

In The United States Court of Appeals  
for the Ninth Circuit

---

---

**ROCIO BRENDA HENRIQUEZ-RIVAS,**  
*Petitioner,*

v.

**ERIC H. HOLDER, JR., ATTORNEY GENERAL,**  
*Respondent.*

ON REHEARING *EN BANC* OF A PETITION FOR REVIEW  
OF AN ORDER OF THE  
BOARD OF IMMIGRATION APPEALS

---

---

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

---

---

ANA C. REYES  
AMY MASON SAHARIA  
WILLIAMS & CONNOLLY LLP  
725 12th Street NW  
Washington, DC 20005  
202-434-5000  
202-434-5029 (fax)  
areyes@wc.com

PAMELA GOLDBERG  
*Counsel of Record*  
JENNIFER RIDDLE  
UNITED NATIONS HIGH COMMISSIONER  
FOR REFUGEES  
1775 K Street NW, Suite 300  
Washington, DC 20006  
202-243-7621  
202-296-5660 (fax)  
goldberg@unhcr.org

## TABLE OF CONTENTS

INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF THE ARGUMENT .....	3
ARGUMENT .....	6
I.    THE UNITED STATES IS BOUND BY THE <i>1951 CONVENTION</i> AND <i>1967 PROTOCOL</i> RELATING TO THE STATUS OF REFUGEES .....	6
II.   UNHCR PROVIDES AUTHORITATIVE GUIDANCE IN INTERPRETING THE REFUGEE DEFINITION INTERNATIONALLY AND IN THE UNITED STATES. ....	8
A.   UNHCR <i>Guidelines on International Protection</i> Are Authoritative Guidance in Interpreting the <i>1951 Convention</i> and <i>1967 Protocol</i> Refugee Definition in the United States Context.....	10
B.   The <i>Social Group Guidelines</i> Interpret the Term “Membership of a Particular Social Group” To Include Two Alternative Approaches. ....	12
C.   The Long-Standing and Well-Respected Approach to Social Group under the <i>Acosta</i> Decision of the BIA Is Consistent with the <i>1951 Convention</i> , its <i>1967 Protocol</i> , and the <i>Social Group Guidelines</i> .....	14
III.  THE “SOCIAL VISIBILITY” REQUIREMENT IS INCONSISTENT WITH THE OBJECT AND PURPOSE OF THE <i>1951 CONVENTION</i> AND ITS <i>1967 PROTOCOL</i> AND MISCONSTRUES THE <i>SOCIAL GROUP GUIDELINES</i> . ....	16

A.	Under the <i>Social Group Guidelines</i> , the “Protected Characteristics” and “Social Perception” Approaches to Defining Social Group Membership Are Alternate Approaches Rather than Dual Requirements.....	17
B.	There Is No Requirement that a Particular Social Group Be Visible. ....	18
IV.	THE “PARTICULARITY” REQUIREMENT IS INCONSISTENT WITH THE OBJECT AND PURPOSE OF THE 1951 CONVENTION AND THE 1967 PROTOCOL AND MISCONSTRUES THE <i>SOCIAL GROUP GUIDELINES</i> . ....	21
V.	INDIVIDUALS WHO HAVE TESTIFIED IN OPEN COURT AGAINST GANGS MAY CONSTITUTE A PARTICULAR SOCIAL GROUP UNDER EITHER THE “PROTECTED CHARACTERISTIC” OR THE “SOCIAL PERCEPTION” APPROACH.....	23
A.	The “Protected Characteristics” Approach. ....	24
B.	The “Social Perception” Approach.....	25
	CONCLUSION.....	26

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Matter of Acosta</i> , 19 I. & N. Dec. 211 (BIA 1985).....	4, 14
<i>Matter of C-A-</i> , 23 I. & N. Dec. 951 (BIA 2006) .....	4
<i>Matter of Fuentes</i> , 19 I. & N. Dec. 658 (BIA 1988) .....	20
<i>Garcia v. Attorney General</i> , 665 F.3d 496 (3rd Cir. 2011).....	25
<i>Gatimi v. Holder</i> , 578 F.3d 611 (7th Cir. 2009).....	19
<i>Hernandez-Montiel v. INS</i> , 225 F.3d 1084 (9th Cir. 2000).....	21
<i>INS v. Aguirre-Aguirre</i> , 526 U.S. 415 (1999) .....	7
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987).....	7, 9
<i>INS v. Stevic</i> , 467 U.S. 407 (1984) .....	7
<i>Matter of Kasinga</i> , 21 I. & N. Dec. 357 (BIA 1996).....	20
<i>Matter of Mogharrabi</i> , 19 I. & N. Dec. 439 (BIA 1987) .....	4
<i>Mohammed v. Gonzales</i> , 400 F.3d 785 (9th Cir. 2005) .....	11
<i>Murray v. Schooner Charming Betsy</i> , 6 U.S. 64 (1804) .....	8
<i>N-A-M v. Holder</i> , 587 F.3d 1052 (10th Cir. 2009) (per curiam).....	2
<i>The Paquete Habana</i> , 175 U.S. 677 (1900) .....	8
<i>Perdomo v. Holder</i> , 611 F.3d 662 (9th Cir. 2010) .....	14
<i>Matter of R-A-</i> , 23 I. & N. Dec. 694 (A.G. 2005) .....	18
<i>Matter of R-A-</i> , A # 073753922 (EOIR San Francisco, CA Dec. 14, 2009).....	18
<i>Ramos-Lopez v. Holder</i> , 563 F.3d 855 (9th Cir. 2009) .....	15
<i>Matter of S-E-G-</i> , 24 I. & N. Dec. 579 (BIA 2008).....	4, 15, 21

