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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:	)
AMICUS INVITATION No. 16-08-08	)

REQUEST OF SCHOLARS OF INTERNATIONAL REFUGEE LAW TO APPEAR
AS *AMICI CURIAE*

Under the Board of Immigration Appeals Practice Manual Chapter 2.10, the following *amici curiae* respectfully request leave to file an amended brief in response to Amicus Invitation No. 16-08-08. *Amici curiae* Scholars of International Refugee Law filed a brief on November 7, 2016 in response to this invitation. Their brief was accepted and placed into the record on January 13, 2017. *Amici* submit this new proposed brief as a substitute for their November 7, 2016 brief due to the government's recent reversal of its position recognizing the availability of a duress exception to the persecutor bar.

On April 26, 2017, the Department of Homeland Security [hereinafter "the Department"] withdrew from the position in its April 20, 2016 brief and submitted a new, amended supplemental brief, rejecting the existence of a duress exception to the persecutor bar. In this new brief, the Department argues that a duress exception is unnecessary to fulfill U.S. treaty obligations and is, therefore, improper as part of the Board's interpretation of the asylum and withholding provisions in U.S. law.

Amici submit this proposed amended brief to replace in full their prior November 7, 2016 brief in order to address the Department's new, contradictory position based on their extensive scholarship in the area of international refugee protection. *Amici curiae* have expertise in international refugee law, and many of them have appeared as *amici curiae* before the U.S. Supreme Court, including in *Negusie v. Holder*, 555 U.S. 511 (2009). *See* Brief for Scholars of Int'l Refugee Law as *Amici Curiae* in Support of Petitioner (2008), (No. 07-499), 2008 WL 2550611.

Deborah Anker is the author of the leading treatise on comparative U.S. and international refugee law, *Law of Asylum in the United States* (2016), which focuses on bringing international law to bear on American refugee law. She is a Clinical Professor of Law at Harvard Law School

and Director of the Harvard Immigration and Refugee Clinical Program. Professor Anker has authored numerous publications on international law, refugee law, and U.S. immigration law. Her works have been frequently cited by courts and tribunals in the United States and other countries. A Fellow of the American Bar Association, she has served as a legal advisor and trainer on refugee issues to the United Nations High Commissioner for Refugees (UNHCR) and the U.S. DHS of Justice.

Catherine Dauvergne is the Dean and Professor of the Peter A. Allard School of Law at the University of British Columbia where she teaches courses on refugee, immigration and citizenship. She has written three books that take a broad perspective on the theoretical underpinnings of these areas of law, including considering how human rights principles and discourses fit into a migration and citizenship framework. From 2013 to 2015, Dauvergne was the Research Director for the Michigan Colloquium on Challenges to International Refugee Law. In 2012, Catherine Dauvergne was made a Fellow of the Trudeau Foundation in recognition of her contributions to public discourse in Canada.

Geoff Gilbert is former Editor-in-Chief of the *International Journal of Refugee Law*, the leading journal in the field of refugee law. He is Professor of Law at the University of Essex School of Law and a scholar of international human rights law, international refugee law, and international criminal law. Professor Gilbert is the author of *Responding to International Crime* (2006) and was commissioned by the UNHCR to write the Global Consultation paper on Exclusion from Refugee Status for the fiftieth anniversary of the 1951 Convention. He has served as an advisor to the UNHCR, the Organization for Security and Cooperation in Europe, and the Council of Europe in matters of refugee law, terrorism, and human rights.

Guy S. Goodwin-Gill is Emeritus Fellow of All Souls College, Oxford, Emeritus Professor

of International Refugee Law, University of Oxford, and a Barrister at Blackstone Chambers, London, where he practises in public international law generally, and in human rights, citizenship, refugee and asylum law. He is the Founding Editor of the *International Journal of Refugee Law* and was Editor-in-Chief from 1989-2001. Professor Goodwin-Gill is the author, with Jane McAdam, of a leading treatise, *The Refugee in International Law* (3d ed. 2007). Among his other books are *Child Soldiers: The Role of Children in Armed Conflict* (1994) (with Ilene Cohn), *Free and Fair Elections*, (2d ed. 2006), and *International Law and the Movement of Persons between States* (1978). More recent publications include "The Mediterranean Papers," *International Journal of Refugee Law* 276 (2016) and "The Dynamic of International Refugee Law," 25 *International Journal of Refugee Law* 651 (2013). He has been regularly cited by the highest courts of several jurisdictions, including in the U.S. in prior refugee law cases.

James C. Hathaway is the James E. and Sarah A. Degan Professor of Law at the University of Michigan, where he is Director of the Program in Refugee and Asylum Law. He is also Distinguished Visiting Professor of International Refugee Law at the University of Amsterdam. Hathaway previously held the positions of Dean and William Hearn Chair of Law at the University of Melbourne, and Professor of Law and Associate Dean at Osgoode Hall Law School in Canada. He is the author of two leading treatises on international refugee law, *The Rights of Refugees under International Law* (2005) and *The Law of Refugee Status* (2014, with Michelle Foster). His analysis of refugee law has been relied upon by leading courts around the world, including the British House of Lords and Supreme Court, the High Court of Australia, and the Supreme Court of Canada.

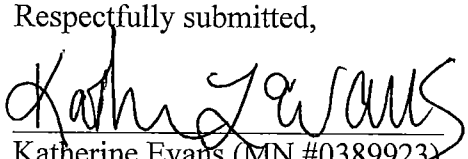
Audrey Macklin is a Professor at the Faculty of Law and Chair in Human Rights Law at the University of Toronto School of Law, where she teaches courses on immigration and refugee

law and administrative law. She was formerly a member of Canada's immigration and refugee board. She has published extensively on citizenship and the status of refugees, including articles in the *European Journal of Migration and Law*, *Georgetown Immigration Law Journal*, and *Human Rights Quarterly*. She has received grants from the United Nations Population Fund, the Law Commission of Canada, and the Social Sciences and Humanities Research Council for her research on refugees, law and citizenship, and the legal aspects of conflict-induced migration by women.

Jane McAdam is co-author (with Guy S. Goodwin-Gill) of a leading treatise on refugee law, *The Refugee in International Law* (3d ed. 2007). She is Scientia Professor of Law and Director of the Andrew & Renata Kaldor Centre for International Refugee Law at the University of New South Wales. Her publications include *Complementary Protection in International Refugee Law* (2007) and *Forced Migration, Human Rights and Security* (2008). She is the Associate Rapporteur of the Convention Refugee Status and Subsidiary Protection Working Party for the International Association of Refugee Law Judges and she is editor of the *Refugee Survey Quarterly*'s issue on the sixtieth anniversary of the Universal Declaration of Human Rights. She is also Editor-in-Chief of the *International Journal of Refugee Law*.

These individuals respectfully request leave to appear collectively as *amici* and to replace their November 7, 2016 brief, previously accepted by the Board, with the new, amended brief, attached hereto. Should the Board choose to acknowledge this submission, please acknowledge: Katherine Evans and Sabrineh Ardalan.

Respectfully submitted,



Dated: July 10, 2017

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PROPOSED AMENDED BRIEF OF *AMICI CURIAE*
SCHOLARS OF INTERNATIONAL REFUGEE LAW

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are legal scholars who have studied and published on the status and rights of refugees under U.S. and international law, on exclusion from refugee status, and on international criminal law. *Amici* have a strong interest in ensuring that U.S. law is properly interpreted in a manner consistent with the United States' obligations under the 1967 Protocol Relating to the Status of Refugees [hereinafter "Protocol"] and the 1951 United Nations Convention Relating to the Status of Refugees [hereinafter "Convention"]. The U.S. Supreme Court has previously consulted and relied on the opinions of leading scholars interpreting those instruments. *See, e.g., I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 439–40 & 451 (1987); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 182 & 182 n.40 (1993).

