

NO. 08-60394

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

**JOSE VLADIMIR ORELLANA-MONSON and
ANDRES EDUARDO ORELLANA-MONSON,**

Petitioners,

v.

**ERIC H. HOLDER, ATTORNEY GENERAL
OF THE UNITED STATES,**

Respondent.

**BRIEF OF THE UNITED NATIONS HIGH COMMISSIONER FOR
REFUGEES AS AMICUS CURIAE IN SUPPORT OF THE
PETITIONERS AND REVERSAL OF THE BIA'S DECISION**

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AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The United Nations High Commissioner for Refugees (“UNHCR”) is mandated by the United Nations to lead and coordinate international action for the worldwide protection of refugees and the resolution of refugee problems. UNHCR’s primary purpose is to safeguard the rights and well-being of refugees. The Statute of UNHCR specifies that UNHCR shall provide for the protection of refugees by, *inter alia*, “promoting 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), Annex, ¶¶ 8 (Dec. 14, 1950).

The supervisory responsibility of UNHCR is formally recognized in the 1951 *Convention Relating to the Status of Refugees*, July 28, 1951, 19 U.S.T. 6259 [hereinafter “1951 *Convention*”] and its 1967 *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter “1967 *Protocol*”]. The United States is a party to the 1967 *Protocol*. Both the *Convention* and *Protocol* provide that the parties “undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions [of these conventions].” 1951 *Convention* art. 35, ¶ 1; 1967 *Protocol* art. II, ¶ 1.

The views of UNHCR are informed by over 55 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 over 100 countries. It has twice received the Nobel Peace Prize, in 1954 and 1981, 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. United States courts have an obligation to construe United States statutes in a manner consistent with United States international obligations whenever 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.”). *See also INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (“‘one 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”)).

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.¹

SUMMARY OF THE ARGUMENT

The Board's decisions in *Matter of S-E-G-*, 24 I. & N. Dec. 582 (BIA 2008), and *Matter of E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008)—which Respondent urges the Court to apply in this case—are inconsistent with the purpose and intent of the 1951 *Convention* and the 1967 *Protocol* and misconstrue 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) [hereinafter "*Social Group Guidelines*" or "*Guidelines*"]. *S-E-G-* and cases preceding it inaccurately cite the *Social Group Guidelines* in support of the Board's new "social visibility" requirement. However, the Board's interpretation of the *Guidelines* is incorrect.

As articulated in the *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"

¹ 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 on the merits of the applicants' claim.

approach reflects the Board's longstanding test first articulated in *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), 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.

Similarly, the Board's analysis of "particularity," as articulated in *S-E-G-*, conflates the other elements of the refugee definition and is inconsistent with the intent and purpose of the 1951 *Convention* and its 1967 *Protocol* to provide international protection to refugees. Furthermore, the proposed social group in this case may very well meet the "particular social group" ground under either approach. Finally, the Board's imposition of these requirements may result in 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 of the 1951 *Convention*.²

ARGUMENT

Respondent urges the Court to adopt *S-E-G-*’s requirements that social groups have “particularity” and “social visibility.” Br. of Resp. 21-31; *S-E-G-*, 24 I. & N. Dec. at 582. But these requirements are inconsistent with the *Social Group Guidelines* and the object and purpose of the 1951 *Convention* and its 1967 *Protocol*.

Beginning with its decision in *In re C-A-*, 23 I. & N. Dec. 951, 959 (BIA 2006), when the Board first introduced the notion of “social visibility” as a factor to be considered in social group cases, the Board has cited with favor the *Social Group Guidelines*. See also *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (BIA 2007), *aff’d*, *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007); *S-E-G-*, 24 I. & N. Dec. at 586. While we fully support and encourage the Board and other asylum adjudicators to rely on the expertise and guidance of UNHCR when interpreting and applying the refugee definition,³ in this instance, the Board’s references to the *Guidelines* have misconstrued their meaning.

² 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*.

