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February 2, 2010

The Honorable Eric Holder  
Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Office of the Attorney General, Room 5114  
Washington, D.C. 20530

Re: ***Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008)**  
**Letter Brief in Support of Request for Certification**

Dear Attorney General Holder:

I write on behalf of the Association of the Bar of the City of New York ("Association") as Chair of the Committee on Immigration and Nationality Law. The purpose of this letter-brief is to express the Association's support for the request by Respondents, Silvia Eualia Gonzales Mira and her brothers, Pablo Alejandro and Rene Mauricio Mira, for certification and review of the Board of Immigration Appeals' ("Board" or "BIA") decision in *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).

I. Interest of Amicus Curiae

The Association is an independent, professional organization with membership comprised of more than 21,000 judges, lawyers and law students. Founded in 1870, the Association has a long-standing commitment to fair and humane immigration laws and policies as well as to advancing the cause of human rights in the U.S. and abroad.

The present case concerns application of provisions within the Immigration and Nationality Act relating directly to the definition of "refugee" and the corresponding right to apply for political asylum. These provisions were intended to codify U.S. obligations under general international law and, most particularly, the 1951 Convention on the Status of Refugees, which the U.S. has largely agreed to be bound by through its accession to the Convention's 1967 Protocol. The remedy of political asylum plays a major role in U.S. immigration policy in that it provides relief for those whose core human rights cannot be protected in the country of origin.

The decision of the Board with respect to which certification is sought raises issues of significant magnitude with respect to a central term within the “refugee” definition, -- membership in a particular social group.<sup>1</sup> These interpretations by the Board require some authoritative clarification. Although the questions in this case directly involve only youths who are persecuted as the result of conscientious opposition to joining criminal gangs in El Salvador, its reach is potentially much broader, involving as they do the parameters of the “social group” ground of refugee protection.

The resolution of this case is likely to affect interpretation by the United States of the refugee and asylum provisions within the Immigration and Nationality Act, as well as of U.S. responsibilities under the 1951 Convention and the 1967 Protocol. The decision can also be expected to influence the manner in which the authorities of other countries interpret corresponding provisions. For these reasons, the Association submits this letter-brief in the hope that it may be of aid in the orderly evolution of refugee jurisprudence.<sup>2</sup>

## II. Summary of Argument

The facts of this case are comparatively straightforward and undisputed. The claimants are two males and one female (all siblings) from El Salvador who fled from that country when they were made the subject of serious harm because of the brothers’ refusal to be co-opted by MS-13, a particularly virulent criminal gang in El Salvador. Expert testimony established that the two brothers had been targeted for recruitment because of their age and because of their position within Salvadoran economy and society. According to the Respondents’ testimony, which was found credible, their reasons for refusing recruitment stemmed from their own religious values, which are directly opposed to those of the gangs, with the gangs’ propensity to violence and towards victimizing other elements of the Salvadoran population.

The Board rejected the claim (thereby upholding the decision of the Immigration Judge), ruling, *inter alia*, that the Respondents were not members of a particular social group, and that they therefore could not satisfy the refugee definition set forth in section 101(a)(42) of the Immigration and Nationality Act. Among other things, the BIA determined that the social group to which the Respondents maintained they belonged (“Salvadoran youth who have been subjected to recruitment by the MS-13 gang 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” and the “family members of such Salvadoran youth”) lacked the required particularity

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<sup>1</sup> The decision on *Matter of S-E-G-* also involved interpretation of the political opinion ground of refugee protection. It is not the Committee’s intention to discuss this basis for refugee status except to the extent that the political opinion ground overlaps with that of social group.

<sup>2</sup> Some unusual procedural history must be made note of here that does not have a bearing on the substance of this request for certification. On July 23, 2009, a joint motion was filed with the Board by both claimants’ counsel and the U.S. Immigration and Customs Enforcement asking that the Board reopen and remand the instant removal proceedings to the Immigration Judge with directions to close the cases so that the Respondents could apply affirmatively for asylum protection pursuant to the William Wilburforce Trafficking Victims Protection Reauthorization Act of 2008, P.L. 110-457, sec. 235(d)(7), 122 Stat. 5044, 5081. Although the granting of that motion has had the effect of vacating the removal orders with respect to claimants herein, it is the position of both the Board and the Department of Homeland Security that the decision in *Matter of S-E-G-* survives as a precedent decision to be followed by the Board in other cases. See *Gonzalez-Mira et al v. Holder*, Nos 08-2925 & 09-2678, Petitioners’ Suggestions of Mootness and Request for Vacatur (8th Cir. Aug. 14, 2009).

and “social visibility” to be cognizable. It is with respect to this aspect of the Board’s ruling, and most particularly the “social visibility” criterion (made a requirement for the first time in *Matter of S-E-G-*) that certification is sought.

The new “visibility” requirement should be rejected in that it conflicts with existing jurisprudence which the Board has never repudiated and subverts the essential purposes of the Convention by eliminating an important group of refugees from surrogate international human rights protection. The new “visibility” criterion for social group membership would also derogate from the historical criteria for membership in a social group established by the Board in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), and substantially followed by a growing community of States as well as by the United Nations High Commissioner for Refugees (UNHCR). These criteria stress immutable characteristics and beliefs, associations linked to the exercise of core human rights, and past associations that have become immutable through the passage of time. The new analysis, by making “social visibility” a litmus test for social group recognition, renders the *Acosta* analysis both nugatory and superfluous. This would have a highly negative impact on the substantial international consensus that has formed around the *Acosta* decision and the human rights paradigm to refugee status. A growing body of States, influenced by *Acosta*, has adopted an equal protection approach to social group recognition that stresses the non-discrimination component of international human rights jurisprudence.

At the same time, the “social visibility” test, as applied by the Board, clearly misinterprets the “social perceptions” test developed by UNHCR and by treatise writers. The Board’s criteria identify “visibility” with sensory intake, perceptibility to the naked eye. This view is clearly erroneous based on the pronouncements of UNHCR and of treatise writers who make it clear that the “social perceptions” test relates not to the group’s physical visibility, but to social attitudes towards it.

The present view of the Board is made, for all practical purposes, unintelligible, by the fact that many refugees are attempting to keep the social, national, religious, or political identities upon which they would be persecuted secret in order to avoid detection and punishment. In addition, the Board’s test does not take account of the U.S. counterpart to the “social perceptions” test, the notion of attributed characteristics and beliefs. The attributed characteristics and beliefs approach applies in principle to social group analysis and asks not how society in general views the group, but rather how the persecutor views it.