SUMMARY OF ARGUMENT

The U.S. Supreme Court in *Negusie v. Holder* rejected the rule set forth by the Board of Immigration Appeals [hereinafter "the Board"] that "motive and intent are irrelevant" to the persecutor bar contained in the Refugee Act, and concluded instead that "coercion or duress" may indeed matter. 555 U.S. 511, 517 & 522–23 (2009). The Court then remanded the case to the Board so that it could perform a more complete analysis. *Id.* at 524. In response to the Supreme Court's reversal and remand, the Board invited interested individuals to present argument on: (1) whether an involuntariness or duress exception exists to limit the application of the persecutor bar contained in the asylum and withholding of removal statutes, INA §§ 208(b)(2)(A)(i) & 241(b)(3)(B)(i); and if so, (2) the proper standards to govern such an exception. The Department of Homeland Security [hereinafter "DHS"] submitted thereafter a brief endorsing the existence of a duress exception to the persecutor bar given the purpose of the Refugee Act of 1980, which incorporated into U.S. law the 1967 Protocol and the 1951 Convention. *See* Supplemental Br. for DHS (Apr. 20, 2016) at 10–11 [hereinafter "2016 DHS Br."]. *Amici*'s original brief submitted in November 2016 expanded

on DHS's recognition of the duress exception and sought to provide the Board with guidance as to the proper standard for duress in keeping with the Convention's drafting history, international law, and the practice of State Parties.

Just one year later, however, in April 2017, DHS abandoned its prior interpretation of the persecutor bar and submitted a new brief, arguing that a duress exception is unnecessary to fulfill U.S. treaty obligations under the Refugee Convention and Protocol and that therefore the persecutor bar in U.S. law should not be interpreted to contain an exception for conduct under duress. Substituted Supplemental Br. for DHS (Apr. 26, 2017) at 10–16 [hereinafter "2017 DHS Br."]. DHS's new position contravenes its prior interpretation, flies in the face of the Convention's purpose, history, and text, fails to comport with international law and practice, and disregards well-established U.S. precedent in regards to international treaty law. *Amici* thus submit a new proposed brief to address DHS's contradictory position. This brief replaces *amici*'s November 7, 2016 brief in its entirety and addresses in one place (1) why the persecutor bar cannot be properly construed to include acts committed under duress, and (2) why the Board should follow the standard for duress that was widely-recognized at the time Congress adopted the Refugee Act.

Section I explains that in keeping with the history, purpose, and text of the Refugee Convention along with statements of congressional intent (and DHS's own prior position), the persecutor bar cannot apply where the acts charged were committed under duress. Next, *amici* urge the Board to adopt the well-settled position, recognized under U.S. and international law and by other State Parties, that membership alone in a persecutory group is insufficient to trigger the persecutor bar. Section III describes the standard for duress that was well-established at the time the Refugee Convention was drafted and the Refugee Act was adopted, which the Board should follow accordingly. Finally, *amici* argue that barring protection for otherwise qualified refugees is

neither reasonable nor just. Instead, the Board should respond to the repeated concerns expressed by the U.S. Supreme Court regarding a categorical persecutor bar and arrive at an interpretation consistent with its history in U.S. and international law that excludes acts committed under duress.

ARGUMENT

I. Acts Committed under Duress Are Outside the Scope of the INA's Persecutor Bars.

Contrary to DHS's assertions in its April 2017 brief, the Board would not be reading into the INA an exception that does not exist by recognizing that the persecutor bar does not encompass acts committed under duress. *See* 2017 DHS Br. at 10–16. Rather, the Board would be affording the persecutor bar its proper scope. As DHS itself acknowledged in its prior brief, "the [U.S.] Supreme Court has already found substance to the contention that coercion or duress is relevant in determining if an [applicant for protection] assisted or otherwise participated in persecution." 2016 DHS Br. at 10 (internal quotations omitted). The history, purpose, and plain language of the Refugee Convention and Protocol, as well as long-standing precedent incorporating these international instruments into U.S. law belie DHS's new, unsubstantiated claims.

A. DHS Fundamentally Misunderstands the Context and Content of the U.N. Convention and Protocol Relating to the Status of Refugees.

DHS's new position that the Refugee Convention and Protocol do not mandate an assessment of duress in order for adjudicators to apply the persecutor bar, *see* 2017 DHS Br. at 10–16, is completely unfounded. The history of the Convention and its connection to the post-World War II military tribunals reflect the drafters' intent to exclude from refugee protection only those who bore individual responsibility for their actions, rather than those who acted under duress. Indeed, the plain language of the exclusions contained in the Refugee Convention and Protocol invokes principles of criminal responsibility and individual culpability, which DHS fails to acknowledge or consider in its new brief. Following the humanitarian crisis of the Holocaust and

World War II, the UN Member States drafted the Refugee Convention, and subsequently the Protocol, to ensure that persons at risk of persecution in their home countries could find refuge elsewhere. *See* Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* 19 (3d ed. 2007). The Convention established an international protection regime that ensures the security, legal protection, and human dignity of individuals victimized by persecution. *See* James C. Hathaway, *The Rights of Refugees under International Law* 4–5 (2005). The United States acceded to the Protocol in 1968, thereby obligating itself to recognize qualified persons as refugees and to comply with the Convention. *See* UN Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267, art. 1(1); *see, e.g.*, *I.N.S. v. Stevic*, 467 U.S. 407, 416 (1984).

Article 1F of the Convention contains the relevant exclusions from refugee protection. It provides:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, art. 1F. Although the language of the U.S. persecutor bar under the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102, is not identical to Article 1F of the Refugee Convention, the Board has recognized that Congress intended the persecutor bar at issue in this case to be construed consistent with the Convention's exception in Article 1F(a). *See Matter of Alvarado*, 27 I&N Dec. 27, 30 n.3 (BIA 2017); *see also* Br. for Scholars of Int'l Refugee Law as *Amici Curiae* to the U.S.

Supreme Court 15–17 (2008) (reviewing extensive legislative history). Additionally, courts and the Board must presume that congressional acts are consistent with U.S. treaty obligations absent explicit congressional intent to the contrary. *See Rest. (Third) of Foreign Rel. L. of the United States* § 114 (1987); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).[1]

1. The Refugee Convention balances the need for protection against the need for accountability.

The purpose of the Refugee Convention, drafted after WWII, is to provide surrogate protection to individuals who fear harm in their countries of origin—not to exclude bona fide refugees for acts performed under duress and put them at risk of grave harm if returned to a country where they face severe harm or death. *See* Deborah E. Anker, *Law of Asylum in the United States* § 6.1 (2017). Exclusion under Article 1F is thus grounded in the need to preserve "the moral authority and political viability of the refugee regime as a whole." James C. Hathaway & Michelle Foster, *The Law of Refugee Status* 529–30 (2d ed. 2014); James C. Hathaway, *The Michigan Guidelines on the Exclusion of International Criminals*, 35 Mich. J. Int'l L. 3, 7 (2013) ("The fundamental object and purpose of Article 1(F)(a) is to exclude persons whose international criminal conduct means that their admission as a refugee threatens the integrity of the international refugee regime.").

Excluding persons from refugee status who are not criminally responsible for their actions, as DHS seeks to do, does not serve this purpose; rather, it undercuts the protective goals of the Convention. *See Ezokola v. Canada (Citizenship & Immigr.)*, [2013] 2 S.C.R. 678, para. 36, 68–71 & 86 (Can.) (holding that "a voluntary, knowing, and significant contribution to the crime or criminal purpose of a group" is required under the Refugee Convention, the international law to

[1] DHS's argument that the Board is not required to "interpret the INA persecutor bar so as to incorporate customary international law," 2017 DHS Br. at 16 (citing *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1152–53 (7th Cir. 2001)), is inapposite. The United States is a party to, and thus obligated to conform its law to, the Protocol, which incorporates the terms of the Convention.

which Article 1F expressly refers, the approach to complicity taken by other State Parties to the Refugee Convention, and under fundamental criminal law principles); *see also Pushpanathan v. Canada (Minister of Citizenship and Immigr.)*, [1998] S.C.R. 982, para. 63 (Can.) (noting that under the Refugee Convention, "those who are responsible for the persecution should not enjoy" protection); Joined Cases C-57/09 & C-101/09, *Bundesrepublik Deutschland v. B and D*, 2010, EU:C:2010:661, Celex No. 609CJ0057 (describing the function of Article 1F in excluding from refugee status persons considered to be undeserving of protection).

