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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 the accompanying brief in response to Amicus Invitation No. 16-08-08. These individuals have expertise in International Refugee Law, and many of them appeared as *amici curiae* before the U.S. Supreme Court 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. They submit this brief to provide the Board their perspective on the issues presented in the Amicus Invitation based on their extensive scholarship in the area of international refugee protection.

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. Department of Justice.

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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.

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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.

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These individuals respectfully request leave to appear collectively as *amici* and to file the following brief. Should the Board choose to acknowledge the submission of this brief, please acknowledge: Katherine Evans, Nancy Kelly, Sabrineh Ardalan.

Dated: November 7, 2016



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**PROPOSED 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 international obligations of the United States. *Amici* further have a strong interest in ensuring that States adhering to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol do not apply those instruments in contradictory ways, but rather give them full and consistent effect with respect to all persons who seek refuge within their borders. The U.S. Supreme Court has previously consulted the conclusions of leading scholars interpreting those instruments. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 439–40, 451 (1987); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 182 & n.40 (1993).

SUMMARY OF ARGUMENT

The U.S. Supreme Court in *Negusie v. Holder* rejected the Board’s rule that “motive and intent are irrelevant” to the persecutor bar, and concluded instead that “coercion or duress” may indeed matter. 555 U.S. 511, 517, 522–23 (2009). The Court then remanded this case so that the Board could provide “a more comprehensive definition” of persecution—“one designed to elaborate on the term in anticipation of a wide range of potential conduct.” *Id.* at 524. In response to the Supreme Court’s reversal and remand, the Board of Immigration Appeals 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; and if so, (2) the proper standards to govern such an exception.

Amici assert first that the persecutor bar must be interpreted to allow for the defense of duress in order for the United States to implement the Refugee Act of 1980 and meet its obligations

under international law, as Congress intended; and second, that the proper standard for duress has long been articulated in the instruments of international law and applied by other countries as part of their international obligations to protect refugees. In light of international law and the history of the 1980 Refugee Act, the INA requires at a minimum that an applicant not be subject to the persecutor bar where the acts charged were: (1) a result of threat of imminent death or of continuing or imminent serious bodily harm against the applicant or another person; (2) reasonable and necessary to avoid the threat; and (3) were not intended to cause greater harm than that threatened. This standard, designed to measure moral choice, must be applied comprehensively, taking into account the entire context of the coercive regime and the subjective perspective of the applicant.

ARGUMENT

I. The INA's Persecutor Bar Must Include A Duress Defense To Effectuate U.S. Obligations Under The UN Refugee Convention And Protocol And Congressional Intent In Enacting The U.S. Refugee Act Of 1980.

Amici concur with the Department of Homeland Security (DHS) and respondent that persecution committed under duress does not trigger the persecutor bar. As DHS correctly notes, the text of the INA persecutor bar requires consideration of individual culpability and well-established exculpatory defenses. *See* DHS Supplemental Br. at 10 (2016). DHS also recognizes that the source of this defense to exclusion from refugee protection lies in international law that developed following World War II. DHS Br. at 27 (citing the U.N. War Crimes Comm'n Law Reports). Moreover, a duress defense is required in order to effectuate U.S. obligations under the UN Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 [hereinafter "Protocol"] and the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter "Refugee Convention"].

A. Congressional Intent To Conform U.S. Law To The Obligations Created By The Refugee Convention And Protocol Is Beyond Dispute.

The persecutor bar at issue in this case was enacted as part of the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102. As DHS recognized, the Refugee Act is inextricably linked to, and must be interpreted in light of, U.S. obligations under the Protocol and the Refugee Convention. DHS Br. at 11. Congress enacted the 1980 Refugee Act specifically to implement U.S. obligations under international law. *See Negusie*, 555 U.S. at 520 (noting the Refugee Act was “enacted to reflect principles set forth in international agreements”); *Cardoza-Fonseca*, 480 U.S. at 432, 436–37.

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* 19–20 (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). In 1967, the Protocol expanded the Convention’s protections. 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, e.g., INS v. Stevic*, 467 U.S. 407, 416 (1984); Protocol, Art. 1(1).

Although the language of the U.S. persecutor bar under the 1980 Refugee Act is not identical to Article 1F of the Refugee Convention, the legislative history of the Refugee Act demonstrates Congressional intent to conform U.S. law to the obligations and exclusions set forth in the Convention and Protocol. *See* Kate Evans, *Drawing Lines Among the Persecuted*, 101 Minn. L. Rev. 453, 486–522 (2016) (reviewing the history of the persecutor bar in U.S. law, including

thousands of archival documents that demonstrate the requirement for individual culpability has been present since the bar's inception)¹; *see also* Brief for Scholars of International Refugee Law as *Amici Curiae* 15–17 (2008) (reviewing extensive legislative history). Moreover, acts of Congress are presumed to be consistent with U.S. treaty obligations in the absence of a clear statement by Congress manifesting contrary intent. *See Restatement (Third) of Foreign Relations Law of the United States* § 114 (1987); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

B. The Text Of Article 1F And Its Context In The Refugee Convention Require The U.S. To Consider Duress In Applying The Persecutor Bar.

i. The text of the exclusions incorporates principles of culpability.

