a discrete analytical question but is subsumed within the analysis of other Convention requirements and thus considered as part of the holistic analysis of the refugee definition. In analyzing the causal link under United States law, the motive of the persecutor is considered an important factor. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). However, as the US Supreme Court recognized in *Elias-Zacarias*, it will often be difficult to establish the motive of a persecutor, and, in light of this, direct proof of the persecutor's motive is not required and circumstantial evidence will suffice. 502 U.S. at 483; *see also Gjerazi v. Gonzales*, 435 F.3d 800, 813 (7th Cir. 2006) (concluding that circumstantial evidence that demonstrates the persecution was at least in part motivated by a Convention ground should not be ignored); *Michigan Guidelines* ¶ 14.

Recognizing that the applicant him or herself may not be aware of the reasons for the persecution, it is for the examiner to ascertain the reason or reasons for the persecution feared and to decide whether, in light of the facts of the particular claim, the Convention refugee definition is met. *UNHCR Handbook* at ¶¶ 66 -67. In particular, when the applicant is a child, he or she may have limited knowledge of country conditions and face more difficulty in explaining the reasons for her or his persecution; thus, the examiner’s responsibility is heightened in cases in which the applicant is a minor or experienced the persecution as a minor. *UNHCR Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* ¶¶ 73-74, U.N. Doc. HCR/GIP/09/08 (December 22, 2009) (“*UNHCR Guidelines on Child Asylum Claims*”), available at <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>; U.S. Department of Justice, Immigration and Naturalization Service, *Guidelines for Children’s Asylum Claims*, 21 (Dec. 10, 1998); *UNHCR Handbook* ¶¶ 214, 219.

In every case, all relevant evidence, both direct and circumstantial, must be assessed by the adjudicator for its potential value to establish that the persecution would be “for reasons of” one or more Convention grounds.

C. Persecutors May Engage in Persecution for Convention and Non-Convention Reasons.

As mentioned above, there may be multiple reasons for persecution. Similarly, United States law has long held that a persecutor may have more than one motive for persecution. *See, e.g., Ndonyi v. Mukasey*, 541 F.3d 702, 711 (7th Cir. 2008) (recognizing that this circuit and several others have adopted the doctrine of “mixed motives”); *In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (2007) (ruling that the BIA’s “standard in mixed motive cases has not been radically altered by the amendments” enacted in 1996 requiring that a Convention ground be at least “one central reason” for the persecution).

In particular, non-state actors often target individuals for both Convention grounds and non-Convention reasons. *See, e.g., UNHCR Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked* ¶¶ 31, 32, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006) (“*UNHCR Trafficking Guidelines*”), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=443679fa4&page=search>; *see also, Mohideen v. Gonzales*, 416 F.3d 567, 570 (7th Cir. 2005) (BIA's finding that applicant had been targeted for persecution by the Liberation Tigers of Tamil Elam (“LTTE”) because of his wealth did not permit BIA to ignore evidence that group had mixed motives, including the individual’s Muslim religion).

The fact that a gang may be motivated to harm an individual for reasons related to advancing its criminal goals does not exclude the possibility that the gang also targets and selects the individual based on a Convention ground. *See Gang Guidance Note*, ¶¶ 10-11. It is reasonable to conclude that gangs will view encouraging community members to follow God and not join gangs not only as a threat to their control over the community but also as anti-gang activity. When an individual engaged in such anti-gang religious activity resists the gang's recruitment attempts, the gang's motivation for persecuting him cannot be considered to be solely to increase its membership but must take into account the gang's motive to persecute the individual for his or her actual or perceived anti-gang religious belief or position. Furthermore, when a gang's efforts to eliminate its competitor also result in the cessation of that competitor's religious activity, it would be difficult to conclude that the gang did not act at least in part on account of the religious activity of the group.

D. Persecutors Who Are Engaged in Widespread Violence may Simultaneously Target Specific Individuals on Account of a Convention Ground.

