

No. 10-1724

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

OSCAR ALEXANDER GRANADOS GAITAN,
Petitioner,

v.

ERIC HOLDER, UNITED STATES ATTORNEY GENERAL,
Respondent.

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

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AMICUS CURIAE IN SUPPORT OF PETITIONER

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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 *Convention*] and Article II of the 1967 *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter *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 *Protocol*, which incorporates by reference all the substantive provisions of the *Convention*. Congress passed the 1980 Refugee Act with the explicit intention to bring the United States into compliance with its international obligations under the *Protocol* and *Convention*.

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 *Convention* and its *Protocol* are both authoritative and integral to promoting consistency in the global regime for the protection of refugees.

United States courts have an obligation to construe federal statutes in a manner consistent with United States international obligations whenever possible.

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 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 five such cases: *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

In concluding that the applicant in the case below failed to establish he was a member of a particular social group, the Board of Immigration Appeals [“Board”] relied on its recently imposed requirements that social groups have “social visibility” and “particularity.” *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582 (BIA 2008) and *Matter of E-A-G-*, 24 I. & N. Dec. 591, 594-95 (BIA 2008). In *Matter of S-E-G-* and several recent cases preceding it, 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). The Board’s interpretation of the *Guidelines* is incorrect.

The requirements of “social visibility” and “particularity” to identify a social group are not in accordance with the text, context or object and purpose of the 1951 *Convention* and its 1967 *Protocol*, nor with the *Social Group Guidelines*.

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.

Significantly, the Board’s imposition of the requirements of “social visibility” and “particularly” 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

In this brief, UNHCR will address the legal basis for establishing eligibility for refugee protection based on membership of a particular social group and the legal basis under which resistance to forcible recruitment by violent gangs may constitute a claim for protection.²

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 *Convention*, *Protocol* Art. I ¶1 and amends the definition of “refugee” by removing the temporal and geographic limits found in Article 1 of the *Convention*.³ *Protocol* art. I ¶¶ (2) and (3).

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

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.”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

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*.

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*.

return a refugee to any country where she or he would face danger lay at the core of the *Refugee Convention and 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 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 *Protocol and Convention* and so it must be interpreted and applied in a manner consistent with these instruments.

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): “[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.”

II. THE BOARD’S “SOCIAL VISIBILITY” REQUIREMENT IS INCONSISTENT WITH THE OBJECT AND PURPOSE OF THE CONVENTION AND PROTOCOL AND THE UNHCR SOCIAL GROUP 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 *Convention* nor *Protocol* provides a definition for this category nor does the drafting history specify its exact meaning⁶, 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

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).

consolidate the various positions taken and to develop concrete recommendations to achieve more consistent understandings of these interpretative issues.⁷ The *Social Group 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 may change over time or even differ from one society to another. *UNHCR Guidelines* ¶ 3. Further, 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.

According to UNHCR and based on a survey of the practice in common law jurisdictions, 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

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).

the Board’s seminal and highly influential *Acosta* decision,⁸ 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, which is 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

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*, [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.

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 recognizes 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 Respondent’s Eligibility for Relief, 25 (Feb. 19, 2004) (emphasis added) [“*Position in R-A-*”], 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,

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).

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 *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.

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 Board’s 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

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.’”).

C. The Board’s characterization of the *UNHCR Guidelines* as supporting its “social visibility” requirement is inaccurate.

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

¹¹ Available at: <http://www.unhcr.org/refworld/docid/4bb21fa02.html>.

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 *Convention* or *Protocol* supports the imposition or use of a “visibility” test to make a social group determination.

III. THE BOARD’S “PARTICULARITY” REQUIREMENT IS INCONSISTENT WITH THE OBJECT AND PURPOSE OF THE *CONVENTION* AND *PROTOCOL* AND *UNHCR GUIDELINES*.