The methodology followed by the Board in *Matter of S-E-G-* conflicts with the remedial interpretation of refugee status under which all significant doubt must be resolved in favor of the asylum seeker. This remedial manner of interpretation requires that all accepted approaches to social group recognition be exhausted before the claim can be denied. The remedial interpretation of the Convention refugee definition is evident at the international level in the works of prominent treatise authors and in doctrinal guidance supplied by the UNHCR. That the remedial approach to refugee status is followed in the United States is evidenced by four important developments: (1) the case law interpreting the “well-founded fear of being persecuted” standard; (2) the benefit of the doubt principle as applied in evidentiary matters; (3) the prevailing view that the asylum seeker need not identify the exact motivation of her persecutor, and may satisfy the “nexus” requirement based on circumstantial evidence; and (4) the still developing notion of attributed characteristics and beliefs.

Finally, the Respondents showed that they had been punished as members of a social group within the meaning of the *Acosta* analysis. The male claimants showed that they had been targeted for recruitment because of their age, because of their economic position within Salvadoran society, and because they were without protection, -- all immutable characteristics under the *Acosta* formulation. (The female respondent showed that she had been threatened with persecution derivatively, -- because of her relationship to her brothers.) Respondents also made out a claim based on the second prong of *Acosta* (associations so fundamental to the asylum seeker's identity or conscience that she should not be forced to relinquish them) by demonstrating that they were being punished because of their conscientious aversion to committing atrocities against members of the Salvadoran public. What value could be more central to the asylum seeker's identity or conscience than a principled antipathy to violating the human rights of others?

A word on organization follows. Part A of the argument section of this letter brief argues that the new "visibility" requirement has immediate consequences for refugee recognition in the context of membership in a social group. Parts B and C then deal with potential collateral consequences of the new requirement with regard to the future development of social group recognition both by the U.S. and by State parties flowing from the preemption of *Acosta* (under B) and resulting from an erroneous application of the social perceptions test (under C). Part D then sets out a proper methodology for determining social group recognition, and Part E argues that the claimants in *S-E-G-* should be recognized as members of a social group under a proper evaluation of the relevant standard.

### III. Argument

#### A. REQUIRING MEMBERS OF A SOCIAL GROUP TO DEMONSTRATE THAT THEY HAVE A CHARACTERISTIC OR BELIEF WHICH IS SOCIALLY VISIBLE IS RADICALLY INCONSISTENT WITH EXISTING CASE LAW AND SUBVERTS THE SOCIAL PURPOSE OF THE CONVENTION TO PROVIDE SURROGATE INTERNATIONAL HUMAN RIGHTS PROTECTION TO QUALIFYING REFUGEES

In *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008), the Board of Immigration Appeals was interpreting a statutory term contained in section 101(a)(42) of the Immigration and Nationality Act, namely, the "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 USC § 1101(a)(42). Section 101(a)(42) sets forth the basic definition of the term "refugee," codifying the language set forth in article 1A(2) of the 1951 Convention on the Status of Refugees.

The decision of the Board of Immigration Appeals in *Matter of S-E-G-* is fundamentally incompatible with the Board's existing jurisprudence on social group in that it adds a new, independent showing ("social visibility"), which criterion must be satisfied before membership in a social group can be recognized.<sup>3</sup> Earlier, in *Matter of Acosta*, 19 I&N Dec. 211 (1985), the

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<sup>3</sup> The road to *S-E-G-* has been a long and winding one, and illustrates the rising importance of "visibility" in the Board's adjudications. *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), was the first case in which the Board asserted that "social visibility" was an important consideration in identifying a "particular social group." In *Matter of C-A-*,

Board had ruled that a “social group” could be united by immutable characteristics, associations so fundamental to the asylum seeker’s identity or conscience that she should not be forced to relinquish them, or associations which had become immutable through the passage of time. Although the decision in *S-E-G-* adopts an entirely different, and mutually exclusive, framework of decision from that of the earlier cases, it never repudiated them.

As the Seventh Circuit recently observed in *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009), “visibility” as a requirement to social group formation is inconsistent with the Board’s earlier precedent, is illogical and “makes no sense.”<sup>4</sup> “Visibility” was not a requirement, for instance,

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the Board found that ‘former non-criminal drug informants working against the Cali drug cartel’ are not a particular social group, asserting “visibility” as a new criterion, but equating it with both the UNHCR “social perception” criterion, as well as with the Second Circuit’s holding in *Gomez v. INS*, 947 F.3d 660, 664 (2d Cir. 1991), and concluding that a social group must be “recognizable and discrete.” *Matter of C-A-*, at 956. The Board went on in *C-A-* to list other decisions that (in the Board’s view) have “involved characteristics that were highly visible and recognizable by others in the country in question,” including *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (young women opposed to female genital mutilation), and *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990) (persons listed by government as homosexual). *Matter of C-A-*, at 960. Critically, however, the Board’s determination that these non-criminal informants do not constitute a particular social group does rely substantially on the fact that “the very nature of the conduct at issue is such that it is generally out of the public view.” *Matter of C-A-*, at 960.

In *Matter of A-M-E-*, 24 I&N Dec. 69 (BIA 2007), the Board concluded that wealthy Guatemalans subject to extortion by criminals, do not constitute a particular social group. The Board first asserts social visibility and particularity as its two primary headings in its social group analysis section. Having found that wealthy Guatemalans do not pass the *Acosta* immutability test, the Board then held that the *Gomez v. INS* criteria were also relevant, once again equating the new social visibility criterion with the “recognizability and discreteness” criterion of the *Gomez* case, together with the social perceptions test advanced by the UNHCR. *A-M-E-*, at 12,13.

In *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2007), the first gang case involving the new BIA social visibility series, the stakes were higher because the IJ has found that the Honduran youth in question would be targeted as part of a particular social group based on his “youth and affiliation or perceived affiliation with gangs.” The Board asserted that the IJ’s opinion was based on two potential social groups. The first social group, “persons resistant to gang membership,” the Board acknowledged as potentially having statistical reality, but maintained that without actual social visibility no such group can be acknowledged for their purposes. *E-A-G-*, at 594–5. Hence, actual visibility was very much the issue and the deciding factor in *E-A-G-*.

In *Matter of S-E-G-*, the Board returned to the social visibility and particularity subheadings of *Matter of A-M-E-*, placing the ‘particularity’ subheading first this time, and stating that these headings simply “give greater specificity to the definition” of social group first determined in *Acosta*. *S-E-G-*, at 582. Once again, the Board began by equating the social visibility criterion with the *Gomez* “recognizable and discrete” analysis, as well as UNHCR’s social perception criterion. *S-E-G-*, at 584, 586. Critical to the Board’s conclusion, however, that these youth did not make up a social group was its finding that “there is little in the background evidence of record to indicate that this social group [here, Salvadoran youth who are recruited by gangs but refuse to join] would be perceived as a group by society, or that these individuals suffer from a higher incidence of crime than the rest of the population.” *S-E-G-*, at 587. The Board had quite clearly moved from viewing “visibility” as an important factor to holding it a requirement for social group cognizance.