In situations of widespread violence, the nexus assessment should be conducted in the same manner as it is in other claims, and no additional requirements should be applied. *Interpreting Convention Article 1* ¶ 20; *see also, Michigan Guidelines* ¶ 17 (stating that applicants in such situations “are

nonetheless entitled to be recognized as refugees if [one of the five grounds] is a contributing factor to their well-founded fear of being persecuted . . .”). This Court has recognized this principle. For example, in *Mohideen v. Gonzalez*, this Court found that, although the evidence reflected that the LTTE was responsible for killings, arbitrary detention, extortion, and the forced recruitment of large segments of society, the applicant had provided credible evidence that the LTTE “selects its victims at least in part on the basis of their religion” and remanded the case to the Board to determine whether the applicant had been similarly targeted on account of his religion. 416 F.3d 567, 568 and 570-71 (7th Cir. 2005); *see also*, *Gjerazi v. Gonzales*, 435 F.3d 800 (7th Cir. 2006) (finding that the Immigration Judge’s conclusion that incidents of persecution by political militants were the product of general criminal lawlessness in Albania ignored “ample, consistent, seemingly credible testimony” that the applicant’s persecution was based in part on his political opinion). *Id.* at 812.

Thus, despite the fact that gangs are often engaged in violence that affects large segments of a society, there may be cases in which an applicant is able to establish that he or she has been specifically targeted for persecution on account of a Convention ground. *UNHCR Gang Guidance Note* ¶¶ 10-11. Some victims of gang violence, such as workers in non-governmental organizations, human rights activists, lawyers and participants in community or church-based groups who

oppose gangs, are distinguishable from the general population and may be specifically targeted for persecution on account of a protected characteristic, or they may be more vulnerable than the general population because of such a characteristic. *Id.* at ¶ 12. As a result, they are more likely to be harmed. *Id.*

In cases where a person or group is at greater risk of persecution by gangs than the general population and that increased risk is related to a protection ground, circumstantial evidence of a nexus between the persecution and the Convention ground exists. *See, e.g. Michigan Guidelines* ¶ 15.

III. A CAUSAL LINK BETWEEN PERSECUTION BY MEMBERS OF VIOLENT GANGS AND ONE OR MORE CONVENTION GROUNDS MAY BE ESTABLISHED

As mentioned above, the Convention grounds are not mutually exclusive and can overlap. More than one ground may apply in any given case. In UNHCR's view, when a powerful criminal gang uses violence and threats in its efforts to forcibly recruit members of a church youth group who, as a core value of their religious mission, advocate for other youth to avoid joining such gangs, both the religion ground and membership of a particular social group ground may apply.

A. Persecution Based On Religion.

The right to freedom of religion includes the freedom to manifest one's religion or beliefs, either individually or in community with others and in public or private in worship, observance, practice and teaching. *Guidelines on International*

Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees ¶ 11, U.N. Doc. HCR/GIP/04/06 (Apr. 28, 2004) (citing the *Universal Declaration of Human Rights*, art. 18 and the *International Covenant on Civil and Political Rights*, art. 18(1)) (“*UNHCR Guidelines on Religion-Based Claims*”), available at <http://www.unhcr.org/refworld/docid/4090f9794.html>. Furthermore, bearing witness in words and deeds is often bound up with the existence of religious convictions.” *Id.* ¶ 13.

In assessing the ground of religion, the following areas of inquiry should be explored:

“the individual profile and personal experiences of the claimant, his or her religious belief, identity and/or way of life, how important this is for the claimant, what effect the restrictions have on the individual, the nature of his or her role and activities within the religion, whether these activities have been or could be brought to the attention of the persecutor and whether they could result in treatment rising to the level of persecution”.

UNHCR Guidelines on Religion-Based Claims ¶ 14.