³ In analyzing claims to refugee status, UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to*

Of the five grounds for refugee protection, the “membership of a particular social group” ground has posed the greatest definitional challenges. The 1951 *Convention* does not itself provide a definition of this category, nor does the drafting history clarify the phrase’s exact meaning.⁴ While there is no “closed list” of potential social group categories and this ground should be read in an evolutionary manner, the social group ground also cannot become a “catch all” classification that “render[s] the other four Convention grounds superfluous.” *Guidelines*, at ¶¶ 2, 3. At the same time, a proper interpretation of the social group ground must be consistent with the object and purpose of the 1951 *Convention*. *Id.* at ¶ 2.

the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1 (January 1992) [hereinafter “*Handbook*”] is internationally recognized as the key source of interpretation of international refugee law. The UNHCR *Handbook* as well as UNHCR’s more recent series of *Guidelines on International Protection* are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary in interpreting the terms of the refugee treaties. The U.S. Supreme Court, federal circuit courts, and the Board have recognized the *Handbook* and the *Guidelines* as providing guidance in construing the 1967 *Protocol*. See, e.g., *Cardoza-Fonseca*, 480 U.S. at 439 n.22; *Rodriguez-Roman v. INS*, 98 F.3d 416, 425 (9th Cir. 1996) (noting the BIA “is bound . . . to consider the principles [for implementing the Protocol] established by” UNHCR); *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (citing *UNHCR’s 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*, U.N. Doc. HCR/GIP/0406 (April 28, 2004)); *Castellano-Chacon v. INS*, 341 F.3d 533, 547-48 (6th Cir. 2003) (citing *Guidelines*); *In re S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996) (noting that in adjudicating asylum cases the BIA must be mindful of “the fundamental humanitarian concerns of asylum law,” and referencing the UNHCR *Handbook*).

⁴ 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).

I. The Board’s “social visibility” requirement is inconsistent with the UNHCR *Social Group Guidelines* and the intent and purpose of the 1951 *Convention* and 1967 *Protocol*.

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

The *Social Group Guidelines* were issued in order to provide guidance to States on interpreting the social group ground and were a product of the Global Consultations on the International Protection of Refugees launched by UNHCR in 2000. This consultative process 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 purpose of the Global Consultations was to take stock of the state of law and practice in several areas of refugee status adjudication, to consolidate the various positions taken and to develop concrete recommendations to achieve more consistent understandings of these various interpretative issues.

Based on a survey of the practice in common law jurisdictions, there are two dominant approaches to social group interpretation: “protected characteristics” and “social perception.” *Guidelines*, at ¶¶ 6-7. The “protected characteristics” approach, embodied by the Board’s seminal and highly influential

Acosta decision,⁵ 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. *Id.* at ¶ 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 the “social perception” 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.” *Guidelines*, at ¶ 7 (emphasis added).

In civil law jurisdictions, the particular social group ground is generally less well developed and different standards have been used. *Id.* at ¶ 8. Given the varying approaches and the protection gaps which can result, UNHCR concluded that the two dominant approaches should be reconciled and has adopted a single standard that incorporates both:

⁵ 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.

[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.

Id. at ¶ 11 (emphasis added). The first step in this analysis is to determine whether the social group in question is based on an immutable or fundamental characteristic. At the end of this assessment, if 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.* at ¶ 13. This second inquiry is an alternative to be considered if and only if a determination is made 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 in a particular social group has been established and there the inquiry ends as to this aspect of the refugee definition.

The goal of the *Guidelines* was to give validity to both approaches, which may frequently overlap, and was by no means intended to create a further requirement nor to serve as a basis to exclude otherwise eligible refugees from protection. The Department of Homeland Security ("DHS") itself has in the past recognized the overlap in the two approaches and 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) *available at* http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf [hereinafter “*Position in R-A-*”], submitted in *In re R-A*, 22 I. & N. Dec. 906 (BIA 1999), DHS in its *Position* also criticized the Board’s reasoning in *In re R-A-* for applying “these [social perception] ‘factors’ as requirements, without relating them in any way to the *Acosta* immutable characteristic standard.” *Id.* at 25.

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” does not require that the common attribute be visible to the naked eye in a literal sense of the term nor that it be one that is easily recognizable to the general public. Nor is “social perception” meant to suggest a sense of community or group identification as might exist for members of an organization or association; members of a social group may not be visibly recognizable even to each other. Rather, the determination rests on whether a group is “cognizable” or “set apart from society at large” in some way.

The Board's understanding of "social visibility" stands in contrast to the approach it took in *Acosta*, as modified slightly in *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 447 (BIA 1987), in which the second prong of the Board's test for determining whether a fear is well-founded in the context of a claim based on social group membership is that "the persecutor is already aware *or could become aware*" (emphasis added)⁶ that the asylum-seeker possesses the belief or characteristic sought to be overcome. This formulation is a clear indication that the Board understood that the trait that forms the basis of a social group is not something necessarily visible on-sight but rather something that could be learned or could come into the awareness of a persecutor or, by extension, a society.

While social visibility may reinforce a finding that the applicant belongs to a particular social group, it should not be a pre-condition for the identification of the group. In fact, a group of individuals may seek to avoid visibility in society precisely to avoid attracting persecution.