Accordingly, the text of Article 1F should be narrowly interpreted, according to its plain language, to exclude from protection only those persons who are undeserving of the protection because they are "seeking to evade legitimate prosecution or punishment for serious domestic crimes, . . . have committed serious international crimes, . . . [or are] guilty of actions contrary to the principles and purposes of the UN." Hathaway & Foster, *supra*, at 524; *see* Anker, *supra*, § 6.1; UN High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 149 (1979, rev. 2011) [hereinafter "*UNHCR Handbook*"] (explaining that the exclusion clauses must be interpreted restrictively considering the serious consequences of exclusion); *see also Al-Sirri v. Sec'y of State for the Home Dep't*, [2012] UKSC 54 [16] (finding that Article 1F(c) should be "interpreted restrictively and applied with caution").

2. The text of Article 1F requires a finding of individual culpability prior to exclusion.

DHS now argues that "the relevant international treaties do not suggest that the INA's persecutor bar should be read to incorporate a duress exception" and asserts that applying the bar regardless of duress would not violate U.S. international treaty obligations. 2017 DHS Br. at 10. The text of Article 1F, however, demonstrates just the opposite.

The text of Article 1F(a), to which the INA's persecutor bar conforms, underscores the Convention's requirement of culpability and moral accountability for a person to be excluded from protection. Article 1F(a) requires "a **crime** against peace, a war **crime**, or a **crime** against humanity, **as defined in the international instruments** drawn up to make provision in respect of such crimes." Convention, art. 1F(a) (emphasis added). These terms target only culpable individuals: criminals whose conduct subjected them to extradition or international criminal proceedings and whose unworthiness would weaken public support for the refugee regime. The text thus expressly incorporates international criminal law principles, including common defenses to liability, and demonstrates that Article 1F is ultimately concerned with those culpable individuals who bear responsibility for persecuting others. *See* Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses, in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 427–29 (Erika Feller et al. eds., 2003).

Article 1F(a) not only uses terms that reflect criminal liability, it also references "international instruments" that incorporate defenses to liability, including duress. This formulation "defined the scope of Art. 1(F)(a) exclusion in an open-ended way . . . that affirms the importance of taking account of contemporary understandings of relevant crimes." Hathaway & Foster, *supra*, at 569 & 585. At the time it was drafted, the "international instruments" referred to in Article 1F included the foundational documents for the trials of war criminals following WWII, as well as the 1949 Geneva Conventions and the 1950 report of the International Law Commission ("ILC"). *See* UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* ¶¶ 23–24 (2003) [hereinafter "*UNHCR Background Note*"].

Indeed, an initial draft of Article 1F(a) specifically referred to the Charter of the

International Military Tribunal [hereinafter "Charter"], and thus to the requirements for and defenses to the crimes tried in the tribunals at that time. Goodwin-Gill & McAdam, *supra*, at 163–65. The Charter defined crimes against humanity to include "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war; *or persecutions on political, racial or religious grounds* in connection with any crime within the jurisdiction of the Tribunal." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal, art. 2(6)(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 (emphasis added).

The final draft of Article 1F referenced "international instruments" more generally, so as to incorporate the ongoing work of the ILC to define these offenses and to allow for evolution in the standards for criminal liability. *See* Atle Grahl-Madsen, 1 *The Status of Refugees in International Law* 276 (1966); Hathaway & Foster, *supra*, at 569 & 585. The military tribunals and the ILC explicitly recognized that conduct performed under duress did not confer individual responsibility. *See* UN War Crimes Comm'n, XV *Law Reports of Trials of War Criminals* 174 (1949) [hereinafter "UN War Crimes Law Report"]. The International Military Tribunal, for example, held that coercion deprived a defendant of any "moral choice," thus excusing what was otherwise criminal conduct. *See* 1 *Trial of the Major War Criminals before the International Military Tribunal* 224 (1947) ("The true test . . . is . . . whether moral choice was in fact possible."). *See also* Report of the UN Int'l Law Comm'n to the General Assembly, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries* 375 (1950) (affirming this test as Nuremberg Principle IV).

U.S. tribunals created to try individuals charged with committing crimes defined in the Charter likewise recognized the duress defense as a way to distinguish when an individual was

"deprive[d] . . . of the freedom to choose the right and refrain from the wrong." *See, e.g.*, The *High Command* Case, *in* 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 509, cited in Report of the Int'l Law Comm'n to the General Assembly on the Work of its Thirty-Ninth Session II(2), U.N. Doc A/CN.4/SER.A/1987/Add.1 (Part 2), at 8 [hereinafter "the *High Command* Case"]; The *I.G. Farben* Case, *in* 8 *Trial of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 1176 (1952) [hereinafter "the *I.G. Farben* Case"] (noting that duress "is a complete defense"). As the Tribunal in the *Einsatzgruppen* case stated, "there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. . . . No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever." The *Einsatzgruppen* Case, *in* 4 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 480 (1950) [hereinafter "the *Einsatzgruppen* Case"].

The standards developed by these tribunals were well-established at the time of the Convention's drafting. *See generally* Kate Evans, *Drawing Lines Among the Persecuted*, 101 Minn. L. Rev. 453, 524–33 (2016) (describing the military tribunal jurisprudence on duress and its connection to the Refugee Convention). The UN General Assembly affirmed the principles set out in the Charter and the judgment of the International Military Tribunal. G.A. Res. 95(I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236 (1946). The UN War Crimes Commission reviewed 1,900 decisions from these tribunals and found duress to be a broadly recognized defense. UN War Crimes Law Report, *supra*, at 174. The ILC subsequently reviewed these standards for culpability and designated duress as an established exception to criminal liability. *See* Jean Spiropoulos, Special Rapporteur, *Draft Code of Offences Against the Peace and Security*

of Mankind 275, 2 Yearbook of the Int'l Law Comm'n, U.N. Doc. A/CN.4/25 (1950).

Concern for freedom of choice and moral responsibility thus permeated the environment in which the Refugee Convention was drafted. *See* Jean Spiropoulos, Special Rapporteur, *Second Report on a Draft Code of Offences Against the Peace and Security of Mankind* 52–53, 2 Yearbook of the Int'l Law Comm'n, U.N. Doc. A/CN.4/44 (1951) (discussing the need to incorporate the Nuremberg principles into the draft offenses, including the requirement for moral choice). Through referencing "international instruments" in the text itself, the Convention's drafters understood that the principles enunciated by post-war military tribunals—including the need to consider individual culpability and whether acts charged were committed voluntarily or not—would apply to exclusion decisions under the Convention. *See* Goodwin-Gill & McAdam, *supra*, at 163–68; Grahl-Madsen, *supra*, at 273–77; Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretations; a Commentary* 66–67 (1953).[2] At no point did these tribunals or the drafters of the Convention contemplate that actions taken under duress would be encompassed by the exclusions in Article 1F.

DHS's rejection of a duress exception thus fails to properly take into account the text and purpose of Article 1F and ignores the reality of persecution, where persecutors may inflict harm by forcing individuals to commit certain acts against their will in order to make them suffer. *See, e.g.*, *Lukwago v. Ashcroft*, 329 F.3d 157, 169–70 (3d Cir. 2003); *Negusie*, 555 U.S. at 514–15. As

[2] *See infra* Part III. The ILC has, to this day, recognized intent as an important requirement in assessing culpability for these crimes, including in its recent efforts to draft a statute punishing "crimes against humanity." *See* ILC, *Summaries of the Work of the International Law Commission*, http://legal.un.org/ilc/summaries/7_7.shtml; Sean D. Murphy, *First Report on Crimes against Humanity* ¶ 13, U.N. Doc.A/CN.4/680 (2015) (using the Rome Statute's definition of crimes against humanity, which includes "persecution" as well as a blanket definition including "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."); *see also* Sean D. Murphy, *Second Report on Crimes against Humanity* ¶ 2, U.N. Doc.A/CN.4/690 (2016) (noting that the ILC was "proceeding in a manner that was complementary to the system of the Rome Statute of the International Criminal Court"); The Rome Statute art. 7(1), 2187 U.N.T.S. 90, *entered into force* July 1, 2002 [hereinafter "The Rome Statute"].