<sup>4</sup> Other circuit court cases have accepted the “visibility” requirement in connection with their upholding of denials of social group claims filed by victims of gang violence. See *Vasquez v. Holder*, 2009 U.S. App. LEXIS 19034 (2d Cir. 2009); *Zavala v. Holder*, 2009 U.S. App. LEXIS 25524 (2d Cir. 2009); *Barrios v. Holder*, 567 F.3d 451 (9th Cir. 2009); and *Santos-Lehmus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008). For the most part, however, these cases rest on “Chevron” type deference in social group adjudications mandated by the Supreme Court in *Gonzalez v. Thomas*, 547 U.S. 183 (2006). Such considerations of deference are obviously not relevant here in these certification proceedings before the Attorney General.

for the following social groups: female members of the Tchamba Kunsuntu tribe who have not had FGM and do not wish to experience it; individuals held together by past military membership or land ownership; and homosexuals in homophobic countries. *See, e.g.*, Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996); Matter of Acosta, *supra*, 19 I&N Dec. 211 (BIA 1985); Matter of Taboso-Alfonso, 20 I&N Dec. 819 (BIA 1990). Most importantly, many refugees are anxious to avoid detection rather than attempting to attract it, and their claims would remain unheard if “social visibility” were a condition precedent to recognizing the human aggregates in which they claim membership as social groups.<sup>5</sup>

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), which first incorporated the asylum remedy into the Immigration and Nationality Act, was itself a legislative effort to bring United States statutory law into conformity with the nation’s international legal obligations concerning refugees. The United States has agreed to be bound by the 1951 Convention on the Status of Refugees through its accession to the Convention’s 1967 Protocol. *See* United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 606 U.N.T.S. 268, as modified by the Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223 (1968).

International conventions must be interpreted in good faith and in the light of their social purpose. Vienna Convention on the Law of Treaties, UN Doc. A/Conf. 39/27, 1155 UNTS 331, 8 ILM 679 (1969), art. 31. The overriding social purpose of the 1951 Convention on the Status of Refugees is to provide surrogate international human rights protection to qualifying refugees. *See* Refugee Convention, *supra*, Preamble (referring to the UN General Assembly’s affirmance of the principle that “human beings shall enjoy fundamental freedoms without discrimination”). *See also* United Nations High Commissioner for Refugees, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/01 (May 7, 2002), ¶ 15. Relief is predicated on the conclusion that the country of origin cannot maintain the refugee’s human rights on an equal basis with other members of the national community; this failure of protection gives rise to the right to flight and the search for surrogate protection elsewhere. JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* 135–41 (1991).

It is well established that the social group ground of refugee protection overlaps with other grounds, including race, religion and nationality, and that it enjoys substantial areas of similarity with them. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985); UN High Commissioner for Refugees, *Handbook on the Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 ¶ 77 (1992). Requiring “visibility” with regard to members of a social group virtually eliminates

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<sup>5</sup> The Seventh Circuit has continued its critique of the Board’s “social visibility” requirement in *Benitez Ramos v. Holder*, Case No. 09-1932 (7th Cir. Dec. 15, 2009) (slip op.). In *Benitez-Ramos*, the appeals court characterized the Board’s position in the following way: “[y]ou can be a member of a particular social group only if a complete stranger could identify you as a member if he encountered you in the street, because of your appearance, gait, speech pattern, behavior or other discernable characteristic.” Slip op. at 7. The Seventh Circuit contrasted this analysis of “external perceptions” with what it held to be a more accurate analysis: “If society recognizes a set of people having certain common characteristics as a group, this is an indication that being in the set might expose one to special treatment, friendly or unfriendly. In our society for example, redheads are not a group, but veterans are, even though a redhead can be spotted at a glance and a veteran cannot be.” *Id.*

from refugee protection important classes by subjecting them to a burden within the home State from which other claimants are obviously exempt: such social group claimants must identify themselves openly and publicly with the characteristic or belief which will cause harm or suffering.

Religious minorities worshipping in secret to avoid punishment, homosexuals fearing abuse and mistreatment either by the State or by homophobic elements within their societies, -- each would be required to “break cover” and expose themselves to the very human rights violations which they are seeking protection from abroad. Importantly, the Board in *Matter of Acosta*, as modified in *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987), established a test for determining whether a fear was well-founded for a claim based on social group. The Board held that it would be sufficient if the persecutor was aware or could become aware that the asylum seeker possessed the characteristic or belief which the persecutor had sought to overcome in others, indicating clearly that the test was not “visibility” as such but a basis for persecution which could be discovered by the persecutor. The new “social visibility” requirement is so obviously at odds with the overriding objective of the framers that it must be viewed as hostile to the Convention’s broad remedial purpose, -- to provide protection.

In the sections which follow, it is respectfully urged that the Attorney General reject the “social visibility” criterion for refugee status, as presently interpreted by the Board, in that it lacks conformity with an emerging consensus of States concerning the criteria for membership in a social group. Instead, an approach is urged which would be more consistent with the overriding purposes of the Refugee Convention and would avoid the anomalies that are inherent in the self-contradictory nature of the Board’s existing jurisprudence.

**B. REQUIRING “VISIBILITY” FOR THE FOURTH PROTECTED GROUND WOULD DEROGATE FROM THE SUBSTANTIAL INTERNATIONAL CONSENSUS WHICH HAS FORMED AROUND THE ACOSTA DECISION AND THE HUMAN RIGHTS PARADIGM OF REFUGEE STATUS**

The Board’s new ruling threatens to undo the emerging international consensus which has been shaped by *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), together with the human rights paradigm of social group recognition which has characterized the decision’s reception by common law States. *Matter of S-E-G-*, therefore, constitutes an impermissible departure from the principle of asylum as surrogate international human rights protection.

The Board of Immigration Appeals’ decision in *Matter of Acosta*, *supra*, now serves as the basis for a significant international consensus with regard to the elements of social group formation. It has been followed in Canada [*Canada Attorney General v. Ward*, [1993] 2 S.C.R. 689], New Zealand [*In re G-J-*, Refugee Appeal No. 1312/92, 1 NLR 387 (New Zealand Refugee Status Appeals Authority 1995)], and the United Kingdom [*Islam (A.P.) v. Secretary for Home Dep’t, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah*. [1999] 2 All ER 545 (House of Lords)], among other jurisdictions. The decision, with its three-part test for “membership in a particular social group,” now enjoys significant influence with respect to the transnational development of the refugee definition.