1. Religious belief can encompass an anti-gang stance.

An applicant’s religion may include the belief that gang life-style and gang violence contradict the word of God and, as a core activity, preaching against youth involvement in gangs. An applicant who encourages youth to join the church as an alternative to gangs, could be perceived by gangs as a competitor for

new recruits. Such activity would also be viewed as a sign of disrespect and as taking an anti-gang position. *UNHCR Gang Guidance Note* ¶ 12 (stating that gangs may direct harm at individuals who in various ways have resisted gang activity or who oppose, or are perceived to oppose, the practices of gangs.).

2. Establishing the link between a well-founded fear of persecution and the religion ground.

Persecution of individuals engaged in religious activity that a gang has identified as opposing it or its practices may be considered to have been on account of the individual's religious beliefs. *UNHCR Gang Guidance Note* ¶ 48. It should be noted that gangs generally view a refusal to give into gang demands as adopting an anti-gang stance that calls for a violent response, whether or not actual opposition is voiced. *UNHCR Gang Guidance Note* ¶ 51. Specifically, such gangs:

tend to share a common mentality which defines the way in which they perceive and respond to events. Central to this mentality is the notion of respect and responses to perceived acts of disrespect. Because respect and reputation play such an important role in gang culture, members and entire gangs go to great lengths to establish and defend both. Refusals to succumb to a gang's demands and/or any actions that challenge or thwart the gang are perceived as acts of disrespect, and thus often trigger a violent and/or punitive response.

Id. ¶ 6.

In *Martinez-Buendia v. Holder*, this Court recently found that the FARC's persecution of a woman after her refusal to give in to their demands led to the

inference that she was targeted “to overcome the anti-FARC political opinion they attributed to her.” 616 F.3d 711, 717 (7th Cir. 2010). This Court concluded: “If political opposition is the reason an individual refuses to cooperate with a guerrilla group, and that individual is persecuted for his refusal to cooperate, logic dictates that the persecution is on account of the individual's political opinion.” *Id.* at 718. So, too, if an individual refuses to comply with threats and violence due to religious beliefs opposing the conduct and life-style of violent gangs, “and that individual is persecuted for his refusal to cooperate, logic dictates that the persecution is on account of the individual's” religion. *Id.*

Furthermore, persistent resistance and opposition to gang activity heighten the risk and the degree of harm by the gang members and deepen their view of the need to retaliate against such individual for being in opposition to them. *UNHCR Gang Guidance Note* ¶ 6 (once an individual has been targeted for retaliation, the gravity of the threat does not diminish over time.) and ¶ 22 (pressure to join a gang often takes place through a gradual escalation of threats and violence.). Continuous refusals to join a gang by a youth who is known by the gang to hold anti-gang religious views and to be advocating to end youth involvement in that gang would thus only enhance the likelihood that, through their on-going threats and violence against him, the gang sought to overcome the individual’s religious beliefs. This Court noted this same tendency by the FARC in the *Martinez-*

Buendia decision. There, this Court found that “Martinez-Buendia's persistent refusal to politically align with the FARC despite the increasingly violent nature of the persecution would have only strengthened the FARC's belief that she was a political opponent.” 616 F.3d at 717.

In addition, threats and attacks that contribute or effectively lead to an end to a religious activity may very well constitute persecution on account of one’s religion. *Id.*; see also *Kantoni v. Gonzales*, 461 F.3d 894, 898 (7th Cir.2006) (“A credible threat that causes a person to abandon lawful political or religious associations or beliefs is persecution”) (citing *Bucur v. INS*, 109 F.3d 399, 405 (7th Cir. 1997) (“it is virtually the definition of religious persecution that the votaries of a religion are forbidden to practice it”); *Krotova v. Gonzales*, 416 F.3d 1080, 1086-87 (9th Cir.2005); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1137 n. 6 (9th Cir.2004).