In its decision below, the Board held that the social group in this case did not satisfy its “particularity” requirement, relying on its decision in *Matter of S-E-G-*. Yet the discussions of “particularity” in *S-E-G-* and other recent Board opinions suggest it is simply another way of stating that the social group must be “particular.” Further, the concerns articulated by the Board in imposing this requirement are already addressed in its overall approach to defining a particular social group or within the other elements of the refugee definition.

More specifically, the Board’s application of a “particularity” requirement appears to stem from a general concern about the potential for unlimited expansion of the social group ground. This concern is misplaced. As the *Social Group Guidelines* make clear, “the fact that large numbers of persons risk persecution *cannot be a ground for refusing to extend international protection* where it is otherwise appropriate.” *UNHCR Guidelines* ¶ 18 (emphasis added).

In its *Position in R-A-*, DHS explains well how the concerns about the potential for unlimited expansion of the social group ground have acted to conflate the separate elements of the refugee definition, pointing out, for example, a ruling that ‘no fact-finder could reasonably conclude that all the members of a proposed social group could have a well-founded fear of persecution based on their membership in the group’ merges the social group assessment with the well-founded fear assessment, two very distinct and separate determinations. *Position in R-A-*, at 22-23.

The example above underscores a basic tenet of refugee status determinations: to establish eligibility for asylum, each element of the refugee definition must be met. For a claim based on membership of a particular social group, it is insufficient to prove mere membership in the invoked category. *UNHCR Guidelines* ¶¶ 16, 19. Every asylum-seeker

must satisfy each element of the refugee definition: that the fear is well-founded, that the feared or experienced harm rises to the level of persecution that the harm is or would be based on one of the five grounds, and an inability or unwillingness to avail him or herself of the protection of the country of origin or the State's inability or unwillingness to offer protection.

The requirement that all elements of the refugee definition must be met, when appropriately interpreted and assessed, serves to focus the analysis and accurately determine the claims that will be recognized. In the context of assessing a claim based on membership of a particular social group, there is no need to add requirements that go beyond the social group reaching to broader concerns, and specifically requirements of social visibility and particularity are contrary to the *Convention*, the *Protocol* and the *UNHCR Guidelines*.

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

In 1985 the Board of Immigration Appeals set forward a definition of membership in a particular social group that has long since become the standard-bearer in the United States as well as internationally. *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), *overruled in part on other grounds*, *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). That definition

provides that membership in 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 such as former military leadership or land ownership. . . . 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 ruling in *Acosta* has provided a well-formulated and widely accepted standard for determining particular social group claims.

Under the *Acosta* standard, there is no requirement of establishing “social visibility,” “social perception” or “particularity,” yet it served to guide decisions by the Board, the Circuit Courts and many international courts for over 20 years. Significantly, the *Acosta* standard is consistent with the *Convention* and *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 would caution against adopting the rigid approach adopted in this and other recent Board cases, which may disregard members of groups the *Convention* and *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 labels of "social visibility" and "particularity." For instance, the general population in Cuba would not recognize homosexuals automatically, *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). 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). Similarly, one could find that young people who oppose gang recruitment are no more diffuse or lacking in particularity than groups such as these.

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*.

V. YOUNG MALES IN CENTRAL AMERICA WHO RESIST GANG RECRUITMENT OR OPPOSE GANG PRACTICES MAY CONSTITUTE A PARTICULAR SOCIAL GROUP UNDER EITHER THE “PROTECTED CHARACTERISTIC” OR THE “SOCIAL PERCEPTION” APPROACH.