The seminal importance of the *Acosta* decision is illustrated through its formal adoption by State parties, by its favorable treatment at the hands of prominent commentators, and through its being

recommended by the United Nations High Commissioner for Refugees, itself a norm generating body. *See generally* United Nations High Commissioner for Refugees, *Guidelines on International Protection: “Membership of a particular social group” within the context of article 1A(2) of the 1951 Convention and the 1967 Protocol relating to the status of Refugees*, HCR/GIP/02/02 (May 7, 2002). Both the UNHCR *Handbook on the Procedures and Criteria for Determining Refugee Status under the 1951 Convention on the Status of Refugees* and the UNHCR *Guidelines on International Protection* have been held to provide essential guidance in construing the 1967 Protocol. *Cardoza-Fonseca v. INS*, 480 U.S. 429, n. 22 (1987). The Board’s decision in *Matter of S-E-G-* would, therefore, threaten the international and comparative process whereby the fourth protected ground has been developed by States parties, consistent with their role of interpreting the Convention refugee definition subject to guidance from UNHCR.

*Acosta* is unassailable as a restatement of social group formation based on internal characteristics and beliefs. The decision draws upon the two fundamental, but independent, predicates of the refugee grounds: 1) immutable characteristics and 2) associations so fundamental to the asylum seeker’s identity or conscience that she should not be constrained to relinquish them, i.e., associations linked to the exercise of core human rights.

*Acosta*, moreover, also provides support to basing a claim on “external perceptions” by its third independent prong: associations that have become immutable through the passage of time due to the “perception” of the persecutor. (Collectively, this three-part test has come to be known as the “protected characteristics” approach). The decision contemplates the orderly evolution of the “social group” ground through an *ejusdem generis* approach which would allow aggregates to be developed in the case law provided that they can meet any of the broad analytic strains developed in *Acosta*.

The *Acosta* formulation for “social group” was itself not an exclusive test in that it held the door open to an analysis predicated on attributed characteristics or beliefs. As a vehicle for identifying refugees based on the fourth Convention ground, however, it retained the substantial advantage of being able to link the elements of social group, and the refugee definition as a whole, to the law of international human rights, which provides the surrounding milieu in which the refugee definition must be interpreted. Subsequent cases have persuasively drawn upon the non-discrimination component of international human rights jurisprudence when analyzing claims to refugee status based on membership in a particular social group. Thus in *Canada v. Ward*, the first case decided outside the United States to adopt the *Acosta* criteria, the Supreme Court of Canada offered the following general guidance:

Underlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination.

This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates.

[T]he enumeration of specific foundations upon which the fear of persecution may be based to qualify for international protection parallels the approach adopted in international anti-discrimination law...



The manner in which groups are distinguished for purposes of anti-discrimination law can appropriately be imported into this area of refugee law [interpretation of the meaning of “particular social group”]. *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 734.

Similarly, the United Kingdom’s House of Lords in 1999 also turned to the non-discrimination component of international human rights doctrine to identify women as a social group in the *Shah and Islam* decision, *supra*. In the opinions of both Lord Steyn and of Lord Hoffman, reliance is placed on article 2 of the Universal Declaration of Human Rights and its broad reference to classes (including sex or gender) with respect to which discrimination is specifically prohibited by the instrument. In the opinion of Lord Steyn, for instance:

[T]he concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect ... [T]he inclusion of ‘particular social group’ recognized that there might be different criteria for discrimination *in pari material* with discrimination on other grounds which would be equally offensive to principles of human rights.... In choosing to use the term ‘particular social group’ rather than an enumeration of specific groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention. *Shah and Islam*, 11 INT’L J. REFUGEE L. 496, 539.

Insisting on a “visibility” requirement, while making it an exclusive test for “social group,” simply precludes an analysis in individual asylum cases that is based on protected characteristics and beliefs in the context of modern international human rights protection. What the Board has now done in effect is to raise the “social visibility” criterion to that of a litmus test beyond which the adjudicator will not proceed if the protection claimant cannot satisfy it. This in effect adds a significant restraining factor to the *Acosta* three-prong approach which the House of Lords recognized in *Shah and Islam*, to be extraneous to the *Acosta* test, and therefore erroneous:

Loyalty to the text requires that one should take into account that there is a limitation involved in the words “particular social group”. What is not justified is to introduce into that formulation an additional restriction of cohesiveness. To do so would be contrary to the *ejusdem generis* approach so cogently stated in *Acosta*. *Shah and Islam*, 11 INT’L J. REFUGEE L. 496, 502.

“Social perceptions,” while still a viable test for determining social group, cannot be considered as containing exclusive criteria for social group recognition. “External” or “social” perceptions constitute an alternative way of viewing asylum claims from that developed in *Acosta*, which emphasizes internal characteristics and beliefs. Yet it is those very internal attributes which form the basis of human rights law and its equal protection component. See Guy S. Goodwin-Gill, *Judicial Reasoning and Social Group after Islam and Shah*, 11 INT’L J. REFUGEE L. 537, 541–42 (1999). To preempt claims based on the *Acosta* criteria would frustrate the human rights

paradigm which has advanced the Convention refugee definition to its present stage in accordance with the instrument's broad remedial purposes.

The Attorney General is respectfully urged not to allow this preemption to occur. The United States, like other States that have agreed to be bound by the Refugee Convention, is a human rights jurisdiction whose influence on the development of international human rights has been significant. See Congressional Declaration of Policies and Objectives at 8 U.S.C. 1521 (1982) (stating the Refugee Act's essential terms must be interpreted in accordance with the country's "historical commitment to human rights and humanitarian concerns"). It was the U.S. model of civil and political rights, for instance, which served as the inspiration for much of the text of the Universal Declaration of Human Rights and for that of the International Covenant on Civil and Political Rights. See, e.g., Louis Henkin, *International Human Rights and Rights in the United States*, reprinted in HUMAN RIGHTS IN INTERNATIONAL LAW 25 (Theodor Merin ed., 1988) (arguing that "American conceptions and practices have additional relevance since the United States was one of the principal spiritual ancestors of the international human rights movement, an important political midwife at its creation, and attentive kin to its development"). The broad international consensus regarding social group formation, still evolving, owes its origins similarly to the initiative taken in *Matter of Acosta*. It is of vital concern that this broad initiative not be sacrificed and that the substantial gains resulting from it be retained.