DHS recognized in its 2016 brief, principles of international law, including those followed by the post-war military tribunals, support a duress exception where, *inter alia*, "the act charged was done to avoid an immediate danger both serious and irreparable." 2016 DHS Br. at 27 (quoting UN War Crimes Law Report, *supra*, at 174). DHS's new and erroneous interpretation of the Refugee Convention contravenes the Convention's widely-recognized history and context, as well as its explicit text.

3. State Parties to the Refugee Convention do not have discretion to exclude individuals who are charged with acts committed under duress.

DHS improperly relies on a passage from the 1991 edition of the *Law of Refugee Status* in support of its contention that State Parties to the Convention have broad discretion in interpreting the scope of the exclusion clause in Article 1F, and the existence (or lack thereof) of a duress exception. *See* 2017 DHS Br. at 13–14. Indeed, the quote from the *Law of Refugee Status* is taken out of context, and DHS fails to note that, in the same 1991 edition, Hathaway underscores that "*[i]ntention is a necessary element of . . . an [Article 1F] offence.*" James C. Hathaway, *The Law of Refugee Status* 217–18 (1st ed. 1991) (emphasis added). The new edition clarifies that states may vary in the type of evidence required to demonstrate eligibility for protection, but states' interpretation of the scope of the exclusion clause must nonetheless fall within the prescribed limits. *See* Hathaway & Foster, *supra*, at 532 & 535. The current edition further explains that even with this evidentiary flexibility, State Parties "must first . . . determine[] that whatever acts are found to have been committed may broadly be said to meet the requirements for criminal liability under the relevant legal standard." *See id.* at 536. This invocation of criminal liability not only emphasizes the importance of determining intent prior to excluding an otherwise deserving individual from protection, but also gives proper meaning to the terms of the Convention and reflects its history and purpose.

B. *Congress Incorporated the Scope of the Refugee Convention's Exclusions into U.S. Law When It Adopted the Refugee Act.*

Congressional intent to conform U.S. law to the obligations created by the Refugee Convention and Protocol is beyond dispute. *See Negusie*, 555 U.S. at 519 (noting the Refugee Act was "enacted to reflect principles set forth in international agreements"); *see also Cardoza-Fonseca*, 480 U.S. at 432–33 & 436–37; *Matter of Alvarado*, 27 I&N Dec. at 30 n.3. As DHS initially recognized, the Refugee Act is inextricably linked to, and must therefore be interpreted in light of, U.S. obligations under the Protocol and the Refugee Convention. 2016 DHS Br. at 10–11.

Though DHS asserts that there is no evidence of congressional intent to limit the persecutor bar to culpable acts, 2017 DHS Br. at 25, the historical record contains ample statements to the contrary. With the Refugee Act, Congress excluded "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion" from the definition of a refugee. Refugee Act of 1980 §§ 203(e) & 201(a). The House Judiciary Committee explained that this provision was "consistent with the U.N. Convention (which does not apply to those who, *inter alia*, 'committed a crime against peace, a war crime, or a crime against humanity')" and reflected the exception "provided in the Convention relating to aliens who themselves participated in persecution . . . ." H.R. Rep. No. 96–608, at 10 & 18 (1979). The Committee stated that the Act will "finally bring the United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the [Convention and Protocol]." *Id.* at 9; *see also* H.R. Rep. No. 96–781, at 19–20 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. 160, 160–61. The Refugee Act's legislative history thus demonstrates Congress' intent to incorporate the exclusions contained in the Convention and Protocol into U.S. law. At the time the Refugee Act was adopted, those exclusions were well-understood not to encompass acts performed under

duress. *See supra* Section I.A.

The Refugee Act built on legislation from two years earlier that inserted the persecutor bar throughout the Immigration and Nationality Act (INA), including as a bar to withholding of deportation—the precursor to withholding of removal. Holtzman Amendment, Pub. L. 95–549 §§ 243(h) & 212(a)(33) (1978) (limiting bar to persecution in connection with the Nazi government). The House Judiciary Committee report accompanying the Holtzman Amendment explained "that the bar would require difficult and very delicate determinations," indicating that it did not foresee an absolute bar to protection. Evans, *supra*, at 516 (quoting H.R. Rep. No. 95–1452, at 6–8 (1978)) (internal quotation marks omitted). The Committee "described the INA's provision for withholding of deportation, [as] amended . . . to include a persecutor bar, as meeting the United States' obligations under the [Protocol] and 'coextensive' with the [Convention]." *Id.* (quoting H.R. Rep. No. 95–1452, at 5). The Committee further explained that the "accepted precept of international law that 'persecution' is a 'crime against humanity'" should guide the administration of the bar, consistent with "international materials on the subject such as opinions of the Nuremberg tribunals." *Id.* (quoting H.R. Rep. No. 95–1452, at 7–8). The Committee emphasized that "the conduct envisioned [by the persecutor bar] must be of a deliberate and severe nature." *See id.* at 516–17.[3] Conduct performed under duress, however, did not result in liability at the

[3] DHS invokes the Holtzman Amendment's persecutor bar and the "objective effects" test that the Board articulated in *Matter of Laipenieks*, 18 I&N Dec. 433, 465 (BIA 1983), in support of its position. 2017 DHS Br. at 38 n.20. That case, however, involved Laipenieks' voluntary membership in the Latvian Political Police under Nazi direction and his awareness that his actions as an investigator and interpreter sometimes led to the detention, torture, and death of his subjects. 18 I&N Dec. at 434–36, 449, 450–52 & 458. The Board's decision turned on the significance of Laipenieks' personal motivation for his actions, which the Board found irrelevant. *Id.* at 464. The case is thus akin to *Alvarado*, which distinguishes an individual's particular motive from the reasons for a group's persecutory acts. While the Board in *Laipenieks* also examined the legislative history behind the Holtzman Amendment, it did so retroactively through the lens of *Fedorenko v. United States* and before *Negusie* was decided. *See infra* Section IV. Congressional statements concerning the Refugee Convention, the role of the Nuremburg jurisprudence, and the equivalent exclusion for crimes against humanity in the Convention are better understood as consistent with similar statements concerning Congress' intent for key terms in the Refugee Act.

Nuremberg tribunals nor is such conduct deliberate or intentional in the way Congress required for the persecutor bar to apply.

Contrary to DHS's contention, the legislative history of the persecutor bar is replete with statements from Congress that the bar was not intended to be absolute, but rather, bound by the culpability requirements recognized by the military tribunals and other international instruments and then incorporated into the Refugee Convention. Because duress prevented culpability before the tribunals, the persecutor bar likewise cannot encompass acts due to duress.[4]

C. *Given Congress's Explicit Intent to Conform U.S. Law to the Protocol to the Refugee Convention, UN Guidance and the Practice of other State Parties Must Be Considered When Interpreting the Persecutor Bar.*

Both the guidance set out in the UNHCR Handbook and the practice of other State Parties should inform the Board's interpretation of U.S. obligations under the Refugee Convention and Protocol. The U.S. Supreme Court, as well as other courts, has recognized the UNHCR Handbook "as a significant source of guidance with respect to the United Nations Protocol." *See* Fatma E. Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U. J. Int'l L. & Pol. 391, 418 (2013) (quoting *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576 (9th Cir. 1986)); *see also Cardoza-Fonseca*, 480 U.S. at 439 n.22 ("[The UNHCR Handbook] has been widely considered useful in giving content to the obligations that the Protocol establishes."); *Negusie*, 555 U.S. at 536–37 (Scalia, J., concurring) ("[T]he Court has looked [to the UNHCR Handbook] for guidance in the past."); Anker, *supra*, § 1 (explaining that U.S. case law, including that of the Board, repeatedly recognizes the interpretive weight of the UNHCR Handbook and other UN

[4] DHS asserts that there is no place for principles of criminal law in administrative proceedings, but this claim ignores clear confines of the Convention's exclusions and the overwhelming evidence that Congress meant to limit the persecutor bar to the scope of the Convention's exclusions. The civil nature of deportation says nothing about the moral considerations that underpin the Refugee Convention. *See* 2017 Br. of *Amici* NIJC and Advocates for Human Rights at 12–14 (2017). Additionally, the Supreme Court's restriction of certain procedural protections in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) is inapposite to the substantive scope Congress gave the persecutor bar.

instruments).