While immigration proceedings are civil in nature, Article 1F deliberately applies principles of responsibility from international criminal law that cannot be read out of the Convention and Protocol. Article 1F 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.

The text thus expressly incorporates international criminal law principles of culpability including commonly applicable defenses to liability. The exclusions of Article 1F all refer to “crime” or “guilt,” concepts that inherently require some form of culpable conduct or *mens rea*.

¹ Pre-publication proof available at <https://papers.ssrn.com/abstract=2861608>.

Consequently, the Convention is concerned not only with the objective effect of the specified conduct, but also with individual culpability for the wrongful acts.

Article 1F has two purposes: (1) to exclude from refugee status persons considered to be undeserving of the protection, *see, e.g.*, Joined Cases C-57/09 & C-101/09, *Bundesrepublik Deutschland v. B and D*, 2010, EU:C:2010:611, Celex No. 609CC0057; and (2) to ensure that serious criminals cannot evade prosecution and punishment for their crimes by claiming asylum. James C. Hathaway & Michelle Foster, *The Law of Refugee Status* 525 (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."). 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. Hathaway & Foster, *supra*, at 529–30.

The persecutor bar in U.S. law is understood to correspond to the first or third exclusion in Article 1F, barring those who have committed a crime against peace, a war crime, a crime against humanity, or those guilty of acts contrary to the purposes and principles of the United Nations. Deborah E. Anker, *Law of Asylum in the United States* §§ 6:3–6:7 (2016); Evans, *supra*, at 525; Goodwin-Gill & McAdam, *supra*, at 184; H.R. Rep. No. 96-608, at 10; *see also* UN High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶¶ 162–63 (1979, rev. 2011) [hereinafter "UNHCR Handbook"] (describing the two exclusions as overlapping). When the Convention was drafted, crimes against humanity included "murder, extermination, enslavement, deportation, and other inhuman acts done against a civilian population, or persecutions on political, racial or religious grounds." J. Spiropoulos, Special

Rapporteur, *Second Report on a Draft Code of Offences Against the Peace and Security of Mankind* 59, 2 Yearbook of the Int'l Law Commission, U.N. Doc. A/CN.4/44 (1951) [hereinafter "Spiropoulos, *Second Report*"] (expanding the definition beyond its original reference to "any crime against peace or war crimes as defined by the Charter of the International Military Tribunals"). Additionally, when the Convention was drafted, the term "persecution" was commonly understood to require deliberate and intentional action. Jane McAdam, *Rethinking the Origins of 'Persecution' in Refugee Law*, 25 Int'l J. Refugee L. 667, 672–82 (2013).

Article 1F's explicit terms thus target 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 makes clear 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). This concern is not served by excluding persons from refugee status who are not criminally responsible for their actions. See *Ezokola v. Canada (Citizenship & Immigr.)*, [2013] S.C.R. 678 (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 which Article 1F expressly refers, the approach to complicity taken by other States Parties to the Refugee Convention, and under fundamental criminal law principles); *Pushpanathan v. Canada (Minister of Citizenship and Immigr.)*, [1998] 1 S.C.R. 982, 1024 (Can.) (noting that under the Refugee Convention, "those who are responsible for the persecution which creates refugees should not enjoy the benefits of a convention designed to protect those refugees").

- ii. The context in which the Convention was drafted demonstrates the relevance of duress.

Following World War II, military tribunals defined and laid the foundation for the crimes contained in the Convention and Protocol, as well as their defenses. The language in Article 1F regarding “the international instruments drawn up to make provision in respect of such crimes” refers to 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, among other international instruments. See UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* ¶¶ 23–25 (2003) [hereinafter “Background Note”]. The Convention’s drafters understood that the principles enunciated by post-war military tribunals would apply to exclusion decisions under the Convention. See Goodwin-Gill & McAdam, *supra*, at 163–68; 1 Atle Grahl-Madsen, *The Status of Refugees in International Law* 273–77 (1966); Nehemiah Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretations; a Commentary* 66–67 (1953).

Tasked with determining who was culpable for the horrific crimes of World War II, the tribunals imposed liability only where conduct warranted moral condemnation. They accomplished this by recognizing that the defenses of duress and necessity negated individual culpability. See XV U.N. War Crimes Comm’n, *Law Reports of Trials of War Criminals* 170–75 (1949) [hereinafter “UN Law Reports”]. The tribunals also drew a distinction between individual criminal responsibility and mere membership in an organization that engaged in international crimes. See 1 Grahl-Madsen, *supra*, at 277. The International Military Tribunal, for example, held that coercion could deprive a defendant of any “moral choice” and excuse what was otherwise criminal conduct. See I Secretariat of the International Military Tribunal, *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 U.N. Int’l Law Crimes 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 for responsibility as Nuremberg Principle IV).