⁶ The articulation here reflects the Board's subsequent modification in *Mogharrabi*, 19 I. & N. Dec. at 447. In *Acosta*, this prong of the test included a qualifier, stating, in pertinent part, that "the persecutor is already aware, or could easily become aware" that an individual possesses the group characteristic in question. *Acosta*, 19 I. & N. Dec. at 226 (emphasis added). The Board "determined that one small but significant change . . . should be made in view of the [Supreme] Court's ruling" in *Cardoza-Fonseca*, 480 U.S. 421. The second requirement should be changed by omitting the word "easily." Thus, it is enough for the applicant to show that the persecutor could become aware that the applicant possesses the belief or characteristic in question. The omission of the word "easily" lightens the applicant's burden of proof and moves the requirements as a whole into line with *Cardoza-Fonseca*. *Mogharrabi*, 19 I. & N. Dec. at 446.

C. The Board’s characterization of the *Social Group Guidelines* is inaccurate.

The Board in *S-E-G-* cited the *Social Group Guidelines* as authority for its new 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.’” *S-E-G-*, 24 I. & N. Dec. at 586 (quoting *C-A-*, 23 I. & N. Dec. at 956). This characterization is inaccurate. The *Guidelines* do address “visibility” stating: “[P]ersecutory action toward a group may be a relevant factor in determining the *visibility* of a group in a particular society.” *Guidelines*, at ¶ 14 (emphasis added). 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 having been set apart in some way that has rendered them subject to persecution. It is not intended to modify or develop the “social perception” approach, nor to define this approach as meaning “visibility” rather than “perception,” nor to establish or support “social perception” or “social visibility” as a requirement that must be met in every case in order to demonstrate membership of a social group. It is, in short, an illustration of the potential relationship between persecution and social group and nothing more.

II. The Board’s “particularity” requirement is inconsistent with the intent and purpose of the 1951 Convention.

The Board also held in *S-E-G-* that the applicant’s proposed social group of Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities “fail[ed] the particularity requirement of the refugee definition.” 24 I. & N. Dec. at 584. In UNHCR’s view, the Board’s use of the term “particularity” in this and other recent decisions is confusing and does not provide helpful guidance to adjudicators. The Board refers to the term in *S-E-G-* as if it is a new requirement, yet its “particularity” analysis appears to be simply a treatment of issues, which are subsumed within its overall approach to defining a particular social group or within the other elements of the refugee definition.

First, the Board’s “particularity” discussion refers to factors of size. In *S-E-G-*, the Board stated that “the size of the proposed group may be an important factor in determining whether the group can be recognized.” 24 I. & N. Dec. at 584. To the extent it should be considered at all, size is a factor to be considered as part of the general test for establishing a particular social group, not a separate factor. Moreover, size is not a relevant criterion in establishing whether a particular social group is established under the refugee definition.

This is true as well for cases arising under the other Convention grounds. For example, States may seek to suppress religious or political ideologies that are widely shared among members of a particular society—perhaps even by a majority of the population; the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.

Guidelines, at ¶ 18. A social group need not be numerically small or homogenous, but should instead be found to exist in situations in which the group’s protected characteristic “accurately identif[ies] the reasons why the persecutors seek to harm the victims.” *Position in R-A-* at 22.

At the same time, in discussing particularity, the Board in *S-E-G-* states: “The essence of the ‘particularity’ requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.” 24 I. & N. Dec. at 584. The “essence” of the Board’s “particularity” requirement is simply an aspect of the general definition under the “social perception” approach, adding nothing new to the analysis. Indeed, as expressed in the leading “social perception” decision by the High Court of Australia:

The word ‘particular’ in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them *and enables them to be set apart from society at large*.

Applicant A, 190 C.L.R. at 241 (Dawson J.) (emphasis added).

The Board also concludes in *S-E-G-* that the group lacks particularity because “[t]here is no evidence in the record to show that gang members limit recruitment efforts to male children who fit the above [social group] description, or do so in order to punish them for these characteristics, although these factors perhaps make the potential recruit an easier and more desirable target.”⁷ 24 I. & N. Dec. at 585. This reasoning relates to whether there is a link between the persecution feared and membership in the proposed particular social group, not to whether a particular social group has been established or to, as the Board has termed it, the “particularity” of the group. Moreover, as discussed in Part III.A., *infra*, Central American gangs often do target youth for recruitment.