The UNHCR has repeatedly recognized that an individual who acts under duress lacks the requisite culpability to be excluded from refugee protection. *See* Br. of *Amici Curiae* UNHCR at 13 (2008). The UNHCR Handbook highlights the importance of the post-World War II military tribunals in relation to interpreting the exclusion clauses and emphasizes that when applying the exclusion clauses, "all the relevant factors—including any mitigating circumstances—must be taken into account." *UNHCR Handbook, supra*, ¶¶ 148–50 & ¶ 157. UNHCR guidance further underscores that Article 1F requires a finding of "individual responsibility," which "flows from the person having committed, or made a substantial contribution to the commission of a criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct." UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* ¶ 18 (2003) [hereinafter "*UNHCR Exclusion Guidelines*"]; *see also UNHCR Background Note, supra*, ¶ 51. Such individual responsibility does not, however, exist in the face of duress. *UNHCR Exclusion Guidelines, supra*, ¶ 22; *see also UNHCR Background Note, supra*, ¶¶ 66–67 & ¶ 69. These sources thus call for an individualized assessment of the applicant's "role and responsibility" as well as a finding of "intent" and "knowledge" regarding the persecutory conduct. *See* Br. of *Amici Curiae* UNHCR at 13 (2008); *see also UNHCR Exclusion Guidelines, supra*, ¶ 21.

The practices of other State Parties are also "entitled to considerable weight." *See Air France v. Saks*, 470 U.S. 392, 404 (1985); *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, dissenting) ("We can, and should, look to decisions of other signatories when we interpret treaty provisions."). The Board should therefore interpret U.S. obligations under the Protocol and Convention consistent with other State Parties, which have addressed the scope of the exclusion

clauses and the role of duress in assessing individual responsibility. *See Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995) (declining "to interpret our version of [a treaty] in a manner contrary to every other nation to have ever addressed the issues").

State Parties, including Canada, the UK, Australia, New Zealand, and Norway, have explicitly recognized that conduct performed under duress is not encompassed within the Article 1F persecutor bar. *See, e.g.*, *Ezokola*, [2013] 2 S.C.R. 678 at para. 86; *see also Gurung v. Sec'y of State for the Home Dep't*, [2002] UKIAT 04870 [110] (stating that an Article 1F assessment "must take into account . . . factors such as duress . . . as well as the availability of a moral choice"); *VWYJ v. Minister for Immigr. & Multicultural & Indigenous Affairs*, [2005] FCA 658 [9] (Apr. 18, 2005) (Austl.) (adopting the definition of duress in the Rome Statute); *Refugee Appeal No. 74646* [2003] NZRSAA [54] (N.Z.) (adopting the ILC duress standard); Maria Bergram Aas, *Exclusion from Refugee Status: Rules and Practices in Norway, Canada, Great Britain, the Netherlands, and Denmark; A Comparative Study*, The Norwegian Directorate of Immigration 80 (2013) [hereinafter "*Rules and Practices in Norway*"] (noting that exclusion under Article 1F requires a showing of the applicant's "intent and knowledge" to commit the offense).

Canada, the UK, and Norway also specifically require a showing of voluntariness or a shared purpose to persecute to bar protection. *See Ezokola*, [2013] 2 S.C.R. 678 at para. 99 ("[The voluntariness] requirement may not be satisfied if an individual was coerced into joining, supporting, or remaining in the organization" or "if he or she did not have the opportunity to leave"); *see also Ramirez v. Canada (Minister of Employment & Immigr.)*, [1992] 2 F.C. 306, para. 38 (Can.) (stating that a finding of complicity with the persecutor "rests . . . on the existence of a shared common purpose [to persecute] and the knowledge that all of the parties in question may have of [the persecution]"); *R (on the application of JS) v. Sec'y of State for the Home Dep't*,

[2010] UKSC 15 [2] (observing that Article 1F(a) will apply only "if there are serious reasons for considering him voluntarily to have contributed in a significant way . . ., aware that his assistance will in fact further that [criminal] purpose"); *Rules and Practices in Norway*, *supra*, at 80 (finding "where there has been a clear, imminent and unavoidable threat against the applicant's life").

Based on its improper reliance on *Prosecutor v. Erdemovic*, DHS claims that there are "wide variations in how different nations define and apply duress defenses," and the Board need not therefore recognize the existence of a duress defense. *See* 2017 DHS Br. at 14. Contrary to DHS's contention, however, there is in fact broad consensus regarding the general availability of a duress defense. *See* William Schabas, *General Principles of Criminal Law in the International Criminal Court Statute (Part III)*, 6 European J. of Crime, Crim. L. & Crim. Justice 84, 109 (1998) (describing the Rome Statute's recognition of duress and necessity as defenses to crimes within the jurisdiction of the International Criminal Court and the work of the Ad Hoc Committee listing "duress/coercion/force majeure" and "necessity" as "excuses and justification[s]"); *see also* Antonio Cassesse et al., 1 *The Rome Statute of the International Criminal Court: A Commentary* 1044 (1st ed. 2002); c*f. Prosecutor v. Erdemovic*, Case No. IT–96–22–A, 1997 WL 33341547, ¶ 19 (I.C.T.Y. App. Chambers Oct. 7, 1997) (declining to recognize duress as a complete defense in highly limited circumstances involving "a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings"); *id.* ¶¶ 66–67 (McDonald and Vorah, JJ., concurring) (noting that while some states consider duress to be "a complete defence to a [person] charged with . . . the killing of innocent persons," other states do not).

II. The Defense Of Duress Is Relevant Only If The Applicant's Conduct Was Sufficient To Trigger The Persecutor Bar; Membership In A Persecutory Group Is Not Enough.

A defense to liability is only necessary if an individual's acts would otherwise give rise to that liability. The briefs of other *amici curiae* address the evidence and procedures required to

determine if an applicant's conduct triggers the persecutor bar in the first place. *See* Br. of *Amici Curiae* Non-Profit Organizations & Law School Clinics (2017); Br. of *Amici Curiae* AILA, JFONE (2017); Br. of *Amici Curiae* NIJC, AILA, JFONE, Advocates for Human Rights at 3–35 (2016). *Amici* Law Scholars will not repeat those arguments here. Rather, *amici* will clarify the significance of membership in an organization that engages in persecutory acts under international law and the high burden imposed by other countries before an exclusionary ground is triggered.

The Board and DHS have accepted the principle that membership alone does not trigger the persecutor of others' bar. *See Matter of Rodriguez-Majano*, 18 I&N Dec. 811 & 814–15 (BIA 1988); 2016 DHS Br. at 24. The Board's recent decision in *Matter of Alvarado* supports that principle. 23 I&N Dec. at 27–30 (relying on the applicant's affirmative acts of harm and his knowledge of their consequence to trigger the bar). However, the Board's "objective effects" test does not take into account knowledge or personal participation and could be improperly invoked to exclude individuals for unknowing and minimal contributions—in essence, membership alone. *Negusie*, 555 U.S. at 516 (rejecting Board's conclusion that the fact that Negusie "may not have actively tortured or mistreated anyone is immaterial").