U.S. tribunals sitting in post-war Germany likewise recognized the duress and necessity defenses as a way to evaluate freedom of choice, 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. 12, at 509, cited in Report of the International Law Commission 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, “[t]here 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”]*.

Concern for freedom of choice and moral responsibility thus permeated the environment in which the Refugee Convention was drafted. *See* Spiropoulos, *Second Report, supra*, at 52–53 (discussing the need to incorporate the Nuremberg principles into the draft offenses, including the requirement for moral choice). An initial draft of Article 1F(a) specifically referred to the Charter

of the International Military Tribunal, and thus to the requirements and defenses to these crimes that were well-recognized by then. Goodwin-Gill & McAdam, *supra*, at 163–65. The final draft referenced “international instruments” more generally, so as to incorporate the ongoing work of the International Law Commission to define these offenses. *See* 1 Grahl-Madsen, *supra*, at 276. Consequently, the 1980 Refugee Act requires a corresponding evaluation of individual culpability through the defense of duress.

C. Decisions Of Other States Parties To The Refugee Convention And Protocol Recognize That Conduct Performed Under Duress Does Not Exclude An Applicant From Refugee Protection.

Given that the persecutor bar in the 1980 Refugee Act derives from an international treaty, the Board must consider decisions of other States Parties to the Refugee Convention and Protocol in interpreting the bar and any defenses that apply. *See, e.g., Olympic Airways v. Husain*, 540 U.S. 644, 658–60 (2004) (Scalia, J., dissenting) (“We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties.”); *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 226 (1996) (stating that “postratification understanding of the contracting parties” serves as an aid to treaty interpretation); *United States v. Stuart*, 489 U.S. 353, 369 (1989) (“The practice of treaty signatories counts as evidence of the treaty’s proper interpretation, since their conduct generally evinces their understanding of the agreement they signed.”); *Air France v. Saks*, 470 U.S. 392, 400–04 (1985) (according “considerable weight” to the “opinions of our sister signatories”). *See also* Fatma Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U. J. Int’l L. & Pol. 391, 399–420 (2013).

Other States Parties to the Refugee Convention recognize that Article 1F excludes from protection individuals who are undeserving by reason of past criminal misconduct, including those

who would escape prosecution if given refugee protection. It is, however, well-established that where an individual can assert a defense that “remov[es] criminal responsibility, . . . the conduct cannot be regarded as criminal.” *Re YYMT and FRFJ* [2010] 53 AAR 287, 340 [124] (Austl.). Moreover, states have consistently found the notion of voluntariness embedded in the persecutor bar. *See, e.g., Ezokola*, [2013] 2 S.C.R. 678 (“[I]t is easy to foresee cases where an individual would otherwise be complicit in [. . .] crimes but had no real choice but to participate in the crime [A] voluntariness requirement captures the defense of duress which is well recognized in customary international criminal law.”); *B and D*, EU:C:2010:611, Celex No. 609CC0057 (finding that exclusion requires an assessment of applicant’s role and any pressure to which he was exposed).

Canadian courts have applied the duress defense to strike a balance between the inappropriateness of demanding heroism and the equally flawed notion of allowing people to act without regard for the consequences of their actions. *Sivakumar v. Canada (Minister of Employment & Immigr.)*, [1994] 1 C.F. 433, 441 (Can.) (“People cannot be required, in order to avoid a charge of complicity . . . , to encounter grave risk to life or personal security in order to extricate themselves from a situation or organization. But neither can they act as amoral robots.”); *Ramirez v. Canada (Minister of Employment & Immigr.)*, [1992] 2 F.C. 306 (Can.) (“While the law may require a choice on the part of those ordered actually to perform international crimes, it does not demand the immediate benevolent intervention, at their own risk, of all those present”). *See generally* Hathaway & Foster, *supra*, at 584–86.

D. The Persecutor Bar’s Text Further Confirms That The Bar Must Be Interpreted To Include The Defense of Duress.

Just as the Convention incorporated concepts of criminal liability into its exclusions, so too did Congress in the persecutor bar. This reliance on culpability requires consideration of

established defenses. For the persecutor bar to apply, it is not enough that “persecution” on account of a protected ground occurred. The bar also requires that the applicant actually “ordered, incited, assisted, or otherwise participated in” the persecution. 8 U.S.C. § 1101(a)(42). The criminal law concepts invoked in the INA’s text require adjudicators to look beyond the objective effect of conduct and to consider culpability. *See* Amici Law Scholars Br. at 9–10. *See also Morissette v. United States*, 342 U.S. 246, 274 (1952) (“It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt there must be not only a wrongful act, but a criminal intention.” (internal citation omitted)). Culpability, in turn, incorporates common defenses to criminal liability, including duress. *See Dixon v. United States*, 548 U.S. 1, 12–13 (2006) (noting that even absent codification of defenses, the Court assumes their availability in federal criminal statutes).

The persecutor bar’s text, the text and context of the Refugee Convention, statements of Congressional intent, as well as the practices of other States Parties to the Convention thus all confirm that the bar must be interpreted to include a duress defense. *See generally Negusie*, 555 U.S. 511 (remanding for Board to fulfill its role under *Chevron*). *Amici* next discuss the standard for duress that the Board should employ.