In the view of UNHCR, there are circumstances, including in the context of Central America, under which individuals who resist gang recruitment or oppose gang practices may establish eligibility for protection based on membership of a particular social group. In UNHCR’s opinion, in certain cases, these claims could satisfy both the “fundamental or immutable characteristic” and the alternative “social perception” standards for determining the existence of a particular social group. *See UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, March 2010* [“UNHCR Guidance Note”].¹²

The Board’s seemingly blanket determination that gang recruitment does not constitute a proper basis for asylum, as articulated in *Matter of S-E-G-* and *Matter of E-A-G-* and relied on in the instant case, ignores the purpose and history of the *Convention* and *Protocol*. The view of UNHCR is that the “membership of a particular social group” ground should be read in an evolutionary manner and contemporary context, and that social groups

¹² Available at: <http://www.unhcr.org/refworld/docid/4bb21fa02.html>.

that did not exist in the past may exist or be emerging today. *Social Group Guidelines* ¶ 3.

A. The “protected characteristics” approach.

In certain cases, particularly in the context of Central America, individuals who are targeted by gangs and resist forced recruitment into gangs or oppose gang practices may share innate or immutable characteristics, such as their age, gender, impressionability and social status. These characteristics set them apart in society and it is precisely because of these traits that they are generally more susceptible to recruitment attempts or other violent approaches by gangs. *UNHCR Guidance Note* ¶ 36.

Vulnerability as a minor is recognized as an immutable characteristic that is unchangeable at any given point in time, notwithstanding that a child will grow into an adult. *See, e.g., 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, 22 December 2009, HCR/GIP/09/08, ¶¶ 49-50¹³; see also, GAF (Re), No. V99-02929, [2000] Refugee Division of the Immigration and Refugee Board of Canada, No. 48, ¶ 21.*

¹³ Available at: <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>.

The Board itself has recognized the “immutable” nature of age, stating: “[W]e 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-* at 583-84. Similarly, the Board has agreed, at least in principle, that the characteristic of being a male is equally immutable. *See, 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.”).

Although gang-related violence may be widespread and affect large segments of society, distinct groups have been specifically targeted because of certain shared characteristics such as their youth, gender, marginalization in society, lack of protection or other factors that make them more vulnerable. *UNHCR Guidance Note* ¶ 30. Indeed, recent studies have found that the recruitment policies of Central American gangs often are age-driven and frequently target young people. For example, a recent U.S. Agency for International Development study found that youth within the age range of 8-18 years may be particularly vulnerable to gang recruitment. USAID Bureau for Latin American and Caribbean Affairs Office of Regional Sustainable

Development, *Central America and Mexico Gang Assessment*, 17 (Apr. 2006).¹⁴ The Washington Office on Latin America *Transnational Study on Youth Gangs* also found that “the primary victims of youth gang-related violence are other youth, both gang and non-gang involved.” *Transnational Study on Youth Gangs*, 2 (Mar. 30, 2007).¹⁵

Similarly, although a social group cannot be “defined exclusively by the persecution that the members of the group suffer or by a common fear of being persecuted,” *Social Group Guidelines* ¶ 14, the fact that members of a group have been or are being persecuted may serve as an aid to illustrate the potential relationship between persecution and a particular social group. *UNHCR Guidance Note* ¶ 35 (citation omitted).

In certain circumstances, past actions such as refusing to join a gang may also be considered immutable traits that cannot be changed. *UNHCR Guidance Note* ¶ 37. The Board has recognized this tenet stating that “youth who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed.” *Matter of S-E-G-*, at 584.

¹⁴Available at http://www.usaid.gov/locations/latin_america_caribbean/democracy/gangs_assessment.pdf.

¹⁵Available at http://www.wola.org/media/Gangs/executive_summary_gangs_study.pdf.

Furthermore, resisting involvement in crime and criminal gangs by evading recruitment or otherwise opposing gang practices may, in some contexts, be considered a characteristic that is fundamental to one's conscience, dignity and human rights. *UNHCR Guidance Note* ¶ 38. At the core of gang-resistance is the individual's insistence on rule of law, an internationally recognized human right, *International Covenant on Civil and Political Rights*, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), as well as the right to freedom of association, including the freedom not to associate. *Id.* at art. 22. The values and beliefs at stake in refusing to give in to the demands of gangs and engage in criminal and violent conduct could be considered to be of such fundamental nature to one's conscience, dignity and human rights that a person should not be required to renounce them. This, in turn, underscores that such beliefs could constitute a fundamental characteristic shared by, and thereby distinguishing, members of a particular social group.