Courts and tribunals in a wide-range of jurisdictions have consistently concluded that membership alone cannot lead to exclusion from the refugee definition. The International Military Tribunal, for example, cited the importance of individual responsibility in evaluating a person's role in perpetrating war crimes and crimes against humanity and observed that the "definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership." UN War Crimes Law Report, *supra*, at 151; The *I.G. Farben* Case, *supra*, at 1192–94 (U.S. military tribunal) (absolving individual plant managers from liability for crimes against humanity where they had functioned simply as members

in the plant); *see also* Goodwin-Gill & McAdam, *supra*, at 169 (distinguishing between "mere membership" and "actual complicity"); Evans, *supra*, at 529.

UNHCR guidelines on the scope of the exclusions from refugee protection likewise state that membership "does not in itself entail individual liability for excludable acts." *UNHCR Exclusion Guidelines*, *supra*, ¶ 19; *UNHCR Background Note*, *supra*, ¶ 59 ("The fact of membership does not, in and of itself, amount to participation in an excludable act. Consideration needs to be given to whether the applicant was personally involved in acts of violence or knowingly contributed in a substantial manner to such acts.").

Decisions of other parties to the Convention and Protocol reflect this understanding. *See, e.g.*, *R (on the application of JS) (Sri Lanka)*, [2010] UKSC at [2] ("It is common ground . . . that [*inter alia*] because of the serious consequences of exclusion . . . more than mere membership of an organization is necessary to bring an individual within the article's disqualifying provisions"); Case C-573/14, *Commissariat général aux réfugiés et aux apatrides v. Lounani*, 2017, EU:C:2017:71, Celex No. 614CJ0573 [79] (noting that evidence of an individual's specific involvement in an organization, such as his position in the organization and past convictions related to the organization's activities, is "of particular importance" to apply an exclusion clause).

Moreover, other State Parties impose a high standard of proof for exclusion. Emphasizing that Article 1F "should be interpreted restrictively and applied with caution," the UK Supreme Court has concluded that "[t]here should be a *high threshold* 'defined in terms of the gravity of the act in question, the manner in which the act is organized, its international impact and long-term objectives, and the implications for international peace and security'." *Al-Sirri*, [2012] UKSC 54 at [71] ("[I]n order to ensure that [A]rticle 1F is applied in a manner consistent with the overall humanitarian objective of the 1951 Convention, the standard of proof should be *high enough to*

ensure that bona fide refugees are not excluded erroneously.") (citing *UNHCR Background Note*, *supra*, ¶ 107 (emphasis added)); *see also UNHCR Exclusion Guidelines*, *supra*, ¶ 2 ("The exclusion clauses should . . . always be interpreted in a restrictive manner.").

To be consistent with the international law standards Congress incorporated, the Board should make clear that the question of duress arises only after an adjudicator determines that conduct beyond mere membership in a persecutory group triggers the persecutor bar.

III. The Standard for Duress Was Firmly Established at the Time of the Drafting of the Convention, U.S. Accession to the Protocol, and the Adoption of the Refugee Act

When Congress enacted the Refugee Act, it incorporated the contemporary understanding of the limited scope of the exclusions clause, along with the then (as now) well-settled understanding that conduct that occurs under duress is not encompassed within the persecutor bar. Indeed, DHS itself has recognized that conduct that occurs under duress does not trigger the persecutor bar. *See* 2016 DHS Br. at 10–11. *Amici* thus urge the Board to adopt a flexible, contextualized approach to analyzing duress that is consistent with U.S. obligations under the Refugee Act, international law, and the practice of other State Parties.

As noted, *supra*, at the time of the Refugee Convention's drafting and approval, it was well-established that culpability was negated where "the act charged was done to avoid an immediate danger both serious and irreparable"; "there was no adequate means of escape"; and "the remedy was not disproportionate to the evil." *See* UN War Crimes Law Report, *supra*, at 170; *see also* Spiropoulos, *Draft Code of Offenses*, *supra*, at 275. The common understanding that only voluntary conduct can trigger exclusion from refugee protection persisted through the time at which the United States acceded to the Protocol and incorporated these obligations into U.S. law. *See* ILC, *Summaries of the Work of the International Law Commission*, *supra*.

While international standards regarding duress have evolved to some degree since the

Convention's drafting, the substance has remained the same. Generally, duress is found where:

> (1) the acts committed resulted from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person;
> (2) they were reasonable and necessary [actions] to avoid that threat; and
> (3) there was no intention to cause greater harm than that threatened.

Hathaway & Foster, *supra*, at 585 (emphasis omitted);[5] *see also* Br. of *Amici* Non-Profit Organizations and Law School Clinics (2017); Br. of NIJC, AILA, JFONE, Advocates for Human Rights at 29–30 (2016) (advancing a standard with the same factors for consideration). Other countries, including the UK, Canada, Australia, and New Zealand, employ the same basic test for duress, having drawn first on the ILC's formulation and then on the Rome Statute. *See, e.g.*, *MT v. Sec'y of State for the Home Dep't* [2012] UKUT 00015 [106]; *Diaz v. Canada (Minister of Citizenship and Immigr.)* [2013] F.C. 88, para. 51 (Can.); *VWYJ*, [2005] FCA 658 at [9]; *Refugee Appeal No. 75634* [2006] NZSRAA [79] (N.Z.).

A. The Threat of Imminent Death or of Continuing or Imminent Serious Bodily Harm to the Individual or Another Should Be Evaluated Comprehensively.

To establish duress, an applicant must show that the acts committed resulted from an imminent threat, specifically a threat was both real and ongoing. This simple, flexible standard functioned for the tribunals trying the worst human rights violators in modern history and requires no modification by the Board today. The military tribunals that addressed the applicability of this defense understood that the immediacy of the threat must be judged based on the entire course of

[5] State Parties to the Refugee Convention have repeatedly recognized that it should be recognized as a "living instrument." *See, e.g.*, *R v. Sec'y of State for the Home Dep't, Ex parte Adan and Others*, [1999] EWCA (Civ) [72] (noting that "[i]t is clear that the signatory States intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world"). These principles, codified by the Rome Statute, reflect pre-existing international jurisprudence on the subject of duress. *See Amici* Int'l Refugee Law Scholars Br. at 27 n.10 (2016). Although the United States is not a party to the Rome Statute, it has voted in favor of a Chapter VII referral to the ICC in the case of Libya. UN Security Council, resolution 1970, S/RES/1970 (2011) (Feb. 26, 2011), http://www.amicc.org/docs/SC%20Res%201970.pdf; *see also* U.S. Dep't of State, International Criminal Court (observing that "[s]ince November 2009, the United States has participated in an observer capacity in meetings of the I.C.C. Assembly of State Parties" and has "sent an observer delegation to the I.C.C. Review Conference").

conduct of both the coercive regime and the individual asserting the defense. The U.S. Nuremberg Military Tribunal addressed this factor in the *Flick* Case, which found not guilty industrialist defendants charged with crimes against humanity for use of slave labor to meet Nazi production quotas. The *Flick* Case, in 6 *Trials of War Criminals Before the Nuernberg Military Tribunal Under Control Council Law No. 10*, at 1196 & 1201 (1952) [hereinafter "the *Flick* Case"]. The prosecution argued that defendants' duress defense failed because they could not show a "clear and present" danger of harm. *Id.* The U.S. Tribunal rejected that argument, concluding that the Nazi regime presented a "constant 'reign of terror'" with agents "ready to go into instant action and to mete out savage and immediate punishment." *Id.* at 1202. The Tribunal relied on the continuous nature of the threat and the possibility that at any time opposition could be met with serious harm. *See* Evans, *supra*, at 428.