II. The Defense Of Duress Is Relevant Only If The Applicant’s Conduct Was Sufficient To Trigger The Persecutor Bar; Mere 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* Proposed Br. of *Amici Curiae* Non-Profit Organizations & Law School Clinics (2016); Proposed Br. of *Amici Curiae* NIJC & AILA (2016). DHS also addresses these preliminary considerations. DHS Br. at

18–21. *Amici* Law Scholars will not repeat the arguments concerning the conduct required to trigger the persecutor bar under U.S. law. 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 accept in principle that membership alone does not trigger the bar. *See Matter of Rodriguez-Majano*, 18 I&N Dec. 811, 814–15 (BIA 1988); DHS Br. at 24. However, the Board’s “objective effects” test, which does not take into account knowledge or personal participation, 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”) and 527–28 (Scalia, J. concurring) (noting that the Board’s test encompassed even those who had “no idea” of the effects of their actions).

Courts and tribunals have consistently concluded that membership alone cannot lead to exclusion from the refugee definition. Discussing the role of different groups in perpetrating war crimes and crimes against humanity, the International Military Tribunal cited the importance of individual responsibility 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 Law Reports, *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, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/03/05, at ¶ 19 (Sept. 4, 2003) [hereinafter “Exclusion Guidelines”]; 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 R (on the application of JS) (Sri Lanka) v. Sec’y of State for the Home Dep’t*, [2010] UKSC 15, (UK S. Ct.) [2] (appeal taken from [2009] EWCA Civ 364) (Lord Brown SCJ) (“It is common ground between the parties . . . that [*inter alia*] because of the serious consequences of exclusion for the person concerned . . . more than mere membership of an organization is necessary to bring an individual within the article’s disqualifying provisions.”). *See also* Case C-573/14, *Commissariat général aux réfugiés et aux apatrides v. Lounani*, EU:C:2016:380, Celex No. 614CC0573, [70], [89] (Opinion of Advocate General Sharpston) (noting that “mere membership of a terrorist organisation does not suffice to trigger the exclusion clauses. . . . Such membership merely indicates that those exclusion clauses may (potentially) be applicable.”).

Other States Parties demand a high standard of proof before an exclusionary clause is triggered. The UK Supreme Court has emphasized that article 1F “should be interpreted restrictively and applied with caution.” *Al-Sirri v. Sec’y of State for the Home Dep’t; DD (Afghanistan) v. Sec’y of State for the Home Dep’t* [2012] UKSC 54 (UK S. Ct.) [12] (appeal taken from [2009] EWCA Civ 222; [2010] EWCA Civ 1407) (citing 1 Grahl-Madsen, *supra*, at 283).

As a result, that Court 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 [16], [71] (quoting the UNHCR Background note, stating that “in order to ensure that article 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.”) (emphasis added); *Lounani*, EU:C:2016:380, Celex No. 614CC0573, [75] (Opinion of Advocate General Sharpston) (“[T]he introductory words ‘serious reasons for considering that’ indicate that the threshold for [an exclusionary ground] is high.”).

To be consistent with the international law standards Congress incorporated into U.S. law with the Refugee Act, 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 or organization—triggers the persecutor bar.

III. The Standard For Duress Should Be Consistent With The International Legal Obligations Incorporated Into U.S. Law With The 1980 Refugee Act.

Multiple international law sources recognize that exceptions to the protections established by the Refugee Convention must be construed narrowly, given the grave consequences if an otherwise-qualified individual is returned to a country where he or she faces severe harm or death.² *Amici* therefore urge the Board to adopt a flexible, contextualized approach to analyzing duress that is consistent with U.S. obligations under the 1980 Refugee Act, international law, and the

² See *Al-Sirri*, [2012] UKSC 54 at [16] (finding that Article 1F(c) should be “interpreted restrictively and applied with caution”); Gilbert, *supra*, at 427–29. Cf. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731–32 (1995); UNHCR Handbook, *supra*, ¶ 116 (explaining that the exclusion clauses must be interpreted restrictively considering the serious consequences of exclusion). On the persuasiveness of interpretive guidance issued by the UNHCR, see, e.g., *Cardoza-Fonseca*, 480 U.S. at 439 n.22. See generally Anker, *supra*, at ch. 1 (explaining that U.S. case law, including that of the Board, repeatedly recognizes the interpretive weight of the UNHCR Handbook and other UN instruments).

practice of other States Parties. Although DHS's proposed duress test includes several factors that draw on international law principles, the test also annexes additional requirements and diverges from these principles in significant and problematic ways. Particularly troubling, DHS's proposed five-part test requires that an adjudicator examine each part of the test separately for "each act or omission" in isolation. DHS Br. at 25–35. This rigid approach contravenes international law and is out of step with the practice of other States Parties. It is the contemporary understanding of the exclusions' scope that Congress incorporated through the Refugee Act. That standard for exclusion is simple, comprehensive, and well-established.