C. THE BOARD'S INTERPRETATION OF THE "SOCIAL PERCEPTIONS" TEST, AS MANIFESTED BY ITS "SOCIAL VISIBILITY" REQUIREMENT, IS FUNDAMENTALLY ERRONEOUS

The "social perceptions" test, to which "social visibility" is transparently related, remains a viable and internationally accepted method for determining "social group" membership. Like the *Acosta* test, it remains recommended by UNHCR. The "social perceptions" test is deeply wedded to the notion of attributed characteristics and beliefs which is generally accepted in U.S. refugee law and practice: importantly, the notion of attributed characteristics and beliefs applies, under U.S. refugee law principles, to all five grounds of refugee protection. See Legacy Immigration and Naturalization Service, *Basic Law Manual* 36, n. 9 (1994).

The Board of Immigration Appeals, in formulating its "social visibility" rule, has interpreted the "social perceptions" test literally so as to make it apply only where the trait (or traits) uniting the group for refugee purposes is "visible" to the naked eye. See *Matter of C-A-*, 23 I&N Dec. 754 (BIA 2006) (first introducing the "social visibility" requirement and finding that informants against the Cali drug cartel in Colombia were not a social group because the activity uniting them took place in secret).

That this is erroneous, however, is illustrated by the numerous instances in which both the UNHCR and eminent treatise writers have developed the notion of social group based on the social perceptions test. These sources make it clear that the term "social perceptions," properly understood, does not refer to visibility as an act of sensory intake, but rather to broad social sensitivities of the community towards the group, -- sensitivities which cause the group to be set apart from society at large (thus making the group "cognizable"), -- particularly where those sensitivities reflect an attitude of discrimination or hostility.

Under the UNHCR *Handbook on the Procedures and Criteria for Determining Refugee Status*, ¶ 78, membership in a social group may be predicated on the fact that there is no confidence in the group's loyalty to the government or because the group's economic or political activity serves as an impediment to the realization of government's policies. Under the UNHCR *Guidelines on "Membership of a particular social group"*, *supra*, moreover, the "social perceptions" test is defined in the following way:

The [social perceptions] 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.... Again, women, families and homosexuals have been recognized under this analysis as particular social groups depending on the circumstances of the society in which they exist. UNHCR, *Guidelines on "Membership of a particular social group"*, *supra*, ¶ 7.

Some of the classes identified above (women, for instance) may be visible, but others (families and homosexuals) are not physically visible at all: the two latter classes simply possess no external characteristics which are physically perceptible. Homosexuals, moreover, would tend to keep their sexual identities a secret, -- at least if they are coming from societies which would be inclined to persecute them because of their sexual orientation.

One of the most ardent defenders of the "social perceptions" test, Guy S. Goodwin-Gill, illustrates the evolution of the test and its relationship to the third prong of the *Acosta* formulation: past associations which have become immutable through the passage of time. As expressed in THE REFUGEE IN INTERNATIONAL LAW:

The *Ward* judgment is of major importance on a variety of issues, but the analysis of the social group question raises a number of concerns. What is meant by 'groups associated by a former voluntary status', is far from clear. The Court said that this sub-category was included 'because of historical intentions'. However, there is no evidence to suggest that those apparently intended to benefit from the social group provision, the former capitalists of eastern Europe, were ever formally associated one with another. They may have been, but equally they may not. What counted at the time was the fact that they were not only *internally* linked by having engaged in a particular type of (past) economic activity, but also *externally* defined, partly if not exclusively, by the perceptions of the new ruling class.

As the Supreme Court in fact recognized, capitalists were persecuted historically, 'not because of their contemporaneous activities, but because of their past status *as ascribed to them by the Communist leaders*.' In this sense, they were persecuted not because they were *former* capitalists, but because they *were* former capitalists; not because of what they had done, but because of what they were considered to be today; not because of any actual or imagined voluntary association, but because of the perceived threat of the class (defined *incidentally* by what they had once done) to the new society. The approach of the new ruling class to the capitalist class reveals a clear overlap between *past* activity and/or

status and the perception of the *present* threat to the new society. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 361 (2d ed. 1996).

Yet it must be clear that former capitalists are not a class which is visible to the naked eye. Members of the putative group simply have no objective indicia on their persons as to their former economic status; such victims cannot be identified by any external feature. But what remains key to the analysis, the central feature of the former capitalist's political and social identity, is not what he was; it was what he was perceived to be. These refugees were defined chiefly through their being viewed (or appreciated) as a threat to the new ruling class.

This aspect of social group recognition based on external perceptions also reveals yet another permutation regarding the fourth ground of refugee protection: it is not merely the broad social perceptions of the community which matter for attribution principles to apply. Equally, if not more, important is the perception of the persecutor. If the agent of persecution perceives the asylum seeker as a threat, and is prepared to punish him on that basis, the requirements of refugee status will have been met. *Cf.* *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988). This form of analysis applies, at least in principle, to the fourth protected ground. *See* Legacy Immigration and Naturalization Service, *Basic Law Manual* 36, n. 9 (1994).

D. A REMEDIAL INTERPRETATION OF THE CONVENTION REFUGEE DEFINITION REQUIRES THAT EVERY ACCEPTED CONSTRUCTION OF “SOCIAL GROUP” BE EXHAUSTED BEFORE THE PROTECTION CLAIM CAN BE DENIED

The UNHCR *Guidelines on “Membership of a particular social group”*, *supra* at ¶ 2, direct that the social group ground be interpreted in conformity with the object and purpose of the 1951 Refugee Convention. Refugee status is a form of surrogate international human rights protection predicated on the premise that the home State cannot maintain the asylum seeker's core human rights at an acceptable level. The Convention refugee definition must be interpreted liberally so as to realize the framers' broad remedial purpose of providing surrogate international human rights protection to those fleeing Convention-specific forms of harm. *See* GUY GOODWIN-GILL AND JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 7 (3d ed. 2007): “For the 1951 Convention, this [reading the Refugee Convention in light of its object and purpose] means interpretation by reference to the object and purpose of extending the protection of the international community to refugees, and assuring to ‘refugees the widest possible exercise of ... fundamental freedoms.’” *See also* Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of ‘Membership of a Particular Social Group’*, in ERIKA FULLER, VOLKER TURK, AND FRANCES NICHOLSON, *REFUGEE PROTECTION IN INTERNATIONAL LAW* 263, 265: “In striking that delicate balance [between concern for the victims and imposing on States obligations they did not consent to] it must be kept in mind that international refugee law bears a close relationship to international human rights law – that refugees are persons whose human rights have been violated and who merit international protection.”