<i>Matter of S-P-</i> , 21 I. & N. Dec. 486 (BIA 1996).....	9
<i>Matter of Toboso-Alfonso</i> , 20 I. & N. Dec. 819 (BIA 1990) .....	20
<i>Valdiviezo-Galdamez v. Attorney Gen.</i> , 663 F.3d 582 (3d Cir. 2011) ..	12, 19, 20, 21

**FEDERAL STATUTES AND LEGISLATIVE HISTORY**

8 U.S.C. § 1101(a)(42) (2006).....	3, 7, 8
8 U.S.C. § 1158 (2006).....	7
8 U.S.C. § 1231(b)(3) (2006).....	7
8 U.S.C. § 1253(h) (1976) .....	7
H.R. Conf. Rep. No. 96–781 (1980).....	7
H.R. Rep. No. 96-608 (1979) .....	7
Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 .....	8
S. Exec. Rep. No. 14, 90th Cong., 2d Sess., 4 (1968) .....	7

**INTERNATIONAL AUTHORITIES AND CASES**

<i>Applicant A and Another v. Minister for Immigration &amp; Ethnic Affairs</i> , 190 C.L.R. 225, 226 (1997).....	13
<i>Canada v. Ward</i> [1993] 2 S.C.R. 689.....	15
<i>Convention Relating to the Status of Refugees</i> , July 28, 1951, 19 U.S.T. 6529.....	passim
<i>International Covenant on Civil and Political Rights</i> , Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).....	25
<i>Islam v. Secretary of State for the Home Department and Regina v. Immigration Appeal Tribunal and Another, Ex Parte Shah</i> , [1999] 2 A.C. 629 .....	15

<i>Protocol Relating to the Status of Refugees</i> , Jan. 31, 1967, 606 U.N.T.S. 267.....	passim
<i>Secretary of State for the Home Department v. K (FC) and Fornah (FC) v. Secretary of State for the Home Department</i> [2006] 1 A.C. 412.....	15
Statute of the Office of the UNHCR, U.N. Doc. A/RES/428(v) (Dec. 14, 1950).....	1
Summary Record of the Third Meeting, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, U.N. Doc. A/Conf.2/SR.3 (July 3, 1951).....	12
UN General Assembly, <i>Office of the United Nations High Commissioner for Refugees: Resolution adopted by the General Assembly</i> , 6 February 2003, A /RES/57/187.....	10
UNHCR, <i>Agenda for Protection [Global Consultations on International Protection/General]</i> , Goal 1, 26 June 2002, A/AC.96/965/Add.1 .....	10
UNHCR Executive Committee, <i>General Conclusion on International Protection</i> , No. 92 (LIII) – 2002, 8 October 2002 .....	10
<i>UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs</i> , 31 March 2010 .....	passim
UNHCR <i>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</i> , U.N. Doc. HCR/GIP/02/02 (May 7, 2002).....	passim
UNHCR <i>Handbook on Procedures and Criteria for Determining Refugee Status</i> , U.N. Doc. HCR/IP/4/Eng/ REV.1 (1979, re- edited Jan. 1992; reissued Dec. 2011).....	passim
<b>MISCELLANEOUS</b>	
<i>Department of Homeland Security’s Position on Respondent’s Eligibility for Relief</i> (Feb. 19, 2004), submitted in Matter of R- A-, 23 I. & N. Dec. 694 (A.G. 2005).....	18, 22

FARIÑA, L., ET AL., “NO PLACE TO HIDE: GANG, STATE, AND  
CLANDESTINE VIOLENCE IN EL SALVADOR (2010). .....25, 26

T. Alexander Aleinikoff, “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 (2002) ..... 15

## INTEREST OF *AMICUS CURIAE*

The United Nations High Commissioner for Refugees (“UNHCR”)<sup>1</sup> has a direct interest in this matter as the organization entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees and others of concern, and together with Governments, for seeking permanent solutions for their problems. Statute of the Office of the UNHCR ¶ 1, U.N. Doc. A/RES/428(v) (Dec. 14, 1950) (UNHCR Statute). 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”. *Id.* ¶ 8. UNHCR’s supervisory responsibility is also reflected in the Preamble and Article 35 of the *1951 Convention relating to the Status of Refugees*, July 28, 1951, 19 U.S.T. 6259 (*1951 Convention*)<sup>2</sup> and Article II of the *1967 Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 (*1967 Protocol*)<sup>3</sup>, obligating States to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role.

UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the *1951*

---

<sup>1</sup> UNHCR represents that Petitioner consents to this filing, while Respondent takes no position. Further, no person or entity other than UNHCR and its outside counsel authored this brief or provided any funding related to it.

<sup>2</sup> Available at <<http://www.unhcr.org/3b66c2aa10.html>> (last visited Feb. 21, 2012).

<sup>3</sup> Available at <<http://www.unhcr.org/3b66c2aa10.html>> (last visited Feb. 21, 2012).