A. The Factors The Board Should Consider Were Well-Established At The Time Of The Convention's Drafting, The Protocol's Accession, And The Refugee Act's Adoption.

As discussed in Part I.B, the Convention's drafters tied the exclusion for persecuting others to the existence of moral choice, drawing on the analysis of the military tribunals. On this principle DHS agrees. DHS Br. at 27, 35. The difficult question for those tribunals was how to determine when a moral choice was truly absent. By the time of the Refugee Convention's drafting, an exhaustive UN report had reviewed over 1,900 military tribunal decisions and derived common principles from the defenses pled during war crimes trials. *See* UN Law Reports, *supra*, at 170–75. The report concluded that an individual could establish the defense of duress for persecuting others if "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." *Id.* at 174.

This duress standard was well-established at the time of the Refugee Convention's drafting and approval.³ *See* J. Spiropoulos, Special Rapporteur, *Draft Code of Offenses Against the Peace*

³ In 1946, the U.N. General Assembly affirmed the principles recognized by the Charter and 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). Shortly thereafter, the U.N.

and Security of Mankind 275, 2 Yearbook of the Int'l Law Commission, U.N. Doc. A/CN.4/25 (1950); ILC, *Draft Code of Offences against the Peace and Security of Mankind*, art. 4 (1954).

The common understanding that exclusions from refugee status incorporated the duress defense persisted through the time at which the U.S. acceded to the Protocol and incorporated these obligations into U.S. law. See ILC, *Summaries of the Work of the International Law Commission*, http://legal.un.org/ilc/summaries/7_3.shtml; Evans, *supra*, at 514–22 (describing Congressional record from 1978 and 1980 linking persecutor bar to the Nuremberg tribunals and describing the bar as consistent with the Refugee Convention).

While international standards regarding the duress defense have evolved to some degree since the drafting of the Convention, the substance has remained the same. Duress is generally recognized as a defense 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.⁴

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 (Article 1F(a) – aiding and abetting) Zimbabwe v. Sec'y of State for the Home Dep't*

International Law Commission (ILC) recognized that a duress defense was well established. See J. Spiropoulos, Special Rapporteur, *Draft Code of Offences Against the Peace and Security of Mankind* 275, 2 Yearbook of the Int'l Law Commission, U.N. Doc. A/CN.4/25 (1950)

⁴ Hathaway & Foster, *supra*, at 585 (emphasis omitted). Other States Parties have repeatedly recognized that the Refugee Convention 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*, UK Ct. of Appeal (England and Wales) [72] (July 23, 1999) (Laws LJ) (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 of the International Criminal Court (2187 U.N.T.S. 90, entered into force July 1, 2002), reflect pre-existing international jurisprudence on the subject of duress. See *Amici* Law Scholars Br. at 27 n.10. Although the U.S. 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 (noting that “[s]ince November 2009, the United States has participated in an observer capacity in meetings of the I.C.C. Assembly of States Parties” and has “sent an observer delegation to the I.C.C. Review Conference”).

[2012] UKUT 00015 (IAC) [106] (citing draft Article 9 on exceptions to the principle of responsibility of the 1987 International Law Commission and the ICC); *Diaz v. Canada (Minister of Citizenship and Immigr.)* [2013] F.C.J. No. 66 [51] (Can.); *CM (Article 1F(a) – superior orders) Zimbabwe* [2012] UKUT 00236 (IAC) [12] (citing Rome Statute); *VWYJ v. Minister for Immigr. & Multicultural & Indigenous Affairs* [2005] FCA 658 [9] (18 April 2005) (Austl.) (same); *Refugee Appeal No. 75634* [2006] NZSRAA [79] (N.Z.); *YYMT* [2010] 53 AAR 342 [129] (same). See also *Ramirez*, [1992] 2 F.C. 306 (quoting Hathaway, *The Law of Refugee Status* (1991), summarizing the three-part test for duress of the International Law Commission, *supra*); *Refugee Appeal No. 61/91* [1992] NZRSAA (N.Z.) (same); *Canada Minister of Citizenship & Immigr. v. Asghedom* [2001] F.C.J. No. 1350 [24] (Can.) (same).

B. Part 1: The Threat Of Immediate Death, Or Of Continuing Or Imminent Serious Bodily Harm, To The Individual Or Another Should Be Evaluated Comprehensively.

Amici and DHS agree that the threat of imminent death or serious bodily harm is a proper factor in the test for duress, but DHS measures imminence in a way that is exceedingly narrow and likely to, perhaps unintentionally, exclude victims of coercion. DHS states that the applicant must face the threatened harm “at the moment” he committed the prohibited act and that the threat must be “specific, as opposed to vague and general.” DHS Br. at 28–29. DHS then relies on this factor to argue that Mr. Negusie failed to establish that the threats against him were sufficiently imminent as required for duress. DHS Br. at 42. This approach is overly literal, difficult to apply, and inconsistent with the Board’s own repeated emphasis on a case-by-case approach to eligibility for protection. See *Anker, supra*, at 1:4.

