

No. 10-9527

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

MINTA DEL CARMEN RIVERA-BARRIENTOS,
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 [“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).¹ 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 [“*Convention*”] and Article II of the 1967 *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 [“*Protocol*”], obligating States to cooperate with UNHCR in the exercise of its mandate and to facilitate UNHCR’s supervisory responsibilities.

¹ Pursuant to Fed. R. App. Proc. Rule 29, all parties have consented to the filing of this brief amicus curiae.

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, 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 before federal circuit courts of appeals in six such cases: *Granados Gaitan* (No. 10-1724) in the Eighth Circuit; *Gonzalez-Zamayo 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 membership 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 support of these requirements, the Board has erroneously relied upon 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*”]. See e.g., *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 *UNHCR 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 *UNHCR Guidelines*. 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 a fundamental obligation under the 1951 *Convention*.²

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

² The prohibition against “*refoulement*” is addressed under Article 33 of the 1951 *Convention* and is a cornerstone of refugee protection. The United States’ obligations under Article 33 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 6, *infra*.

“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 could, in at least some circumstances, 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 and the legal basis under which resistance to forcible recruitment by violent gangs may constitute a claim for protection.³

³ 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*, 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*.⁴ 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 Refugees.”⁵ *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

⁴ 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 5, *infra*.

⁵ 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 4, *supra*.

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.⁶ *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 1951 *Convention* and 1967 *Protocol* and so it must be interpreted and applied in a manner consistent with these instruments.

⁶ Article 33 of the 1951 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 1951 CONVENTION AND 1967 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 1951 *Convention* nor 1967 *Protocol* provides a definition for this category nor does the drafting history specify its exact meaning⁷, 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 State parties, 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

⁷ 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.⁸ The *UNHCR Guidelines* are a product of the Global Consultations and were issued to provide guidance to States on interpreting the membership of a particular 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 may change over time or even differ from one society to another. *UNHCR Guidelines* ¶ 3. It was further recognized that “particular social group” should be read in an evolutionary manner and a contemporary context 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.

UNHCR concluded, based on a survey of asylum decisions in common law jurisdictions as well as presentations during the Global Consultations, that there are two dominant approaches to defining a social

⁸ 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).

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,⁹ 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

⁹ 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.

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.

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 *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

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

The Board has cited the *UNHCR 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. As discussed above, the *UNHCR Guidelines* present the social perception approach—which is about cognizance of the existence of a group within a society, not about visibility to the naked eye—as an alternative to be assessed only in situations where it has been determined that the social group members do not possess a protected characteristic.

The *UNHCR Guidelines* do address “visibility,” stating that:

“[P]ersecutory action toward a group may be a relevant factor in determining

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.’”).

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* [“*UNHCR Guidance Note*”] 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 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 a social group has no relation to the “social perception” approach to determining membership of a particular social group. It 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*

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

or the 1951 *Convention* or 1967 *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 1951 CONVENTION AND 1967 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 the 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).

The Department of Homeland Security has explained 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. *Department of Homeland Security’s Position on Respondent’s Eligibility for Relief*, 22-23 (Feb. 19, 2004) [“*Position in R-A-*”], submitted in *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. 2005).¹²

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

¹² 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).

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. Specifically, in the context of assessing a claim based on membership of a particular social group, the additional requirements of social visibility and particularity imposed by the Board are unnecessary and are contrary to the 1951 *Convention*, the 1967 *Protocol* and the *UNHCR Guidelines*. An appropriate interpretation and assessment of all the elements of the refugee definition serve to focus the analysis and to most accurately determine the claims that will be recognized.

IV. 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.

In 1985 the Board of Immigration Appeals established 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.¹³ *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] . . .

¹³ See, e.g., note 8, *supra*.

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 Immigration Judges, the Board, the Circuit Courts and many international courts for over 20 years. Significantly, the *Acosta* standard is consistent with the 1951 *Convention* and 1967 *Protocol* as well as the *UNHCR Guidelines*, to the extent that it assesses the immutability or fundamentality of the characteristic without requiring more. UNHCR cautions against the approach adopted in this and other recent Board decisions, which 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 labels of “social visibility” and “particularity.”

For instance, the general population in Cuba would most likely not recognize all homosexuals, *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.

The Department of Homeland Security itself has recognized that, while additional factors such as “social perceptions may provide evidence of immutability or the fundamental nature of a [protected] characteristic” and may thus be “indicators that the social group exists,” imposing additional requirements beyond the protected characteristics assessment “departs from the sound doctrine of the Board established nearly 20 years ago in *Acosta* and *there is no reason for such departure.*” *Position in R-A-* at 25. (emphasis added).

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 FEMALES 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.

There are circumstances under which individuals who resist gang recruitment or oppose gang practices may establish eligibility for protection based on membership of a particular social group and 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. *See UNHCR Guidance Note*.