Finally, although not required, evidence of persecution in close connection to an applicant’s participation in religious activity may also be relevant. For example, in *Gomes v. Gonzales*, 473 F.3d 746, 754 (7th Cir. 2007) this Court found that “[t]he fact that the attacks on Gomes family members often took place en route to religious meetings [was] at least circumstantial evidence that they were religiously motivated.” See also, *Gjerazi v. Gonzales*, 435 F.3d 800, 812 (7th Cir. 2006) (remanding where Board upheld asylum denial in which Immigration Judge

attributed attacks to “general criminal lawlessness” and failed to appreciate “the timing of the events” in connection with petitioner’s political statements); *Cecaj v. Gonzales*, 440 F.3d 897, 899 (7th Cir. 2006) (finding that the “immigration judge should have considered whether the entire sequence of experiences that Cecaj underwent as a consequence of his political activity made him a victim of persecution.”).

Many of these factors are relevant in this case. For instance, the gang only began attacking the applicant after the applicant started to engage in advocating his religious beliefs, which are against gang life-style, in the community. In addition, the gang attacked and attempted to recruit the applicant after he left a church meeting. When the applicant refused to join, the gang continued to attack the applicant in an increasingly violent manner and the majority of the attacks took place outside the applicant’s church. Moreover, the applicant ultimately had to halt his religious activity as a result of the gang’s attacks. Thus, these can be probative of a link between the applicant’s religion and the persecution feared from gangs.

B. Persecution Based On Membership of a Particular Social Group.

The right to freedom of religion and manifestations thereof by a church youth group may also be relevant for establishing a nexus between persecution and membership of a particular social group. In assessing the ground of membership

of a particular social group in this case, the “protected characteristics approach” is applicable. As discussed in *UNHCR’s Social Group Guidelines*, there are two alternative approaches to the particular social group definition; however, if the first “protected characteristics” approach is satisfied, the second “social perception” approach need not be considered. The protected characteristics test “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.” *UNHCR Social Group Guidelines* ¶ 6. The seminal Board decision on this issue, *Matter of Acosta*, upholds these same criteria, as has this Court. 19 I. & N. Dec. 211 at 233 (BIA 1985), *overruled in part on other grounds*, *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); *Gatimi v. Holder*, 578 F.3d 611, 614 (7th Cir. 2009).

Under the protected characteristics test, members of an Evangelical church-based youth group who, as a fundamental component of their religious beliefs, advocate against youth involvement in gang activity and encourage youth to join the church, are united by characteristics that are fundamental to their identity, the characteristics of their religious beliefs and their young age.

1. Religious belief, conscience and the exercise of human rights as a “protected characteristic”.

The right to freedom of thought, conscience or religion, which includes freedom to have or adopt a religion or belief of one’s choice and to manifest that religion or belief in worship, observance, practice and teaching, is a fundamental human right. *International Convention on Civil and Political Rights*, art. 18, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). Thus “[r]eligious belief, identity, or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution.” *UNHCR Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees* ¶ 13, HCR/GIP/04/06, (Apr. 28, 2004), available at <http://www.unhcr.org/40d8427a4.html>, (“*UNHCR Guidelines on Religion-Based Claims*”).

The willingness of group members to put themselves at significant risk by speaking out publicly against gangs and actively discouraging youth involvement in them can be viewed as strong evidence of the depth and fundamentality of their convictions and their sense of religious obligation to preach their views.

In addition, resisting involvement in crime by, for instance, evading recruitment or otherwise opposing gang practices may be considered a characteristic that is fundamental to one’s conscience and the exercise of one’s

human rights. *UNHCR Gang Guidance Note* ¶ 38. At the core of gang resistance is the individual's respect for the rule of law and the freedom not to be associated with gangs. *Id.*

2. Age as a “protected characteristic”.

Age is also recognized as an immutable protected characteristic that is unchangeable at any given point in time, notwithstanding that a child will grow into an adult. *UNHCR Guidelines on Child Asylum Claims* ¶ 49; *GAF (Re)*, No. V99-02929, [2000] Refugee Division of the Immigration and Refugee Board of Canada, No. 48, ¶ 21. The Board of Immigration Appeals itself has recognized the “immutable” nature of age stating: “we acknowledge that the mutability of age is not within one's control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual's age places him within the group, a claim for asylum may still be cognizable.” *Matter of S-E-G-*, 24 I. & N. Dec. 579 at 583-84. The fact that the child eventually will grow older is irrelevant to the identification of a particular social group, as this is based on the facts as presented in the asylum claim. *UNHCR Guidelines on Child Asylum Claims* ¶ 49.