The military tribunals that addressed the applicability of this defense understood that the immediacy of the threat must be judged based on the entire context, the course of conduct of both the coercive regime and the individual asserting the defense, rather than threats made only “in the

moment.” 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 did not look at each event in which defendants used slave labor in isolation, but rather 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.

Decisions by other countries on the proper standard for duress similarly reflect a more nuanced and flexible approach to imminence. *See Diaz* [2013] FCJ No. 66 [52] at [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 v. Mann* [2007] F.C.J. No. 790 [16]–[17], [23]–[25] (Can.) (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” in considering the applicant’s actions and the threat he faced in the aggregate and in upholding a finding that “in light of his fear that the BK would kidnap or kill him, there was a situation of clear and imminent danger” (internal citations omitted)); *Asghedom*, [2001] F.C.J. No. 1350 [29]–[32] (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, such as severe punishment or death, if he had deserted from the army, given that “another soldier who had tried to escape, had

been killed”). *But see Refugee Appeal No. 75634* [2006] NZSRAA [70] (rejecting applicant’s claim that he acted under “compulsion” where his eleven years of employment in the Somali army did not appear to result from “threats of imminent death or serious bodily harm”). Importantly, DHS recognizes that too narrow a conception of imminence will “invite punishment of blameless victims of coercion.” DHS Br. at 28. Military tribunals and decisions of other countries heed this admonition. To establish duress, an applicant must thus show that the threat is both real and ongoing. This simple standard functioned for the tribunals trying the worst human rights violators in modern history and requires no modification by the Board today.

C. Part 2: 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 529–30. *Amici* and DHS agree on this factor’s relevance and its source in international law. DHS Br. at 31. The more recent formulation of this factor contained in Article 31(d) of the Rome Statute similarly requires that “the person acts necessarily . . . to avoid this threat.” 2187 U.N.T.S. 90, *entered into force* July 1, 2002.

The practice of States Parties to the Refugee Convention and Protocol follows suit. *See, e.g., Diaz* [2013] F.C.J. No. 66 [55] (finding that applicant had no legal alternative to complying with the cartel’s demands where he continued to face threats after closing and reopening store under different name, changing address, and receiving no police protection); *Mann* [2007] F.C.J. No. 790 [20] (noting that this requirement “involves a realistic appreciation of the alternatives open to a person; the accused need not be placed in the last resort imaginable, but he must have no reasonable legal alternative”). *But see CM Zimbabwe* [2012] UKUT 00236 [29] (finding that applicant had ample opportunities to disassociate himself from beatings, but failed to avail himself

of opportunities); *MT Zimbabwe* [2012] UKUT 00015 [109] (excluding an applicant who “never turned her mind to possible avoidance of participation in abusive conduct”); *RBD File No. MB-05095* [2013] RPDD No. 611 [134] (Can.) (considering the existence of a “safe avenue of escape, evaluated on a modified objective standard”).

In assessing whether an asylum applicant’s actions were reasonable or necessary to avoid the threat of harm, this factor thus requires an examination of the asylum applicant’s motivations to ensure that he does not share the persecutor’s objectives. *See Refugee Appeal No. 74646* [2003] NZRSAA [53] (N.Z.) (finding that applicant at no time “shared a common purpose” with the militant organization he assisted nor had any “ideological commitment” to the group); *Refugee Appeal No. 2142/94* [1997] NZRSAA 92 (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 was able to send mother to India and escape himself, both of which he did “with reasonable alacrity in all the circumstances”).

D. Part 3: 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.

Amici and DHS agree that the duress defense can apply so long as an applicant for protection “does not *intend* to cause greater harm than the one sought to be avoided.” *See UNHCR Exclusion Guidelines*, *supra*, ¶ 22 (emphasis added); *Background Note*, *supra*, ¶ 69 (same) (explaining its source in the trials following WWII). The military tribunals rejected the defense where the threat avoided was merely loss of property. *See Evans, supra*, at 531; *The Krupp Case*, in *9 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 1412, 1444–46 (1951) [hereinafter *The Krupp Case*]. Several U.S. tribunals applied the

defense to acts involving the loss of life. *See* The *Einsatzgruppen* Case, *supra*, at 584–87; The *High Command* Case, *supra*, at 557–78.

States Parties to the Convention and Protocol similarly look to the intent of the applicant in causing the harm. *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.J. No. 1350 [12], [38]–[39] (affirming finding that Eritrean teenager who was forcibly recruited by Ethiopian military acted under duress when standing guard during raids, pushing people onto trucks taking them 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). *See also Mann*, [2007] F.C.J. No. 790 [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 at the hands of the BK”). *Cf. MT Zimbabwe* [2012] UKUT 00015 [108] (finding that applicant, whose police unit had committed torture, could not demonstrate duress because she would only have faced suspension or disciplinary action for deserting); *CM Zimbabwe*, [2012] UKUT 00236 [30] (excluding applicant from refugee status after finding that punishment of deserters included a range of judicial and non-judicial measures that “did not constitute acts of comparable severity to the beatings the appellant inflicted”).