Underlying the Board’s focus on “particularity” appears to be a general concern about the potential for unlimited expansion of the social group ground. This concern is unfounded. While there is no requirement that a particular social group be “cohesive” or that members know each other or associate with each other as a group, *Guidelines*, at ¶ 15, the other elements in the refugee

⁷ It is not entirely clear what the Board meant here as it did not reach a full analysis of the “on account of” element of the refugee definition in *S-E-G-*, and a thorough treatment of this aspect of the refugee definition is beyond the scope of this brief. However, it is important to note that there is no requirement that a persecutor have a motive to punish its victims. The definition of “persecution” does not include a subjective intent to punish or harm. Indeed, “[o]ften the applicant himself may not be aware of the reasons for the persecution feared.” *Handbook*, at ¶ 66. The Board itself has recognized this point. See *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (stating that “a subjective “punitive” or “malignant” intent is not required for harm to constitute persecution”) (citing *Matter of Kulle*, 19 I. & N. Dec. 318 (BIA 1985); *Matter of Acosta*, 19 I. & N. Dec. at 233).

definition adequately serve to help accurately identify the claims which should be recognized. In its *Position in R-A-* at 22-23, 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. For refugee status based on membership in a particular social group, it is insufficient merely to prove membership in the invoked category, be it gender, sexual orientation, kinship ties, etc. *Guidelines*, at ¶¶ 16, 19. The asylum seeker must also demonstrate the additional elements of the refugee definition: a nexus between the feared persecution and the social group ground, that the feared ill-treatment would amount to persecution and an inability or unwillingness to avail him or herself of the protection of the country of origin.

In UNHCR's view, there are no additional requirements to establishing a "particular social group" other than those in the "protected characteristics" or "social perception" approaches. To require more is likely to lead to erroneous decisions and a failure of protection to refugees in contravention of the 1951 *Convention* and its 1967 *Protocol*.

III. Youth in Central American who resist gang recruitment or oppose gang practices may constitute a particular social group under either the “protected characteristic” or the “social perception” approaches.

A. The “protected characteristics” approach.

In certain cases, particularly in the context of Central America, individuals who resist forced recruitment into gangs or oppose gang practices may be united by innate or immutable characteristics, such as their age and gender. “Youth” can be considered an immutable characteristic as one cannot change one’s age, except by waiting and letting time pass; thus, the immutable character of “age” or “youth” is gradual, yet, in effect, unchangeable at any given point in time. The Board itself has recognized the “immutable” nature of age in *S-E-G-* where it stated: “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.” 24 I. & N. Dec. at 583-84; *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” and that “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice” meet the particular social group test in *Acosta*).

Young people may, precisely because of the characteristics that set them apart in society, such as their young age, impressionability and dependency, be more susceptible to recruitment attempts or other clandestine approaches by gangs. Indeed, recent studies have found that the recruitment policies of Central American gangs often are age-driven and frequently target young people. *See, e.g.,* USAID Bureau for Latin American and Caribbean Affairs Office of Regional Sustainable Development, *Central America and Mexico Gang Assessment*, 17 (Apr. 2006), *available at* http://www.usaid.gov/locations/latin_america_caribbean/democracy/gangs_assessment.pdf (finding that youth within the age range of 8-18 years may be particularly vulnerable to recruitment). Thus, an age-based identification of a particular social group could be especially relevant concerning applicants who have refused to join gangs.

In addition, resisting involvement in crime and criminal gangs, such as by evading recruitment or otherwise opposing gang practices, may in some contexts, be considered a characteristic that is fundamental to one's conscience and the exercise of one's human rights. 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), and in the case of those who refuse to join the gangs, also the right to freedom of association, including the

freedom not to associate, *id.* at art. 22. The values and beliefs at stake against violence and crime could be considered to be of such fundamental nature that requiring a person to renounce them would be tantamount to requiring one to give into the demands of gangs and become involved in crime. The fundamental character of the resistance may be evidenced by the fact that the applicant would rather suffer the severe consequences of non-compliance with the gangs, such as constant harassment, violence, kidnapping or even death, than forsake his or her anti-gang sentiments. *See Fatin v. INS*, 12 F.3d 1233, 1241 (3rd Cir. 1993) (finding that women who refuse to conform to gender-specific laws and social norms may well constitute a particular social group because “if a woman's opposition to the Iranian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as ‘so fundamental to [her] identity or conscience that [they] ought not be required to be changed’” (citing *Acosta*, 19 I. & N. Dec. at 234)).