Youth may be targeted for persecution precisely because of their age, lack of maturity or vulnerability. *UNHCR Guidelines on Child Asylum Claims* ¶ 18. For example, armed forces may target youth for recruitment because youth are

particularly susceptible to abduction, manipulation and force and may be less likely to resist recruitment. *Id.* ¶ 22. Similarly, in gang-related situations, in particular those concerning young people who resist forcible recruitment or other demands, youth are often targeted because of their increased vulnerability. *UNHCR Gang Guidance Note*, ¶ 30; *see also*, Washington Office on Latin America, *Transnational Study on Youth Gangs*, 2 (Mar. 30, 2007) (finding that “the primary victims of youth gang-related violence are other youth, both gang and non-gang involved.”), available at http://www.wola.org/index.php?option=com_content&task=viewp&id=272.

3. Establishing the link between a well-founded fear of persecution and the “particular social group” ground.

In examining whether an asylum applicant is targeted on account of his or her membership in a particular social group, a variety of factors may be relevant. For instance, while it is not necessary that all members of a group be targeted to establish a claim, *UNHCR Social Group Guidelines* ¶ 17, the fact that other members of the social group have been targeted, may be evidence that the persecution was on account of the particular social group. T. Alexander Aleinikoff, *Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group,’* in ERIKA FELLER, VOLKER TÜRK & FRANCES NICHOLSON, EDS, *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS IN INTERNATIONAL PROTECTION*, 288, 302

(2003); *see also*, 8 C.F.R. §208.13(b)(2)(C)(iii) (establishing a “pattern or practice” of persecution on account of one of the five grounds of persons similarly situated to the applicant will satisfy the requirement that the applicant’s fear is well-founded).

Evidence that the persecution begins only after an applicant has joined the group could be instructive. In addition, as previously discussed, if the persecution takes place in close time and proximity to the group’s meetings or activities, this may also be probative. Finally, evidence that the persecutor opposes the core characteristics of the group and seeks to end the activities of the group would be highly probative.

Thus, the following evidence may be probative of a nexus between the persecution feared by gang members and the applicant’s membership of a particular social group: that the persecution began only after the applicant joined the church group and began encouraging other youth to join the church rather than gangs; that the gang members observed the applicant engaging with community members and encouraging them to stay away from gangs; that the applicant and other members of the group were threatened; that the applicant was attacked after church meetings; and that the gang acted to put an end to the group’s religious activities.

CONCLUSION

For all the foregoing reasons, UNHCR respectfully urges this Court to grant the Petition for Review, remand this case, and urge the Board to consider the relevant international standards and the views of UNHCR when determining whether the nexus requirement is satisfied in order to ensure that the United States fulfills its obligations under the 1951 Convention and its 1967 Protocol to protect refugees.

RESPECTFULLY SUBMITTED,

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Dated: November 9, 2010

CERTIFICATE OF COMPLIANCE PURSUANT TO
CIRCUIT RULE 32(a)(7)

Pursuant to Fed.R.App.P. 32(a)(7)(C), undersigned counsel for Amici Curiae on behalf of the Petitioner, Erlin Bueso-Avila, certifies that the foregoing brief complies with the type-volume limitations of Fed.R. App. 32(a)(7)(B)(i) and contains 6,100 words, exclusive of table of contents, table of authorities, and certificates of counsel.

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CERTIFICATE OF SERVICE

I, H. Elizabeth Dallam, hereby certify that two copies of the foregoing brief were served, by First-Class United States Mail, postage-prepaid, upon each of the following individuals, the 9th Day of November, 2010:

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