*Convention*. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, U.N. Doc. HCR/IP/4/Eng/ REV.1 (1979, re-edited Jan. 1992; reissued Dec. 2011) (*Handbook*)<sup>4</sup> represents the first comprehensive such guidance and has subsequently been complemented by a number of UNHCR *Guidelines on International Protection*<sup>5</sup> including on “Membership of a Particular Social Group”.

UNHCR, which has won two Nobel Peace Prizes for its work, currently cares for over 33 million refugees and uprooted people in some 125 countries. The views of UNHCR are informed by its more than six decades of experience supervising the treaty-based system of refugee protection established by the international community. 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. Accordingly, the Supreme Court has “consistently turned [to UNHCR] for assistance in interpreting our obligations under the Refugee Convention.” *N-A-M v. Holder*, 587 F.3d 1052, 1061-62 (10th Cir. 2009) (Henry, J., concurring) (per curiam) (citing cases).

UNHCR has a direct interest in this matter, which involves the definition of the term “membership of a particular social group” found in the

---

<sup>4</sup> Available at <<http://www.unhcr.org/refworld/docid/4f33c8d92.html>> (last visited Feb. 21, 2012). See *infra* Point II for a discussion of the *Handbook*.

<sup>5</sup> UNHCR issues *Guidelines on International Protection* pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the *1951 Convention*. See *infra* Point II.A. for a discussion of the *Guidelines on International Protection*.

*1951 Convention* and its *1967 Protocol* and 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) (2006). The proper interpretation of this term presents questions involving the status of refugees within the mandate of UNHCR. It is of national significance and has already been the subject of a number of high-profile immigration appeals in which UNHCR has participated as *amicus curiae*.<sup>6</sup> Moreover, UNHCR anticipates that this Court’s decision may influence the manner in which the authorities of other countries apply the refugee definition.

Consistent with its approach in other cases, UNHCR submits this brief *amicus curiae* to provide guidance to the Court on the relevant international standards and not to offer an opinion directly on the merits of the Petitioner’s claim.

## SUMMARY OF THE ARGUMENT

Membership of a “particular social group” is one of the five protected grounds for refugee protection. *1951 Convention* art. 1A(2) as amended by *1967 Protocol* art. I ¶¶ (2). The international refugee definition has been incorporated into United States national law and includes the “membership in a particular social group” ground for protection. 8 U.S.C. § 1101(a)(42)(A). Until recently, the term was largely defined by reference to a “protected” characteristic that is either immutable or is fundamental to one’s

---

<sup>6</sup> See *Mercado v. Holder* (No. 10-71311) (9th Cir.); *Gonzalez-Zamayoa v. Holder* (No. 09-3514) (2d Cir.); *Valdiviezo-Galdamez v. Holder* (No. 08-4564) (3d Cir.); *S.E.T.-E. v. Holder* (No. 09-2161) (3d Cir.); *Orellana-Monson v. Holder* (No. 08-60394) (5th Cir.); *Doe v. Holder* (No. 09-2852) (7th Cir.); *Gaitan v. Holder* (No. 10-1724)(8th Cir.); *Rivera-Barrientos v. Holder* (No. 10-9527) (10th Cir.).

identity or conscience, an approach first articulated in the United States in the seminal decision of the Board of Immigration Appeals in *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). In recent years, however, the Board has required that members of social groups *also* demonstrate “social visibility” and “particularity.” Some courts have adopted these as requirements for establishing membership of a particular social group, including this Court in the decision now before it. Other courts have rejected these additional requirements as being inconsistent with previous authority and as only compounding the confusion.<sup>7</sup>

In imposing the “social visibility” and “particularity” requirements the Board has cited for support 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) (*Social Group Guidelines*).<sup>8</sup> See, e.g., *Matter of C-A-*, 23 I. & N. Dec. 951, 959 (BIA 2006); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 586 (BIA 2008). However, the Board’s interpretation of these Guidelines is incorrect. Indeed, requiring “social visibility” and “particularity” to identify a social group is not in accordance with the *Social Group Guidelines* or with the text, context or object and purpose of the *1951 Convention* and its *1967 Protocol*.

---

<sup>7</sup> See Brief as *Amici Curiae* on Behalf of Non-Profit Organizations and Law School Clinics and Clinicians for a discussion of this U.S. case law.

<sup>8</sup> Available at <<http://www.unhcr.org/refworld/docid/3d36f23f4.html>> (last visited Feb. 21, 2012).

The interpretation of the Board is incorrect in at least three respects. First, as articulated in the *Social Group Guidelines*, there are two separate, *alternative* tests for defining a particular social group consistent with the *1951 Convention* and *1967 Protocol*: the “protected characteristics” approach and the “social perception” approach. Requiring applicants to meet both approaches is fundamentally inconsistent with the *Social Group Guidelines*.

Second, the “social visibility” requirement does not consistently reflect the meaning of the “social perception” approach delineated in the *Social Group Guidelines*. The “social perception” approach calls for an examination of 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. Nothing in the *Social Group Guidelines*, the *1951 Convention* or the *1967 Protocol* requires that members of a particular social group be “visible” to the naked eye or otherwise recognizable on sight as the term has been mistakenly interpreted to mean. In addition, the “particularity” requirement seems to be a reiteration of the “social visibility” test and in any event is likewise inconsistent with the *Social Group Guidelines*, the *1951 Convention* and the *1967 Protocol*.