Although gang-related violence may be widespread and affect large segments of society, at the same time, there may be distinct groups that are specifically targeted because of certain shared characteristics, such as their youth, marginalization in society, lack of protection or other factors, which make them more vulnerable. This view is supported in the context of Latin America by recent studies. *See, e.g.*, Washington Office on Latin America, *Transnational Study on*

Youth Gangs, at 2 (Mar. 30, 2007), available at http://www.wola.org/media/Gangs/executive_summary_gangs_study.pdf (noting that “the primary victims of youth gang-related violence are other youth, both gang and nongang involved”). Furthermore, 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,” *Guidelines*, at ¶ 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. See, e.g., *Applicant A*, 190 C.L.R. at 264 (finding that “while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society”). As explained earlier in Part III.A., *supra*, the experience of persecution may also “be a relevant factor in determining the visibility of a group in a particular society.” *Guidelines*, at ¶ 14.

In certain circumstances, past actions such as refusal to join a gang may also be considered as immutable traits that cannot be changed. The Board itself recognized this tenant in *S-E-G-*, 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.” 24 I. & N. Dec. at 584.

B. The “social perception” approach.

In addition to youth and gender, those targeted for gang recruitment may also share other social characteristics such as their geographical origin, including a particular neighborhood or marginalized urban area. They may also share the characteristic of being poor or from a lower socioeconomic class. *See, e.g., USAID Central America and Mexico Gang Assessment*, at 17. Accordingly, youth who are targeted for recruitment may be distinguishable as a particular social group because of their age, vulnerability, social background or class. For instance, it could indeed be widely known in a given community that young people from marginalized neighborhoods or of a certain socioeconomic 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 resistance and their lack of gang membership.

The Board’s conclusions that the proposed group in *S-E-G-* was too “amorphous,” “large[,] and diffuse,” 24 I. & N. Dec. at 585, and was not “perceived as a group by society,” *id.* at 587, ignore the purpose and history of the 1951 *Convention*. 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* may 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 in the mind of the drafters may have included “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.* Rather than viewing such groups as too “large” or “diffuse” to be cognizable, the authors provide that such groups 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. 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.

CONCLUSION

In sum, the Board’s approach to defining a particular social group in *S-E-G-* is inconsistent with UNHCR’s views, the *Social Group Guidelines*, and the purpose and intent behind the 1951 *Convention* and its 1967 *Protocol* to protect

those who meet the refugee definition. First, the consolidation of the “protected characteristics” and “social perception approach” in the *Guidelines*’ definition was intended to create alternative approaches for particular social group analysis rather than dual requirements, and “social visibility” is not a requirement of either approach nor of the particular social group ground of the definition. By reconciling the approaches used in various jurisdictions toward the particular social group ground, the definition in the *Guidelines* is intended to help guide adjudicators with the task of identifying and discerning social groups that exist in a particular society, without opening up the ground to become a “catch all” classification.

Second, the Board’s “particularity” requirement conflates different elements of the refugee definition and does not provide helpful or clear guidance to adjudicators. Concerns about the cohesiveness, homogeneity, and size of a purported social group should not color the analysis of whether a particular social group exists. An asylum seeker must demonstrate the remaining elements of a valid claim, including a nexus between the feared persecution and the social group ground; this serves to focus the analysis and accurately determine the claims that will be recognized. Finally, the group proposed in this case includes characteristics which are both immutable and could be considered cognizable by the relevant society.

The Board's ruling in *Acosta* has provided a well-formulated and widely accepted standard for determining particular social group claims. The Board in *Acosta* did not require "particularity" or the additional requirement of meeting either a "social perception" or "social visibility" test, and UNHCR would caution against adopting the rigid approach adopted in this case which may disregard groups that the 1951 *Convention* is designed to protect. The groups recognized by the Board in the past 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 automatically recognize homosexuals, *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990); nor would average Salvadorans necessarily recognize former members of the national police, *Matter of Fuentes*, 19 I. & N. Dec. 658 (BIA 1988). Not only would a typical Togolese tribal member 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), one could argue that young men who oppose gang recruitment are no more diffuse or lacking in particularity than such a group.

In conclusion, UNHCR respectfully urges the Court to reverse or vacate the Board's decision in this case, remand the case and urge the Board to consider the relevant international standards and UNHCR's views when

determining a framework for examining claims based on membership of a particular social group in order to ensure that the intent and purpose of the 1951 *Convention* and its 1967 *Protocol* to protect refugees is satisfied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a) because it contains 5,332 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on May 7, 2009, a true and correct copy of this Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioners and Reversal of the BIA's Decision was served in paper and electronic form on the following counsel by regular mail:

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