DHS follows the practice of other States Parties in recognizing that duress can apply even where the loss of life occurred so long as the applicant did not intend to cause greater harm than the threat avoided. DHS Br. at 35–36. *Amici* agree with this approach.

E. The Three-Part Test For Duress Must Take Into Account The Applicant's Subjective Perspective And Be Assessed In The Aggregate.

While many of the factors in DHS's proposed test for duress align with those articulated in historical international law sources, DHS's application of the test does not. In particular, DHS speaks of the exclusive role of objective evidence, DHS Br. at 27, 29, 31, and urges an assessment that examines each prong separately for each act in isolation, *id.* at 25–35.

DHS improperly asserts that the applicant “must prove by a preponderance of the evidence, for each act or omission at issue, that he or she reasonably believed that he or she had to act, or not act, in order to directly avoid the threatened harm,” and thus confuses subjective and objective evidence, stating that the “element is critical in assessing whether the threat *objectively appeared to the applicant* as likely to be carried out.” DHS Br. at 29 (emphasis added). This approach should be rejected as it breaks with the interpretation of the duress defense at the time of the Refugee Convention and Protocol and diverges from the standard applied by other States Parties. The factors considered by the Board in evaluating duress should, instead, reflect the reality that one's moral choice not to persecute others cannot be as neatly parsed as DHS asserts, and should be evaluated in light of the applicant's subjective perspective.

Tasked with assessing moral choice, the military tribunals emphasized the role of subjective evidence and the need to consider whether the evidence as a whole demonstrated that the person pleading the defense 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 Law Reports, *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, *supra*, 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.”).

Importantly, DHS recognizes that an applicant’s age or mental capacity “is likely to affect his or her perception of the situation, including the reasonableness and gravity of the threats and imminence of harm, his or her ability to avoid the conduct, and the potential results of his or her conduct.” DHS Br. at 25 n.7. Nonetheless, DHS inconsistently stresses the role of objective evidence as to the availability of alternative courses of action. *Id.* at 31. Excluding consideration of an applicant’s subjective perspective would contravene the purpose of the defense and would contradict DHS’s own practice of determining whether the harm experienced amounts to persecution from the perspective of the applicant. *See* UNHCR Handbook, *supra*, ¶ 52 (“Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.”).

DHS’s approach also eliminates the comprehensive assessment of duress as set out by international law and conducted by other States Parties. For example, the U.S. military tribunals looked at the evidence going to each prong of duress in the aggregate and determined whether the evidence as a whole demonstrated that the person pleading the defense had lost his freedom of choice. *See* The *Flick* Case, *supra*, at 1194-1202; The *Krupp* Case, *supra*, at 1435-49; The *Einsatzgruppen* Case, *supra*, at 470-488 (general judgment on presence of duress as a whole) and 509-87 (judgments of individual defendants). 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 714 [92] (noting that “[r]efugee claimants come from many countries and appear

before the Board with their own life experiences and backgrounds in their respective countries of origin. Thus, the assessment of the factors developed in our jurisprudence, the decisions of the courts of other countries, and the international community will necessarily be highly contextual.”). *See also Mann* [2007] FCJ No. 790 [23]–[25] (considering the claimant’s actions and the threat he faced in the aggregate in upholding Board’s finding that “in light of his fear that the BK would kidnap or kill him, there was a *situation* of clear and imminent danger”) (emphasis added).

Similarly, tribunals in the UK have emphasized “[i]t is not uncommon . . . for the respondent’s exclusion case and the appellant’s refugee claim to rely on the same evidence” and that “[a]n assessment of whether an appellant is excluded from refugee protection, even if the standard for that assessment is different, must take account of his evidence as a whole, not just part of it.” *AS (s.55 “exclusion” certificate – process) Sri Lanka* [2013] UKUT 00571 (IAC) [26]–[29]. *See also Gurung v. Sec’y of State for the Home Dep’t* [2002] UKIAT 04870 [39] (noting that “a holistic approach” must be adopted; “exclusion issues should never be examined in complete isolation from the examination of the appellant’s overall claim”). The Tribunal in *Gurung* stressed the importance of considering all of the circumstances, including “evidence about the status and level of the person in the organisation and factors such as duress and self-defence against superior orders as well as the availability of a moral choice” as well as “evidence about the nature of the organisation and the nature of the society in which it operates.” *Id.* [110].

By requiring a preponderance of the evidence for each prong and act as DHS urges, the Board risks missing the forest for the trees. DHS’s approach would result in denying needed protection to individuals subjected to a pervasive, overarching, and coercive regime simply due to a lack of evidence at an isolated moment in time.

IV. DHS's Additional Requirements Concerning Negligent Conduct And Earliest Disclosure Have No Basis In And Are Inconsistent With International Law.

DHS asks the BIA to require proof that an applicant's involvement in the persecution of others was not the result of negligence. DHS Br. at 33. It also asserts that applicants must disclose their involvement at the earliest possible opportunity or risk an adverse credibility determination. DHS Br. at 22–24. Neither annexed requirement reflects the concerns that underlie refugee protection or conforms to international law.