Third, the proposed social group in this case—individuals who have testified in open court against gangs in El Salvador—could, in at least some circumstances, meet the “particular social group” basis for refugee protection under both the “protected characteristics” and “social perception” standards. Individuals who testify in open court against gang members may have done so out of beliefs fundamental to their conscience, identity or human rights. Moreover, individuals who have testified in a public proceeding share the unchangeable past experience of having given that testimony. In a

society or community where gang violence is widespread, individuals who testify against gangs in open court are even more likely to be a cognizable group precisely because their testimony is public and it counteracts gang rule.

UNHCR submits that adopting the Board’s incorrect interpretation of the *Social Group Guidelines* 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 the United States’ fundamental obligations under the *1951 Convention* and the *1967 Protocol*.

## ARGUMENT

### I. THE UNITED STATES IS BOUND BY THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES.

The *1951 Convention* and its *1967 Protocol* are the key international instruments governing the protection of refugees and address who is a refugee, his or her rights and responsibilities and the legal obligations of States. The *1967 Protocol* binds parties to comply with the substantive provisions of Articles 2 through 34 of the *1951 Convention* with respect to “refugees” as defined in Article IA(2) of the Convention. *1967 Protocol* Art. I ¶ 1. The *1967 Protocol* also removes from the Convention refugee definition in Article 1, the geographical and temporal limitations to events that occurred in Europe before 1 January 1951, thus universalizing the refugee definition. *Id.* ¶¶ 2-3. The core of both the *1951 Convention* and *1967 Protocol* is the obligation to provide protection to refugees and to safeguard the principle of non-refoulement, which is the obligation not to return a refugee

to any country where she or he would face danger.<sup>9</sup> In 1968, the United States acceded to the *1967 Protocol*,<sup>10</sup> thereby binding itself to the international refugee protection regime and the definition of a refugee in the *1951 Convention*.

Congress enacted the Refugee Act of 1980 expressly to “bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (citing H.R. Rep. No. 96-608 at 9 (1979)). As the Supreme Court has recognized, “‘one of Congress’ primary purposes’ in passing the Refugee Act was to implement the principles agreed to in the 1967 [Protocol] . . . .” *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (quoting *Cardoza-Fonseca*, 480 U.S. at 436-37).

In fulfilling the requirements of the Protocol, Congress provided a path for refugees to seek and receive protection in the United States. 8 U.S.C. §§ 1101(a)(42) and 1158. Congress also obligated the United States to refrain from returning refugees to a place where they would face danger so as to conform to the fundamental principle of non-refoulement. *See INS v. Stevic*, 467 U.S. 407, 421 (1984) (citing to then 8 U.S.C. § 1253(h) (1976), now codified at 8 U.S.C. § 1231(b)(3) (2006)).

---

<sup>9</sup> The prohibition against “*refoulement*” is addressed under Article 33 of the *1951 Convention* and is a cornerstone of refugee protection. Article I(1) of the *1967 Protocol* incorporates this Article, along with Articles 2 through 32 and 34, by reference. The principle is reflected in U.S. law under 8 U.S.C. §1231(b)(3).

<sup>10</sup> H.R. Conf. Rep. No. 96–781, p. 19 (1980), U.S. Code Cong. & Admin. News 1980, p. 160; H. R. Rep., at 9; S. Exec. Rep. No. 14, 90th Cong., 2d Sess., 4 (1968).

The Refugee Act thus serves to bring the United States into compliance with its international obligations under the *1967 Protocol*, and through this Protocol the *1951 Convention*, and should be interpreted and applied in a manner consistent with those instruments. More generally, courts have a responsibility to construe federal statutes in a manner consistent with United States treaty 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.”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained . . . by the courts . . . of appropriate jurisdiction . . .”).

The *1951 Convention* and its *1967 Protocol*, as well as the 1980 Refugee Act<sup>11</sup>, define “refugee”, in part, to include any person who has a well founded fear of persecution due to “membership of a particular social group.” *1951 Convention* art. 1A(2) as amended by *1967 Protocol* art. I ¶¶ (2)-(3); 8 U.S.C. § 1101(a)(42) (only changing the “of” to “in,” such that it reads “membership *in* a particular social group . . .” (emphasis added)).<sup>12</sup>

## **II. UNHCR PROVIDES AUTHORITATIVE GUIDANCE IN INTERPRETING THE REFUGEE DEFINITION INTERNATIONALLY AND IN THE UNITED STATES.**

Over the 60 years of its existence, UNHCR has issued guidance on the interpretation of the refugee definition. The first of these is the UNHCR

---

<sup>11</sup> The 1980 Act is codified in the Immigration & Nationality Act (INA) at §§ 101(a)(42) & 208.

<sup>12</sup> The Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, amended certain provisions of the INA not applicable to the interpretation of “membership in a particular social group.”

*Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*.<sup>13</sup> The *Handbook* is internationally recognized as an important source of interpretation of international refugee law.