Other State Parties to the Refugee Convention have also adopted this approach to imminence. *See Diaz* [2013] F.C. 88 at para. 54 (finding that the principal applicant "was in a situation of clear and imminent danger," despite the fact that there was "some delay between the threats" and the crime committed); *Canada (Minister of Citizenship & Immigr.) v. Maan* [2007] F.C. 583, para. 19 (noting that "the threat need not operate instantly, but must be a present one in the sense that it creates an immediate pressure to act") (internal quotations omitted)); *Canada (Minister of Citizenship & Immigr.) v. Asghedom*, [2001] F.C.T. 972, para. 34–37 (finding that applicant, who had been in the army for two years without attempting to flee or disobey orders, would have faced an "imminent, real, and inevitable threat" to his life if he had deserted from the army, given that "another soldier who had tried to escape, had been killed").

B. Demonstrating Either That the Actions Were Reasonable and Necessary to Avoid the Threat or That There Was No Adequate Means of Escape Establishes Moral Objection.

The defense of duress is premised on the existence of moral objection but the absence of moral choice. *See* Evans, *supra*, at 530–31. DHS previously agreed on this factor's relevance and its source in international law. 2016 DHS Br. at 31. To establish the absence of moral choice, State Parties assess whether the applicant's actions were reasonable and necessary to avoid the harm and whether the applicant had no adequate means of escape. *See* The Rome Statute, art. 31(d); *see, e.g.*, *Maan*, [2007] F.C. 583 at para. 20 (noting that this requirement "involves a realistic appreciation of the alternatives open to a person; the accused . . . must have no reasonable legal alternative"); *Diaz* [2013] F.C. 88 at para. 55; *CM (Article lF(a)-superior orders) Zimbabwe v. Sec'y of State for the Home Dep't* [2012] UKUT 00236 (IAC) [29]; *MT (Article 1 F(a) - aiding and abetting) Zimbabwe v. Sec'y of State for the Home Dep't* [2012] UKUT 00015 (IAC) [109]; *RBD File No. MB–05095* [2013] RPDD No. 611 [134] (Can.). In effect, this factor serves as a test for whether an asylum applicant shares the persecutor's objectives. If escape were previously possible or the applicant's acts were not clearly necessary, he may be complicit in the persecutory conduct. *See Refugee Appeal No. 74646*, [2003] NZRSAA [53] & [58] (N.Z.) (finding that applicant at no time "shared a common purpose" with or any "ideological commitment" to the militant organization he assisted); *see also Refugee Appeal No. 2142*, [1997] NZRSAA (N.Z.) (finding that applicant did not adhere to organization's principles and, in order to protect himself and his mother, had no choice but to supply dynamite and store belongings until he and his mother could escape, which they did "with reasonable alacrity in all the circumstances").

C. *The Requirement That the Remedy Was Not Disproportionate to the Evil Demands That the Person Did Not Intend to Cause Harm Greater Than the Threat Avoided.*

Conduct performed under duress does not preclude the grant of refugee status so long as the applicant "does not *intend* to cause greater harm than the one sought to be avoided." *See UNHCR Exclusion Guidelines*, *supra*, ¶ 22 (emphasis added); *see also UNHCR Background Note*,

supra, ¶ 69 (citing the trials following WWII). As a result, State Parties to the Convention and Protocol look to the intent of the applicant in causing the harm, and the Board should do the same. *See, e.g.*, *Refugee Appeal No. 74646*, [2003] NZRSAA [53] (recognizing duress defense where applicant, who was forcibly conscripted for six months, provided a safe house and identified innocent civilians for torture and murder because he had been tortured, threatened with further torture, and had "witnessed his deceased brother's battered body"); *Asghedom*, [2001] F.C.T. 972 at para. 7]& 38–39 (affirming finding that Eritrean teenager who was forcibly recruited by Ethiopian military acted under duress when standing guard during raids, facilitating transport of people to military camp to be tortured and killed, and burying dead bodies where Ethiopian officials would have executed him if they had caught him deserting); *Maan*, [2007] F.C. 583 at para. 26 (finding that "the harm [the claimant] caused [in transporting drugs five different times] was not disproportionate to the harm he avoided given that the consequences of refusing to act meant death to him and his family").

D. The Three-Part Test for Duress Must Take into Account the Applicant's Subjective Perspective and Be Assessed in the Aggregate.

In the aftermath of WWII, military tribunals tasked with assessing moral choice emphasized the role of subjective evidence and the need to consider whether the totality of evidence demonstrated that the person had lost his freedom of choice. As the UN War Crimes Commission reported, the test for duress is "to be applied according to the facts as they were honestly believed to exist by the accused." UN War Crimes Law Report, *supra*, at 174. One of the U.S. military tribunals explained the importance of subjective evidence, noting that "the contemplated compulsion must actually operate upon the will of the accused to the extent he is thereby compelled to do what otherwise he would not have done." The *Krupp* Case, 9 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at

1438–39 ("The effect of the alleged compulsion is to be determined not by objective but by subjective standards" from the "standpoint of the honest belief of the particular accused in question.") [hereinafter "the *Krupp* Case"]. The military tribunals also assessed evidence of duress in the aggregate to determine whether the person pleading the defense had lost his freedom of choice. *See* the *Flick* Case, *supra*, at 1194–1202; *see also* the *Krupp* Case, *supra*, at 1435–49; the *Einsatzgruppen* Case, *supra*, at 470–88 & 509–87.

State Parties to the Convention and Protocol have similarly applied a fact-intensive assessment of an individual's role in the persecutory conduct, as well as the surrounding circumstances, to determine whether the person acted under duress. Canadian courts have, for example, concluded that when determining whether an asylum applicant "voluntarily made a significant and knowing contribution to a crime or criminal purpose," or acted under duress, adjudicators must bear in mind the "diverse circumstances encompassing different social and historical contexts." *Ezokola*, [2013] 2 S.C.R. 678 at para. 100 (stating that application of exclusion clause requires a "full contextual analysis [which] would include any viable defences, including . . . duress."); *see also Maan*, [2007] F.C. 583 at para. 23–25 (considering the actions and threat in the aggregate to affirm that "there was a situation of clear and imminent danger").

Tribunals in the UK have emphasized that "[a]n assessment of whether an appellant is excluded from refugee protection . . . must take account of his evidence as a whole, not just part of it." *AS v. Sec'y of State for the Home Dep't*, [2013] UKUT 00571 [27]; *see also Gurung*, [2002] UKIAT 04870 at [39] (noting that "a holistic approach" considering all of the applicant's circumstances must be adopted and "exclusion issues should never be examined in complete isolation from the examination of the appellant's overall claim"); *Al-Sirri*, [2012] UKSC 54 at [15] ("requir[ing] an individualised consideration of the facts of the case, which will include an

assessment of the person's involvement in the act concerned, his mental state and possible grounds for rejecting individual responsibility"). The European Court of Justice has also noted that a finding of "individual responsibility for acts committed [requires] . . . examin[ing] all the relevant circumstances." *B and D*, EU:C:2010:661, Celex No. 609CJ0057, at [98]; *see also B and D*, EU:C:2010:302, Celex No. 609CC0057 (Opinion of Advocate General Mengozzi), at [78] (emphasizing that individual responsibility requires consideration of the "possible physical or psychological constraints to which [the individual] has been subjected, [and] . . . whether that person had a genuine opportunity to prevent the acts in question or to distance himself from them (without jeopardising his own safety)," among other factors).

The Board should thus adopt a flexible standard that allows for the comprehensive assessment of each applicant's circumstances to determine whether conduct occurred under duress and whether the persecutor bar applies.

IV. Barring Protection for Otherwise Qualified Refugees because of Actions Committed under Duress Is Neither Reasonable nor Just and Ignores the Supreme Court's Repeated Concerns.