Paragraph 203 of the UNHCR *Handbook on the Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees* (the “benefit of the doubt” provision) sheds light on the spirit in which refugee status

determinations are to be made. *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997), incorporates the *Handbook's* standards into United States law. Importantly, although the “benefit of the doubt” has special relevance to evidentiary considerations, it should be noted that it expresses a philosophy which extends, by analogy, to other aspects of establishing an asylum claim. Evidentiary concerns, moreover, play a pervasive role in refugee status determinations, informing such issues as (i) whether a claimant is within a particular social group; and (ii) whether the harm or suffering made out in the case is related or linked to a ground of refugee protection.

This evidentiary aspect of decision-making has been particularly the case where “social visibility” is at issue. See generally *Romero v. Mukasey*, 262 Fed. Appx. 328, 2008 WL 268682 (2d Cir. 2008), finding reversible error in the BIA’s failure to consider as evidence reports showing that “wealthy, landowning businessmen are specifically targeted by guerilla groups in Colombia [which reports were] prima facie evidence of that group’s social visibility for purposes of asylum and withholding of removal.” See also JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS*, *supra* at 89, discussing the relationship between protected grounds and the well-founded fear of persecution:

The best circumstantial indicator of risk is the experience of those persons perceived by the authorities in the country of origin to be most closely connected to the claimant, generally including persons who share the racial, religious, national, social or political affiliation upon which the claimant bases her case.

The best evidence of nexus between persecution and membership in a social group is the finding of sustained and systemic core human rights violations against others enjoying the same characteristics or beliefs that make up the putative group in question. This is based for the most part on an inferential analysis in which social proclivities as made out in background materials are taken together with the willingness and ability of the State to provide protection. But the treatment of others similarly situated provides the key to the analysis as is demonstrated by the following obiter quoted in *Islam and Shah*:

Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutor may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But if they were persecuted because they were left-handed, they would no doubt become quickly recognizable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group. *Shah and Islam, supra*, 11 INT’L J. REFUGEE L. 496, 505, quoting *A v. Minister of Immigration and Ethnic Affairs*, 142 ALR 331.

Numerous developments in U.S. refugee law point to the conclusion that U.S. jurisprudence has in effect adopted a remedial interpretation of the refugee definition by facilitating the ways in which eligibility can be established. *Acosta’s* three-prong approach, for instance, is itself disjunctive, suggesting strongly that the “social perceptions” test and the *Acosta* criteria should be viewed as disjunctive as well. Beyond this, however, evolving United States asylum law reveals that, in striking a balance between establishing rigid criteria for asylum and sensitivity

for the plight of the refugee, U.S. law has veered decidedly towards the latter, consistent with the human rights underpinnings of the Convention. Broadly speaking, this trend is reflected in the following developments: 1) treatment of the “well-founded fear of being persecuted” standard in the case law; 2) emerging requirements for establishing nexus; and 3) the still developing notion of attributed characteristics and beliefs.

In *Cardoza-Fonseca v. INS*, 480 U.S. 421 (1987), the Supreme Court ruled that, to meet the well-founded fear standard, an asylum seeker was not obligated to show by a balance of probabilities that persecution would occur [the standard for withholding under section 241(b)(3)]. Instead, the Court ruled:

That the fear must be "well founded" does not alter the obvious focus on the individual's subjective beliefs, nor does it transform the standard into a "more likely than not" one. One can certainly have a well founded fear of an event happening when there is less than a 50% chance of the occurrence taking place. As one leading authority has pointed out:

"Let us . . . presume that it is known that, in the applicant's country of origin, every tenth adult male person is either put to death or sent to some remote labor camp. . . . In such a case, it would be only too apparent that anyone who has managed to escape from the country in question will have 'well founded fear of being persecuted' upon his eventual return." *Id.*, citing 1 ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966).

Although it deals primarily with the question of when a fear of future harm or suffering is reasonable, *Cardoza-Fonseca* has transparent implications with respect to the other elements in the Convention refugee definition as well. A holistic interpretation of the Convention refugee definition virtually forces an interpretation under which the Court's ruling (that a fear of persecution can rest on a one in ten chance that it will take place) must be understood as extending both to the notion of persecution and to the related issue of whether serious harm is connected to a refugee ground: The common denominator amongst these separate elements (well-founded fear, nexus, the existence of a protected ground) can be identified in the essential principle underlying all refugee law that qualifying for asylum should not be subjected to unrealistic hurdles which would hinder refugee recognition for those in actual need of international human rights protection. UNHCR *Handbook* at ¶¶ 195–204.

The interpretation of “well-founded fear” provided by the Supreme Court is clearly consistent with the remedial purposes of the Convention. But *Cardoza-Fonseca* does not stand alone. Also relevant are administrative and judicial treatments of the nexus issue. In *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996), the Board of Immigration Appeals held that an asylum seeker does not need to know the precise motivation of her persecutor so long as one reason for the act of serious harm is to overcome a protected ground.<sup>6</sup> At the same time, *Matter of S-P-* also establishes that a

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<sup>6</sup> This is virtually the same test which is now applied by statute. See section 101(a)(3) of the REALID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 302, 303 which requires that an asylum seeker establish that overcoming a protected ground is at least “one central reason” for the underlying fear of persecution. Importantly, *Matter of S-P-*,

finding that serious harm is related to a Convention ground can be based on circumstantial evidence and on the use of inferential reasoning on the part of the adjudicator. Indeed, in civil war cases, the adjudicator is directed to look specifically at certain external criteria to determine whether nexus to a refugee ground has been established.<sup>7</sup>

UNHCR recommends that it is only when the *Acosta* test has failed, that the “social perceptions” test should be used. UNHCR *Guidelines*, *supra* ¶ 13. Accordingly, if there is any accepted methodology upon which the asylum seeker could qualify for refugee status based on the social group category, that methodology must be exhausted before the claim can be denied. UNHCR methodology is broadly consistent with the United States approach to social group which was contained in proposed regulations published for comment on December 7, 2000. *See* 65 FR 76588 (December 7, 2000) (proposed social group regulations). *Compare* UNHCR *Guidelines on International Protection: “Membership of a particular social group”* ¶ 13, and 65 FR 76588 (December 7, 2000).

The regulations endorse an approach based chiefly on the *Acosta* criteria. A variant of the “social perceptions” test was added in a listing of factors to consider in determining social group membership, but was made strictly voluntary on the part of the adjudicator. These regulations, although never finally promulgated, are nonetheless persuasive authority with respect to the state of United States doctrine on “social group” issues. They point forcefully to the conclusion that the UNHCR’s principles of interpretation are appropriate and that “social perceptions” (or “social visibility”) may be used as a supplement to determining the existence of social group, but only if application of the *Acosta* criteria proves unsuccessful.