The *Handbook* was prepared by UNHCR in 1979 at the request of Member States of the Executive Committee of the High Commissioner's Programme, including the United States, to provide guidance to governments in applying the terms of the Convention and Protocol. The Supreme Court has determined that, although the UNHCR *Handbook* is not legally binding on United States officials, it nevertheless provides "significant guidance" in construing the *Protocol* and in giving content to the obligations established therein. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987); see also *Matter of 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*). As discussed below, beginning in 2002, UNHCR began issuing *Guidelines on International Protection* to complement the interpretative guidance in the *Handbook*, rather than continuing to revise or edit the contents of the *Handbook* itself.<sup>14</sup>

---

<sup>13</sup> Available at <<http://www.unhcr.org/refworld/docid/4f33c8d92.html>> (last visited Feb. 21, 2012).

<sup>14</sup> The *Handbook* was reissued in December 2011 and now includes all eight of the current *Guidelines on International Protection*. See *infra* note 19 and accompanying text.

**A. UNHCR Guidelines on International Protection Are Authoritative Guidance in Interpreting the 1951 Convention and 1967 Protocol Refugee Definition in the United States Context.**

In 2000, UNHCR launched the Global Consultations on the International Protection of Refugees (Global Consultations), 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 academics. The Global Consultations were undertaken 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 interpretative issues. As part of the Global Consultations, UNHCR convened an expert roundtable<sup>15</sup> to address the definition of “membership of a particular social group.”

As envisaged under the Agenda for Protection<sup>16</sup>, which was endorsed by the Executive Committee<sup>17</sup> and the UN General Assembly<sup>18</sup>, UNHCR

---

<sup>15</sup> The experts from the United States included at least one representative of the U.S. Government. *See id.* at 314-15 for a list of all participants.

<sup>16</sup> UNHCR, *Agenda for Protection [Global Consultations on International Protection/General]*, Goal 1, 26 June 2002, A/AC.96/965/Add.1, at 5, available at <<http://www.unhcr.org/refworld/docid/3d4fd0266.html>> (last visited Feb. 21, 2012).

<sup>17</sup> UNHCR Executive Committee, *General Conclusion on International Protection*, No. 92 (LIII) – 2002, 8 October 2002, available at <<http://www.unhcr.org/refworld/docid/3dafdce27.html>> (last visited Feb. 21, 2012).

<sup>18</sup> UN General Assembly, *Office of the United Nations High Commissioner for Refugees: Resolution adopted by the General Assembly*, 6 February 2003, A/RES/57/187, ¶ 6, available at <<http://www.unhcr.org/refworld/docid/3f43553e4.html>> (last visited Feb. 21, 2012).

began issuing its *Guidelines on International Protection (Guidelines)*.<sup>19</sup> These *Guidelines* are complementary to the UNHCR *Handbook* and draw upon applicable international legal standards, State practice and jurisprudence, and, as appropriate, the inputs from the debates in the Global Consultations Expert Roundtable discussions. One of the first of these to be published are the *Social Group Guidelines*<sup>20</sup>, which offer a detailed interpretation of the “membership of a particular social group” protection ground.

By design, the *Social Group Guidelines* provide legal interpretive guidance for governments, legal practitioners and decision-makers, including the judiciary. Among other courts, this Court has expressly relied on the *Social Group Guidelines* in assessing refugee claims based on a particular social group and has recognized that UNCHR’s “analysis provides significant guidance for issues of refugee law.” *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (relying on the *Social Group Guidelines* to hold that women may constitute a particular social group under certain circumstances).

---

<sup>19</sup> Pursuant to its statutory mandate, UNHCR issues *Guidelines on International Protection* to provide legal interpretative guidance for governments, legal practitioners, decision-makers, the judiciary, and UNHCR staff who conduct refugee status determinations. To date UNHCR has issued eight *Guidelines*. Available at <<http://www.unhcr.org/refworld/docid/4f33c8d92.html>>, at 77-170 (last visited Feb. 21, 2012).

<sup>20</sup> Available at <<http://www.unhcr.org/publ/PUBL/3d58de2da.pdf>> (last visited Feb. 21, 2012).

**B. The *Social Group Guidelines* Interpret the Term “Membership of a Particular Social Group” To Include Two Alternative Approaches.**

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 the *1967 Protocol* provides a definition for this category nor does the drafting history specify its exact meaning<sup>21</sup>, but over time and as reflected in the *Social Group Guidelines*, expert commentary and international jurisprudence have sought to clarify the meaning of this term.

UNHCR has determined, based on a survey of asylum decisions in a variety of jurisdictions as well as presentations during the Global Consultations, that there are two dominant approaches to defining a social group: “protected characteristics” and “social perception.” *Social Group Guidelines* ¶¶ 6-7. As the *Social Group Guidelines* articulate, the “protected characteristics” approach, embodied by the Board’s seminal and highly influential decision in *Matter of Acosta*, 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

---

<sup>21</sup> 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); see also *Valdiviezo-Galdamez v. Attorney Gen.*, 663 F.3d 582, 594 (3d Cir. 2011) (reciting this history).

of its historical permanence; or 3) so fundamental to human dignity that group members should not be compelled to forsake it. *Id.* ¶ 6.

The “social perception” approach, established in *Applicant A and Another v. Minister for Immigration & Ethnic Affairs*, 190 C.L.R. 225, 226 (1997), by the High Court of Australia, “examines whether or not a group shares a common characteristic which makes them a *cognizable* group or *sets them apart* from society at large.” *Social Group Guidelines* ¶ 7 (emphasis added).<sup>22</sup>

UNHCR concluded that these two approaches needed to be reconciled and thus adopted a standard definition that accommodates both as *alternative* approaches:

[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.