B. The “social perception” approach.

In addition to youth and gender, those targeted for gang recruitment may share other social characteristics such as their geographical origin, including a particular neighborhood or marginalized urban area. *UNHCR Guidance Note* ¶ 41 (citation omitted). They also may share the

characteristic of being poor or from a lower socio-economic class. *See, e.g., USAID Central America and Mexico Gang Assessment*, at 17 (finding that youth within the age range of 8-18 years may be particularly vulnerable to recruitment). Accordingly, youth who are targeted for recruitment may be set apart in society and recognized as a particular social group because of their age, vulnerability, social background or class. *UNHCR Guidance Note*, ¶ 41. For instance, it could be widely known in a given community that young people from marginalized neighborhoods or of a certain socio-economic class are the common targets of gangs for recruitment, extortion or other purposes. Those who are targeted for, and resist, gang recruitment may stand out even further because of their very resistance, which may further set them apart in their community or society.

As noted by leading refugee law scholar Guy Goodwin-Gill and his co-author Jane McAdam, the initial intention of the drafters in including the particular social group ground in the *Convention* seems to have been to protect social categories which existed at the time, which are groups largely defined by socioeconomic factors. GUY GOODWIN-GILL AND JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 74 (3rd ed. 2007). Groups the drafters may have intended to include are “landowners, capitalist class members, independent business people, the middle class and their families,”

which attracted special attention as a result of “the ‘restructuring’ of society then being undertaken in the socialist States.” *Id.* As Goodwin-Gill and McAdam further articulate, there are

those who, in simple sociological terms, are groups in society, in the ordinary, everyday sense which describes the constitution or make-up of the community at large. This is most evident in the use of language to describe, for example, the landlord class, the working class, the ruling class, the bourgeoisie, the middle class, even the criminal class. . . . It helps to emphasise, not so much that the group is, as it were, ‘set apart from society’, as that it is essentially a group *within* society which is faced with persecution within the social context of that very society (including its attitudes, prejudices and actions).

Id. at 85-86.

Rather than viewing such groups as too “large” or “diffuse” to be cognizable, the authors note that they are based on “many ‘natural’ meanings of ‘social’” and “may . . . prove a sufficient and appropriate basis for defining or describing social groups for the purposes of the Convention.”

Id. at 85. These kind of socio-economic factors, along with age, gender, and related characteristics, are clear indications that a group is perceived in the context of a society and, as such, the group would satisfy the “social perception” approach to particular social group determinations.

CONCLUSION

For all the foregoing reasons, UNHCR respectfully urges this Court 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 a framework for examining claims based on membership of a particular social group and on gang-related violence to ensure that the United States fulfills its obligations to satisfy the object and purpose of the 1951 *Convention* and its 1967 *Protocol* to protect refugees.

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Dated: July 13, 2010

CERTIFICATION OF COMPLIANCE

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)(a) and (a)(6) because it has been prepared in a proportionally spaced typeface, using Microsoft Word 2003 in Times New Roman 14-point font.

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s/ pamela goldberg
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Dated: July 13, 2010

CERTIFICATION OF VIRUS-FREE CD

The CD enclosed with this written submission containing the Brief Amicus Curiae of UNHCR and the identical CD served on opposing counsel were created using MS Word 2003 and were scanned using McAfee Virus Scan Enterprise version 8.5 and no viruses were detected.

s/ pamela goldberg
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Dated: July 13, 2010

CERTIFICATE OF SERVICE

I certify that on July 13, 2010, a true and correct copy of this Brief of the United Nations High Commissioner for Refugees as *Amicus Curiae* in Support of Petitioner was served in paper and on CD by regular mail on the following counsel:

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