E. THE CLAIMANTS IN *S-E-G*- MADE OUT A CLAIM TO REFUGEE STATUS BASED ON THE FOURTH CONVENTION GROUND IN THAT THEY DEMONSTRATED CONFORMITY WITH THE ACOSTA MODEL AND WITH THE “SOCIAL PERCEPTIONS” TEST PROPERLY APPLIED

The evidence adduced in the proceedings below demonstrated that MS-13 targeted for recruitment young males who were from poor families and therefore lacked social protection.

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*supra*, was cited with approval in the one Board decision interpreting the nexus requirement as set forth in the REAL ID Act. *See* Matter of J-B-N- & S-M-, 24 I&N Dec. 208, 214 (BIA 2007).

<sup>7</sup> The Board set out a list of five factors or criteria which the adjudicator should consider:

- Indications in the particular case that the abuse was directed toward modifying or punishing opinion rather than conduct, e.g., statements or actions by the perpetrators or abuse out of proportion to nonpolitical ends;
- Treatment of others in the population who might be confronted by government agents in similar circumstances;
- Conformity to procedures for criminal prosecution or military law including developing international norms regarding the law of war;
- The extent to which anti-terrorism laws are defined and applied to suppress political opinion as well as illegal conduct (e.g., an act may broadly prohibit “disruptive” activities to permit application to peaceful as well as violent expressions of views);
- The extent to which suspected political opponents are subjected to arbitrary arrest, detention and abuse.

The evidence also made out that the male claimants were savagely beaten as the result of their refusing to become members of MS-13, and that the female respondent had been threatened with rape. The case was thus one of arguable past persecution within the meaning of 8 CFR § 208.13(b)(1).

At this juncture, it is essential only to note that the gang's original incentive for recruiting the male respondents was not simply to fill their ranks: they were recruited because they came from a vulnerable segment of society and were generally defenseless against such recruitment efforts. The Board's citation to past cases holding "affluence" too "amorphous" under the particularity requirement to warrant social group cognizance are inapposite: poverty is different from wealth in that those possessing assets can disencumber themselves of the bases of persecution but those wanting means of support and protection cannot alter their status. *Cf.* HATHAWAY, *THE LAW OF REFUGEE STATUS*, *supra* at 166–67. *See also* GUY GOODWIN-GILL AND JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW*, *supra* at 73–74: "The 1951 Convention is not alone in recognizing 'social' factors as a potential irrelevant distinction giving rise to arbitrary and repressive treatment. Article 2 of the 1948 Universal Declaration of Human Rights includes 'national or social origin, property, birth or other status' as prohibited grounds of discrimination ...."

In any case, within the *Acosta* analysis, the second prong (associations so fundamental to the asylum seeker's identity or conscience that she should not be forced to relinquish them) is the one which these asylum seekers emphasize in their claims. The position they maintain is that their own religious and moral outlooks forbid them from taking part in the inhuman activity of the gangs. That such claims are within the purview of social group analysis, even though the claimant's aversion runs against private parties rather than against the government, is clarified by the "horizontal enforcement of human rights" (a doctrine recognizing that human rights may be enforced not merely vertically against the State, but horizontally as well against private parties). *See generally* ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* 89–133 (1996), and cases cited therein.

The Respondents' claims to "conscientious objector" status was not really treated by the Board in its analysis of "membership in a particular social group." The Board did touch upon this aspect of the claim, however, in rejecting the Respondents' political opinion arguments, holding that the Supreme Court's decision in *Elias-Zacarias v. INS*, 502 U.S. 478 (1992), was controlling. But *Elias-Zacarias* does not deal with the situation in which the claimant rejects coercive measures by an insurgent force (or a violent, illegal gang) based on a clear expression of principle. A case which comes to terms with this issue more cogently is *Ward v. Canada*, [1993] 2 S.C.R. 689, where Canada's Supreme Court recognized as a valid political opinion a refusal to cooperate in the killing of hostages held by the revolutionary Irish National Liberation Army.

Such humanitarian proclivities, based on the premise that torturing, maiming or killing innocent third parties is wrong, has long been implicitly recognized as an association so fundamental to the asylum seeker's identity or conscience that he or she should not be compelled to relinquish it. *Cf.*, *Matter of A-G-*, 18 I&N Dec. 502 (BIA 1987), *applying* ¶ 171 of the UNHCR *Handbook* (maintaining that draft evasion or desertion may provide the basis for refugee status where the military action in which the claimant would be involved offends his or her "political, religious, or moral convictions" insofar as it has been "condemned by the international community as



contrary to basic rules of human conduct”). *See also* JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 44–49 (1985) (discussing the development of common article 3 to the Geneva Conventions of August 12, 1949).

As noted saliently in the Commentary to the first Geneva Convention, the “principle of respect for the human personality, which is at the root of all the Geneva Conventions, was not the product of the Conventions. It is older than they are and independent of them.” COMMENTARY: GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 39 (Geneva 1952). Indeed, systemic or widespread violations of human rights carried out against a substantial portion of the population and without significant restraint by the government could very easily reach the level of “crimes against humanity” as that term is understood in general international criminal law. *See generally* AMNESTY INTERNATIONAL, GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 33–49 (2004): crimes against humanity can be committed in peacetime, and may be either systemic *or* widespread. Refusing to participate in such acts must be viewed as an association so fundamental to the asylum seeker’s identity or conscience that she should not be constrained to relinquish it; a refusal to commit grave human rights violations which have implications under general international criminal law lies at the heart of the Refugee Convention’s essential function of surrogate human rights protection.<sup>8</sup>

As noted earlier, the “social perceptions” test (to which “social visibility” is related) bears a clear relationship to the concept of attributed characteristics and beliefs. *See* Basic Law Manual, *supra* at 36, n. 9 (1994). Once the concept of attributed characteristics and beliefs is extended to social group, then the relevant inquiry is not how the group is perceived by other members of society in general; rather, one must examine the manner in which the persecutor views the group. *See* *Desir v. Ilchert*, *supra*. *See also* Matter of S-P-, 21 I&N Dec. 486 (BIA 1996) (upholding the principle of attributed characteristics and beliefs in the context of political opinion). The claimants in the present case will be persecuted not only because of who they are (believers in religious norms which dictate humane practices towards other members of the community), but also for what they are perceived to be (principled opponents of gang practices). As Respondents’ testimony regarding the fate of others similarly situated illustrates, Respondents have a characteristic or belief which has become transfixed in the eyes of the persecutor and is therefore immutable through the passage of time.<sup>9</sup>