*Social Group Guidelines* ¶ 11 (emphasis added). Thus, the *Guidelines* make clear that only one of the two approaches need to be met to satisfy the social group definition.

---

<sup>22</sup> 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. *Social Group Guidelines* ¶ 8.

**C. The Long-Standing and Well-Respected Approach to Social Group under the *Acosta* Decision of the BIA Is Consistent with the *1951 Convention*, its *1967 Protocol*, and the Social Group Guidelines.**

In *Matter of Acosta*, the Board established a definition of membership of a particular social group that has long since become the standard in the United States<sup>23</sup> as well as internationally. 19 I. & N. Dec. at 233. For over twenty years, Immigration Judges, the Board, and the U.S. Circuit Courts of Appeals have been guided by the standard set forth by the Board in *Acosta*. That definition provides that membership of a particular social group refers to:

a group of persons all of whom share a common, immutable characteristic [that] . . . might be an innate one such as sex, color, or kinship ties, or . . . a shared past experience 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.

*Id.* at 233. Under this standard, there is no requirement of establishing “social visibility” or “particularity.” Like the “protected characteristics”

---

<sup>23</sup> This Court has ruled that “a ‘particular social group’ is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.” *Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010). The second factor in this analysis reflects the *Acosta* standard.

approach in the *Social Group Guidelines*, the *Acosta* standard assesses the immutability or fundamentality of the characteristic without requiring more.

The Board's ruling in *Acosta* established a well-formulated and internationally accepted standard for determining particular social group claims. 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<sup>[24]</sup> and has been widely cited in cases arising in other jurisdictions as well."<sup>25</sup> T. Alexander Aleinikoff, "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 Board has recently diverged from this approach, creating an "*Acosta*-and" standard that requires an asylum-seeker to also show that the group's members have "social visibility" and can be defined with sufficient "particularity." See, e.g., *Matter of S-E-G-*, 24 I. & N. Dec. at 582. Among other courts, the Ninth Circuit Court of Appeals has adopted this approach. See, e.g., *Ramos-Lopez v. Holder*, 563 F.3d 855, 860-62 (9th Cir. 2009). As set forth below, however, the imposition of these additional requirements is contrary to the intent and purpose of the *1951 Convention* and *1967 Protocol* as well as to the express interpretation in the *Social Group Guidelines*, which treat "social perception" as an alternative to the "protected

---

<sup>24</sup> *Canada v. Ward* [1993] 2 S.C.R. 689 (Can.).

<sup>25</sup> 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.

characteristics” approach formulated in *Acosta*. In jurisdictions applying the “protected characteristics” approach, any reference to “social perception” is to be applied solely in those situations in which an immutable or fundamental characteristic has not been established. *See Social Group Guidelines* ¶13.

### **III. THE “SOCIAL VISIBILITY” REQUIREMENT IS INCONSISTENT WITH THE OBJECT AND PURPOSE OF THE 1951 CONVENTION AND ITS 1967 PROTOCOL AND MISCONSTRUES THE *SOCIAL GROUP GUIDELINES*.**

In UNHCR’s view, the only requirements to establish a “particular social group” are those recited in the “protected characteristics” approach or, *only 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*. The *Social Group Guidelines* do not require any “social visibility” requirement. In cases where no “protected characteristic” is identified and the “social perception” approach is thus invoked, there is no “visibility” aspect to be met, only that the group is cognizable as a group by society. While being socially visible may help to identify the group, it is not a prerequisite to the existence of the group. Rather, in those cases where no immutable or fundamental characteristic has been identified, the issue is whether the social group is cognizable—that is, understood to exist—in the society irrespective of its visibility.

**A. Under the *Social Group Guidelines*, the “Protected Characteristics” and “Social Perception” Approaches to Defining Social Group Membership Are Alternate Approaches Rather than Dual Requirements.**

As articulated in the *Social Group Guidelines*, the first step in any social group analysis is to determine whether the group in question is based on a shared 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.” *Social Group Guidelines* ¶ 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.

Inexplicably, and without justification, the Board has turned this disjunctive into a conjunctive. Put differently, the Board has turned “*Acosta-or*” into “*Acosta-and*.” The *Social Group Guidelines* expressly state the opposite and UNHCR has never endorsed the Board’s cumulative approach. The Board’s more restrictive view is inconsistent with the *1951 Convention* and the *1967 Protocol*, and inappropriately narrows the ability of individuals who are in need of the protection of asylum to receive it. The approach therefore likewise contravenes the purpose of the Refugee Act of 1980, which was to ensure that the United States fulfill its obligations under the *1951 Convention* and *1967 Protocol*. Under the Board’s recent interpretation, the United States would provide *less*, not equal, protection than that established under international standards.