DHS summarily dismisses the effect of its new position on individuals who otherwise qualify as refugees but "have been placed in unthinkable situations." 2017 DHS Br. at 41. This categorical bar is not "reasonable [or] just." *Id.* Rather, it denies the Refugee Act—and consequently the Convention and Protocol—its fundamental, protective purpose. *See* Anker, *supra*, § 6.1; Hathaway & Foster, *supra*, at 529–30; Gilbert, *supra*, at 427–29; 2017 Br. of *Amici* Non-Profit Organizations and Law School Clinics (illustrating how DHS's new position would send vulnerable children, victims of domestic violence, and individuals with intellectual disabilities back to persecution and potential death) at 20–29; Br. of *Amici* Human Rights First, AILA, Human Rights Watch, U.S. Committee for Refugees and Immigrants (2009) (describing the common practice of persecutors forcing their victims to persecute others and the severe impact

of the government's position on child soldiers and victims of torture). Congress adopted the balance struck by the Convention's protections and exclusions, a balance premised on recognizing duress in order to maintain the Convention's moral integrity. The Board must follow suit.

DHS cites *Fedorenko v. United States* in support of its categorical bar to refugee protection, 2017 DHS Br. at 33, but, in fact, *Fedorenko* made no such rule. Indeed, in a critical set of footnotes, the Supreme Court recognized that certain conduct *cannot* "be considered assisting in the persecution of civilians." *Fedorenko v. United States*, 449 U.S. 490, 512, nn.33 & 34 (1981) (contrasting "an individual who did no more than cut the hair of female inmates before they were executed" with "a guard who was issued a uniform and armed with a rifle and a pistol," "paid a stipend," "was regularly allowed to leave the concentration camp," and "who admitted to shooting at escaping inmates," and finding that only the latter "fit[] within the statutory language about persons who assisted in the persecution of civilians"). The Court then acknowledged that other distinctions "may present more difficult line-drawing problems." *Id.*

In *Fedorenko*, the Court had to distinguish between the Jewish prisoners forced to facilitate the genocide taking place at concentration camps and Fedorenko's position as an armed guard, because of the case's litigation history, which DHS also fundamentally misperceives. The Court granted *certiorari* in *Fedorenko* to review a question completely distinct from the meaning of the persecutor bar; proper interpretation of the bar was therefore never briefed by the parties. *Id.* at 493 & 530. Moreover, the parties agreed throughout the *Fedorenko* litigation that "involuntary" assistance in the persecution of others was not disqualifying under the bar, and the Solicitor General maintained that position before the Supreme Court. *See* Evans, *supra*, at 466. The consular officer, who served as the government's key witness, noted that after reviewing thousands of cases he knew of no Jewish prisoner disqualified under the persecutor bar for his or her forced

supervision of other prisoners. *Fedorenko*, 449 U.S. at 468. And on the opposing side, in response to a question regarding whether Jewish prisoners assisted in bringing prisoners to their death, one such prisoner explained: "We automatically assisted, all of us, but . . . it was under the fear and terror." *Id.* at 469. The Supreme Court responded to this record by using the term "persecution" to draw lines between victims and perpetrators. *See id.* at 512 n.34.

Nearly thirty years later, the Supreme Court again expressed concern over excluding victims of persecution and returned again to the meaning of "persecution" as a way to determine who deserves protection. *See Negusie*, 555 U.S. at 520 & 524 (inviting the agency to develop "a more comprehensive definition [of persecution], one designed to elaborate on the term in anticipation of a wide range of potential conduct" that is consistent with the broad purpose of the Refugee Act). Yet now, DHS ignores the Court's call in this very case.

DHS also looks to the many iterations of the persecutor bar in U.S. immigration and refugee law for support but draws the wrong conclusion. 2017 DHS Br. at 36–39. The persecutor bar in U.S. law can be traced back to its first appearance in the Constitution of the International Refugee Organization (IRO), a precursor to UNHCR charged with resettling or repatriating approximately 1.6 million displaced individuals after World War II. Evans, *supra*, at 477–86 & 511–23; IRO Const., annex I, pt. II, ¶ 6 *reprinted in* 18 U.N.T.S. 23–24 (1948). The *Fedorenko* Court relied on the presence of the term "voluntarily" in one provision of the IRO Constitution, but not in the provision containing the persecutor bar to conclude that the bar encompassed both voluntary and involuntary conduct. 499 U.S. at 512. The Court, however, lacked evidence of the bar's context and application when it decided the case. The bar's drafting history, the IRO's eligibility directives, and the nearly 1,500 appellate decisions applying the IRO's eligibility criteria demonstrate that individual culpability was required before someone was excluded from IRO services. *See* Evans,

supra, at 487–510. Critically, the persecutor bar was never applied to victims of persecution. *Id.* at 499 & 503. IRO adjudicators instead looked for indicia of culpability, including being promoted based on merit, moving to a more brutal unit, personally gaining from Nazi policies, occupying position of trusts, or taking direct actions to cause harm. *Id.* at 503–10.

The persecutor bar was then incorporated into U.S. law through the Displaced Persons Act of 1948, the Refugee Relief Act of 1953, the INA through the Holtzman Amendment of 1978, and the Refugee Act of 1980, among other provisions. *Id.* at 511–23. At nearly every turn, including with the Refugee Act, Congress referenced the appearances of the bar in other immigration and refugee provisions and its consistency with international obligations. *Id.* Rather than interpreting this history as support for a categorical bar as DHS does, this history better illustrates the long-standing requirement of culpability in both U.S. and international law.

The Court's decision in *Fedorenko* can also be reconciled with an interpretation of the persecutor bar that exempts conduct performed under duress. *See id.* at 461–63, 476 & 538–40. Duress and voluntariness are not synonymous. The Supreme Court and the Board refer at different times to voluntariness, duress, coercion, knowledge, intent, motive, and culpability. *See, e.g.*, *Negusie*, 555 U.S. at 516–23; *Fedorenko*, 499 U.S. at 512; *Matter of Laipenieks*, 18 I&N Dec. at 464. But these terms are not interchangeable. Critically, voluntariness here means an act performed without outside interference and uncompelled by outside influence. *Voluntary*, Black's Law Dictionary (10th ed. 2014). As discussed above, establishing duress requires much more than the presence of outside influence; it requires proof of a serious and imminent threat, the inability to escape, and a proportionate response. *Fedorenko* did not discuss culpability or duress, it discussed only voluntariness. 449 U.S. at 490. Moreover, the facts on which it distinguished the camp prisoners who assisted in its operations from the camp guard channel the test for duress: The Court

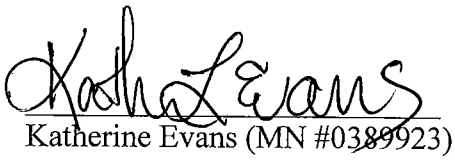
emphasized that Fedorenko was armed, that he was paid, that he could leave the camp, that other guards had escaped, and that he admitted to shooting at inmates. *Id.* at 500, 512 n.34, & 513 n.35.

Fedorenko's facts fail to show the threat of imminent harm, the absence of alternatives, or proportionality in the harm he caused. The test adopted by UNHCR, other State Parties and international tribunals, is sufficiently rigorous and strict to prevent individuals, like Fedorenko, from availing themselves of U.S. protections. Moral culpability and individual responsibility are at the heart of the persecutor bar. Recognizing duress under this test would recover the bar's history in U.S. law, restore congressional intent, and reconcile U.S. law with international obligations.

CONCLUSION

To meet U.S. obligations under the Refugee Protocol and comply with congressional intent, the Board should interpret the persecutor bar to exempt conduct performed under duress, using the standard that is consistent with its source in international law.

Respectfully submitted,



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PROOF OF SERVICE

On July 10, 2017, I, Katherine L. Evans, filed by courier three copies of the Request to Appear as *Amici Curiae* and the Proposed Substitute Brief on behalf of Scholars in International Refugee Law to the following address pursuant to the Board's instructions in its Amicus Invitation 16-08-08:

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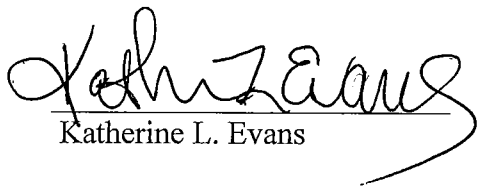
Dated: July 10, 2017



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