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<sup>8</sup> One important decision arising at the immigration court level illustrates how *S-E-G-* could have been decided favorably under the *Acosta* criteria. The facts of *S-E-G-* parallel the facts of *In re D-V-*, [alien registration number not available], *slip op.*, (IJ Castro, Sept. 9, 2004), *available at* [http://www.refugees.org/uploadedFiles/Participate/National\\_Center/Resource\\_Library/H.002.pdf](http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/H.002.pdf). *In re D-V-* concerned a male Honduran youth who fled his country to escape the forced recruitment of MS-13 because his refusal to join the gang invited violence and death threats against him. *D-V-* petitioned for asylum based on both the political opinion and the social group ground, urging that *Acosta* controlled. *D-V-* asserted that he was a “member of the particular social group [consisting of those] who have been actively recruited by gangs, but who have refused to join because they oppose the gangs.” *Id.* at 9–10. The IJ found that *D-V-* had suffered past persecution at the hands of the gang and was presumed to have a well-founded fear of future persecution if he was returned to Honduras. *Id.* at 8. The IJ further found that *D-V-* was targeted for persecution because of his refusal to join the gang which characteristic he should not be required to change. *Id.* at 11. The IJ found that the Honduran Government was unable or unwilling to protect *D-V-* from persecution. *Id.* at 15. The IJ also found that relocation within Honduras would not be reasonable. *Id.* at 16. *D-V-* was granted asylum.

<sup>9</sup> The Seventh Circuit has recently expanded on its treatment of “membership in a particular social group” to adopt a comparable analysis in the case of former members of MS-13 who are persecuted as such. Normally, the appeals

Finally, the Board ruled that the claimants in *S-E-G-* would not be differentially treated upon return in that they would not suffer a greater degree of harm than other members of the Salvadoran population. This is entirely inconsistent with modern asylum jurisprudence which teaches that one can be persecuted either individually or as the member of a group. *See* 8 CFR § 1208.13(b)(2)(iii)(A): asylum claimants need not demonstrate that they would be individually targeted so long as they can show that they would be mistreated as the members of a group which itself has been the victim of a pattern or practice of historical persecution. *See* 8 CFR § 208.13(b)(2)(iii)(A). *See also* *Matter of H-*, 21 I&N Dec. 337 (BIA 1996), adopting in effect the “non-comparative” approach to adjudicating asylum claims arising from civil war scenarios. Expert testimony adduced below showed that the gangs could easily identify those who had resisted gang membership, punishing them for their refusal. The Respondents’ testimony, found to be credible, showed that, according to reports, a boy had been killed for declining gang membership a few months before the respondents’ flight.

That one can be persecuted either individually or as the member of a group is also the broad position maintained by respected treatises. It is received doctrine that an asylum claimant is not required to show that he or she would be differentially treated upon return, -- only that there is a well-founded fear of persecution and that this fear is connected to a protected ground (the “non-comparative” analysis). As James Hathaway writes:

In sum while modern refugee law is concerned to recognize the protection needs of particular claimants, the best evidence that a person faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country of origin. In the context of claims derived from situations of generalized oppression, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly-based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm in her country, and if that risk is grounded in their civil or political status, then in the absence of effective national protection she is properly considered to be a Convention refugee. As Atle Grahl-Madsen has observed, “[o]nce a person has been subjected to a measure of such gravity that we consider it persecution, that person is persecuted in the sense of the Convention, irrespective of how many others are subjected to the same or similar measures.” JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS*, *supra* at 97 (footnotes omitted).

To the same effect, *see* DEBORAH ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* 73 (3d ed. 1999), and *citing* *Kotas v. INS*, 31 F.3d 847 (9th Cir. 1994): There must be some evidence showing that members of the group have been placed at risk; but, once that is done, the size of the targeted group is irrelevant. “Where the harm feared constitutes persecution, the applicant’s situation is ‘not alleviate[d] ... in the very least if the measure is part of a general policy, or if

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court held, being a member of a gang is not a characteristic that he or she cannot change. “But if he can’t resign, his situation is the same as that of a former gang member who faces persecution for having quit – the situation which Ramos appears to be in. A gang is a group, and being a former member of a group is a characteristic impossible to change, except perhaps by rejoining the group.” *Benitez Ramos v. Holder*, Case No. 09-1932 (7th Cir. Dec. 15, 2009) (slip op. at 4). The position of the Respondents in this case is clearly analogous: they have refused to be inducted into gang membership, a position which they cannot change except by joining the group.

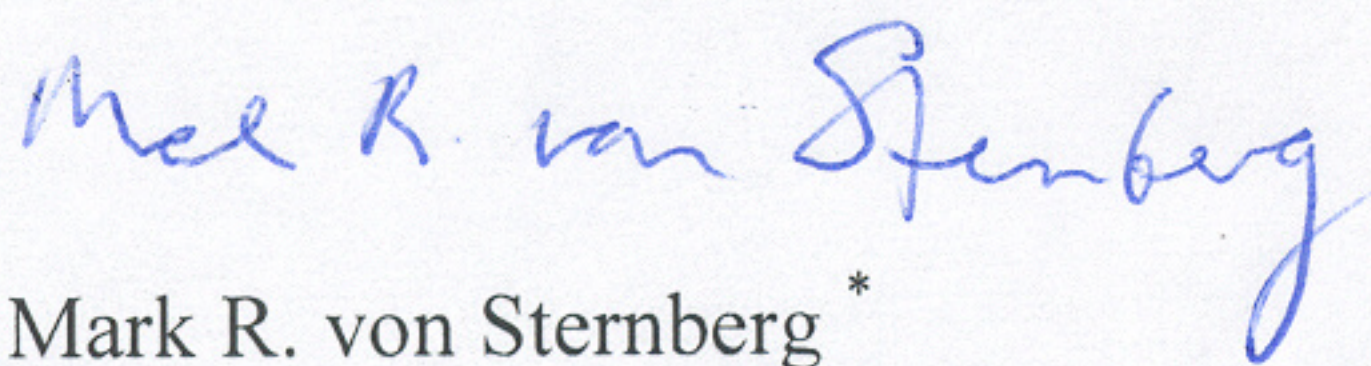


whole strata of the population are subjected to the same kind of measure.” *Id.*, citing 1 ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 213 (1966).

#### IV. Conclusion

The essential position of the Committee may be succinctly stated. The “social visibility” requirement constitutes an erroneous evidentiary burden to impose on those seeking asylum based on the fourth ground of refugee protection. The Board should restore the essential guidance of the *Acosta* analysis, adopting the social perceptions test only when that fails. In the case before the Attorney General, application of the *Acosta* criteria would lead to refugee recognition based on the second prong of the decision, associations so fundamental to the asylum seeker’s identity or conscience that she should not be forced to relinquish them.

Respectfully submitted,



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