The Department of Homeland Security itself has recognized that, while additional factors such as “social perceptions may provide evidence of the immutability or fundamentality of a characteristic” and may thus be “indicators that a social group exists,” imposing additional requirements beyond the protected characteristics assessment “departs from the sound doctrine the Board established nearly 20 years ago in *Acosta* and *there is no reason for such a departure.*” *Department of Homeland Security’s Position on Respondent’s Eligibility for Relief*, 25 (Feb. 19, 2004) (*DHS Position in R-A-*), submitted in *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. 2005) (emphasis added).<sup>26</sup>

**B. There Is No Requirement that a Particular Social Group Be Visible.**

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” requires neither that the common attribute be literally visible to the naked eye nor that the attribute be easily identifiable 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 simply on whether a group is “cognizable” or “set apart from society” in some way. This is the same approach taken in respect of the other grounds, such as

---

<sup>26</sup> Available at <[http://cgrs.uchastings.edu/documents/legal/dhs\\_brief\\_ra.pdf](http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf)> (last visited Feb. 21, 2012). In an unreported decision in 2009, an immigration judge granted asylum to the respondent and no appeal was taken by either party. *Matter of R-A-*, A # 073753922 (EOIR San Francisco, CA Dec. 14, 2009).

religion or political opinion, as persons persecuted for their religious or political beliefs would obtain refugee status, regardless of whether their belief manifested in non-visible private ways or more visible public ways. *Social Group Guidelines* ¶ 15.

The use of the term “social visibility” to mean a group or characteristic that could be identified visually may reinforce a finding that an applicant belongs to a particular social group, but 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.<sup>27</sup>

The *Social Group Guidelines* state that: “[P]ersecutory action toward a group may be a relevant factor in determining the *visibility* of a group in a particular society.” *Social Group Guidelines* ¶ 14 (emphasis added); *see also UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, ¶ 35 (*Guidance Note*) (“[T]he 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.”).<sup>28</sup> This language relates to the role of persecution in defining a particular social group and is meant to illustrate how being targeted can,

---

<sup>27</sup> The Seventh and Third Circuit Courts of Appeals have recently made this same observation. *See, e.g., Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (stating that the social visibility test “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 . . . .”); *Valdiviezo-Galdamez*, 663 F.3d at 607 (noting that members of a particular social group “would certainly take pains to avoid being identified in a society where they would face persecution [for that membership]”).

<sup>28</sup> Available at <<http://www.unhcr.org/refworld/docid/4bb21fa02.html>> (last visited Feb. 21, 2012).

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, however, has no relation to the “social perception” approach to determining membership of a particular social group. It is intended neither to modify nor 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 particular social group.

It bears highlighting that this “social visibility” requirement is also inconsistent with *Acosta* itself. 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.” See, e.g., *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990) (recognizing homosexuals as a particular social group); *Matter of Fuentes*, 19 I. & N. Dec. 658 (BIA 1988) (recognizing former members of the Salvadoran national police); *Matter of Kasinga*, 21 I. & N. Dec. 357, 366 (BIA 1996) (recognizing young female Togolese tribal members who oppose female genital mutilation and had not been subjected to the practice). “If a member of any of these groups applied for asylum today, the BIA’s ‘social visibility’ requirement would pose an unsurmountable [sic] obstacle to refugee status, even though the BIA has already held that [persecution on account of] membership in any of these groups qualifies for refugee status . . . .” *Valdiviezo-Galdamez*, 663 F.3d at 604.

In sum, nothing in the *Social Group Guidelines* or the *1951 Convention* or its *1967 Protocol* supports the imposition or use of a “visibility” test to make a social group determination.

**IV. THE “PARTICULARITY” REQUIREMENT IS INCONSISTENT WITH THE OBJECT AND PURPOSE OF THE 1951 CONVENTION AND THE 1967 PROTOCOL AND MISCONSTRUES THE SOCIAL GROUP GUIDELINES.**

In some cases, proposed social groups that did not satisfy a “particularity” requirement have also been rejected. *See, e.g., Matter of S-E-G-*, 24 I. & N. Dec. at 582. Yet the discussions of “particularity” in *S-E-G-* and other recent Board opinions suggest it may simply be another way of stating the social group must satisfy that it is “particular.” To the extent that this requirement is intended to mean something more, it seems the Board may have conflated “particularity” with its “social visibility” requirement. The two requirements “appear to be different articulations of the same concept.” *Valdiviezo-Galdamez*, 663 F.3d at 608.<sup>29</sup>

The Board’s application of the “particularity” requirement appears to stem from a general concern about the potential for unlimited expansion of the social group ground. This concern is misplaced. First, it is a well-established principle that “the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.” *Social Group Guidelines* ¶ 18; *see also, e.g., UNHCR Guidance Note* ¶ 35 (reiterating the *Social Group Guidelines*); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

---

<sup>29</sup> The court continues, stating that the “attempt to distinguish the two oscillates between confusion and obfuscation, while at times both confusing and obfuscating.” 663 F.3d at 608.

Second, none of the other Convention grounds are limited by the question of size. *See, e.g., Social Group Guidelines* ¶ 18. Third, this concern is already addressed either by the overall approach to defining a particular social group or by the other elements of the refugee definition.

The Department of Homeland Security has explained well how the concern about the potential for unlimited expansion of the social group ground has acted to conflate 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. *See* DHS Position in *Matter of R-A*.<sup>30</sup>

The example above underscores a basic tenet of refugee status determinations: to establish eligibility for refugee status, 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. *Social Group 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 to avail him or herself of the protection of the country of origin or the State's inability or unwillingness to offer protection.