The Board’s seemingly blanket determination that resistance to 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 1951 *Convention* and 1967 *Protocol*. As discussed above, the “membership of a particular social group” ground for refugee protection should be read in a contemporary context and social groups that did not exist in the past may exist or be emerging today. *UNHCR Guidelines* ¶ 3.

A. The “protected characteristics” approach.

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. *Id.* ¶ 30. In certain cases, particularly in the context of Central America, young women who resist forced recruitment into gangs or oppose gang practices may share innate or immutable characteristics such as their age,¹⁴ gender or social status, which set them apart in society and make them generally more susceptible to recruitment attempts, threats or other gang-related violence.¹⁵ *UNHCR Guidance Note* ¶ 36.

¹⁴ In contrast to the Board’s assertion in this case that “youth is not an immutable characteristic,” the Board 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. See also, 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, ¶¶ 49–50, available at: <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>; see also, *GAF (Re)*, No. V99-02929, [2000] Refugee Division of the Immigration and Refugee Board of Canada, No. 48, ¶ 21.

¹⁵ In addition, in certain circumstances, past actions such as refusing to join a gang or opposing their practices and conduct may also be considered immutable traits that cannot be changed. *UNHCR Guidance Note* ¶ 37. The

UNHCR holds the view that “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.” *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), ¶ 30. Consistent with its rulings in other cases, in its decision below the Board agreed that gender is an immutable characteristic. BIA Dec. at 2 (“Here, there is no immutable characteristic other than the respondent’s gender.”). *See also, 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.”).

Gangs are highly patriarchal in their structure and attitudes, and those in Central America in particular endorse the same male-dominated treatment of women as can be seen in other segments of society in countries such as El Salvador. *See, e.g., United Nations Commission on Human Rights, Report of*

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.

the Special Rapporteur on violence against women, its causes and consequences, Mission to El Salvador, UN Doc. E/CN.4/2005/72/Add.2 (Dec. 20, 2004). Although female members are increasingly active participants in gangs, young women are often targeted to act as sexual partners—whether voluntarily or by force—for the male gang members, leading to sexual assault, rape and violence.

In the context of gangs in El Salvador, “Salvadoran society’s patriarchal view of the appropriate role of women in society, combined with the culture of violence and the search for power that characterize gang structures, create an environment in which women are constant and easy targets of abuse not only by rival gangs, but also by male members of their own [gang].” LAURA PEDRAZA FARIÑA, SPRING MILLER AND JAMES L. CAVALLARO, *NO PLACE TO HIDE: GANG, STATE AND CLANDESTINE VIOLENCE IN EL SALVADOR* 82 (2010). Women are also commonly forced to have sex with a number of gang members as a means of initiation. *Id.* at 77. It is precisely the characteristics that set them apart in society—their age, vulnerability and the discrimination they face—that may make them more susceptible than others to recruitment attempts, threats, coercion and violence by gangs.

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) ("*ICCPR*"), as well as the right to freedom of association, including the freedom *not* to associate. *Id.* art. 22. Moreover, rape and other sexual violence, which are often employed in the recruitment and membership of women in gangs, are violations of the fundamental right to physical security and bodily integrity. *Id.* art. 9. As such, resistance to recruitment and opposition to gang practices may be understood as characteristics that are fundamental to conscience, dignity and the exercise of human rights, thereby distinguishing members of a particular social group. *UNHCR Guidance Note* ¶ 38.

B. The “social perception” approach.

Some of the same 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 is certainly a category that virtually all societies recognize, as are people of a young age. In addition, individuals targeted for gang recruitment may share other social characteristics such as their geographical origin or socio-economic class. *UNHCR Guidance Note* ¶ 41 (citation omitted). For instance, it could be

widely known in a given community that young, poor people from marginalized neighborhoods or in remote areas¹⁶ are the common targets of gangs for recruitment, extortion or other purposes.

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 1951 *Convention* seems to have been to protect social categories that were largely defined by socio-economic 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

¹⁶ Although it is beyond the scope of this brief, it is important to note that the fact that an individual comes from a distinct neighborhood or village does not necessarily indicate that internal relocation is an option for them. In many cases, gangs have deep, sophisticated and country-wide communication systems that could prevent individuals from finding safety from gang-related violence against them anywhere in the country. *UNHCR Guidance Note* ¶¶ 52–54.

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.

Moreover, in addition to socially perceived characteristics such as age, gender, and socio-economic status, individuals who resist recruitment and oppose gang practices in a society or community where gang violence is widespread are likely to be a cognizable group precisely because they refuse to comply with the demands of the gang. Such resistance may set these individuals apart even further. These various characteristics of the group members 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.

Respectfully submitted,

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Dated: August 18, 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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CERTIFICATE OF SERVICE

I certify that on August 18, 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 electronically via the ECF filing system on the following counsel:

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