In the context of assessing a claim based on membership of a particular social group, the additional requirements of social visibility and particu-

---

<sup>30</sup> DHS then adds that “[t]he confusion of these elements in the social group analysis results in an incorrect and misleading conclusion.” DHS Position in *Matter of R-A*-, at 23.

larity imposed by the Board are unnecessary and are contrary to the *1951 Convention* and the *1967 Protocol* and as interpreted in the *Social Group Guidelines*. Proper interpretation and assessment of all the elements of the refugee definition serve to determine most accurately the claims that will be recognized.

**V. INDIVIDUALS WHO HAVE TESTIFIED IN OPEN COURT AGAINST GANGS MAY CONSTITUTE A PARTICULAR SOCIAL GROUP UNDER EITHER THE “PROTECTED CHARACTERISTIC” OR THE “SOCIAL PERCEPTION” APPROACH.**

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. Put another way, “the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.” *Social Group Guidelines* ¶ 3. Gang violence that rises to the level of persecution and is targeted against certain individuals such as those who testify openly against gangs presents a clear example of the evolving, contemporary approach to interpreting the social group protection ground. *See generally* UNHCR *Guidance Note*.

There are circumstances under which individuals who testify in open court against gangs and gang violence 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.

Gangs may direct harm at individuals who in various ways have resisted gang activity or who oppose, or are perceived to oppose, the practices of gangs. Members of this group need to be understood in their specific country and societal contexts. In areas where criminal activity is widespread and law enforcement is incapable of protecting people from gang violence, a person expressing opposition to gangs will often stand out from the rest of the community. Such “gang-resisters” may be grouped broadly into the following categories: witnesses of crimes committed by gangs, or individuals who have reported such incidents to the authorities who subsequently become vulnerable to violence as a form of deterrence or retribution. *Guidance Note* ¶ 12 (citation omitted).

**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. *Guidance Note* ¶¶ 30, 36, 37, 39, 40 (addressing various characteristics that may cause an individual to be targeted for persecution by gang members). Individuals who testify against gang members may also be found to share an immutable trait that cannot be changed—their history as an individual who counteracted gang hegemony by testifying against certain gang members. *Id.* ¶ 30.

At least one Court of Appeals has reached this conclusion, ruling that the petitioner, having testified against members of a gang “shares a ‘common immutable characteristic’ with other civilian witnesses who have the ‘shared past experience’ of assisting law enforcement against violent gangs that threaten communities in Guatemala. . . . [a] characteristic that

members cannot change because it is based on past conduct that cannot be undone.” *Garcia v. Attorney General*, 665 F.3d 496, 504 (3rd Cir. 2011). This same characteristic may be considered so fundamental to one’s identity, conscience or human rights that it should not be required to be changed. “To the extent that [individuals who have provided such testimony] can recant their testimony, they ‘should not be required to’ do so.” *Id.* (citations omitted).

At the core of gang resistance is the individual’s insistence on the rule of law and justice, as well as the right to freedom of association, including the freedom *not* to associate. See *International Covenant on Civil and Political Rights*, art. 22, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). As such, opposition to gang practices, including through testimony against criminal gang members, may be understood as a characteristic that is fundamental to conscience, dignity and the exercise of human rights, thereby distinguishing members of a particular social group. *Guidance Note* ¶ 38.

### **B. The “Social Perception” Approach.**

Individuals who testify against gangs in open court in a society or community where gang violence is widespread are likely to be a cognizable group precisely because their testimony is public and it counteracts gang hegemony. These characteristics of the group members would satisfy the “social perception” approach to particular social group determinations.

In 2006, the Salvadoran government created a new Witness Protection Program in an attempt to protect those who testify in open court against gang members. See, e.g., FARIÑA, L., ET AL., “NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR, 161-62 (2010). That such a program became necessary is testament to the fact that individuals who

testify against gang members are cognizable to society; that is, it is recognized in Salvadoran society that such witnesses exist and that they need protection from persecution based on their membership in that group of people.<sup>31</sup>

## CONCLUSION

For the foregoing reasons, UNHCR respectfully urges this Court to remand this case and urge the Board to consider the relevant international standards and the views of UNHCR in determining a framework for examining claims based on membership in a particular social group and on gang-related violence to ensure the United States fulfills its obligations under the *1951 Convention* and its *1967 Protocol*.

Respectfully submitted,

By:                   /s/ Pamela Goldberg                  

Pamela Goldberg  
Jennifer Riddle  
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES  
1775 K Street NW, Suite 300  
Washington, DC 20006  
(202) 243-7621  
(202) 296-5660 (fax)  
goldberg@unhcr.org

---

<sup>31</sup> Concerns have been raised about the effectiveness of this Witness Protection Program. For example, one study of homicide investigations in parts of El Salvador concluded: “in spite of being under a protection regime, numerous witnesses were murdered or could not be located to testify at trial.” *Id.* at 162.

Ana C. Reyes  
Amy Mason Saharia  
WILLIAMS & CONNOLLY LLP  
725 12th Street, N.W.  
Washington, D.C. 20005  
(202) 434-5000  
(202) 434-5029 (fax)  
areyes@wc.com

AMICUS CURIAE IN SUPPORT OF PETITIONER

Dated: February 23, 2012

### **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.

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 6942 words excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Pamela Goldberg

Pamela Goldberg

Dated: February 23, 2012

### **Certificate of Service**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 23, 2012. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Amy Mason Saharia

Amy Mason Saharia

Dated: February 23, 2012