A. DHS's Proposed Requirement Concerning Negligent Conduct Is Inconsistent With The Purpose Of The 1980 Refugee Act, The Refugee Convention And Protocol.

DHS looks to U.S. criminal law and argues that an individual should be returned to the site of persecution solely because that person perhaps *should* have expected the harmful consequence of his actions but in fact *did not intend or know* about those consequences. DHS Br. at 33–34. However, the U.S. criminal law, on which DHS relies, concerns whether an individual should be able to avoid a sentence of incarceration or probation. DHS Br. at 33–34 (citing Model Penal Code § 2.09(2)). It does not contemplate a defense against a proven likelihood of persecution, and in any event, U.S. criminal law is not the correct source of interpretation for a statutory provision enacted to bring U.S. law into conformance with an international treaty. *See Ezokola*, [2013] 2 S.C.R. 678 [46] (“We are therefore required by both the text of art. 1F(a) and the realities of international crime to look beyond the bounds of Canadian criminal law.”); *M. (M.Q.) Re* [1995] CRDD 90 (Can.) (noting that “the exclusion provisions of the refugee definition cannot be interpreted only in reference to domestic criminal law”). *See also FTZK v Minister for Immigr. and Border Protection* [2014] 88 ALJR 754 [34] (“There is no warrant for reading the text of the [international] treaty as operating by reference to common law judicial or procedural precepts.”); *Minister for Immigr. and Multicultural Affairs v Singh* [2002] 186 ALR 393 [93] (Austl.) (“[C]ourts may fall

into the error of introducing into the elaboration of [the Convention's] meaning peculiarities of domestic law that have no place in an international context.”); *Refugee Appeal No. 74665/03*, [2004] NZRSAA [38] (N.Z.) (observing that it “is inherently undesirable [to apply domestic standards] in the context of an international human rights treaty which must be interpreted and applied according to international, not domestic standards” (internal citation omitted)).

UNHCR has emphasized the need to exercise caution in excluding someone who is otherwise eligible for refugee protection. *Exclusion Guidelines*, *supra*, ¶ 2 (noting “the possible serious consequences of exclusion”); *Background Note*, *supra*, ¶¶ 3–5 (explaining that exclusions “must be viewed in the context of the overriding humanitarian objective of the 1951 Convention”). The decisions of other parties to the international refugee agreements also reflect this concern. *See Ezokola*, [2013] 2 S.C.R. 678 at 693 [32] (“The preamble to the *Refugee Convention* highlights the international community’s . . . commitment ‘to assure refugees the widest possible exercise of . . . fundamental rights and freedoms’. Our approach to art. 1F(a) must reflect this ‘overarching and clear human rights object and purpose.’”) (internal citations omitted).

Amici therefore urge the Board not to adopt DHS’s improper additional requirement that asylum adjudicators apply domestic criminal law standards for *mens rea*, which has the potential to sentence someone who otherwise meets the refugee definition to death for merely negligent conduct. *See Ezokola*, [2013] 2 S.C.R. 678 at 706 [68] (concluding that “[a]t a minimum,” exclusion from refugee protection “requires an individual to knowingly (or, at the very least, recklessly) contribute in a significant way to the crime or criminal purpose of the group”).

B. *DHS's Requirement For Earliest Possible Disclosure Is Inconsistent With International Law.*

DHS argues that “[a]n applicant’s failure to be completely forthcoming from the start of the claim for relief or protection should be carefully considered in determining credibility.” DHS

Br. at 23. DHS cites to no authority in support of its argument that the statutes and regulations governing the immigration process contain an “implicit requirement of complete candor at the first reasonable opportunity.” DHS Br. at 23. Indeed, under the REAL ID Act, the trier of fact must first consider “the totality of the circumstances[] and all relevant factors” in making a credibility determination. Pub. L. No. 109-13, 119 Stat. 231, 303 (2005). When assessing consistency of an applicant’s statements, the trier of fact must “consider[] the circumstances under which the statements were made.” *Id.* DHS’s assertion is thus inconsistent with U.S. law, as well as with international law and DHS practice in other related areas of refugee law. It also ignores the impact of trauma and the *pro se* status of many applicants.

The UNHCR and other States Parties to the Refugee Convention have adopted a contextualized approach to credibility determinations; so too should the Board. *See* UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems* 46, 214 (2013) [hereinafter “UNHCR, *Beyond Proof*”] (noting that “the credibility of asserted material facts should be assessed with reference to the entirety of the applicant’s statements, including any additional information given to explain any apparent inconsistencies, vagueness or doubts regarding plausibility” and that “[t]he determining authority should take into account any individual and contextual circumstances that might account for the applicant’s actions” (collecting cases from the UK, Canada, Australia, and the EU)). UNHCR has emphasized that “[u]ntrue statements by themselves are not a reason for refusal of refugee status and it is the examiner’s responsibility to evaluate such statements in the light of all the circumstances of the case.” UNHCR Handbook, *supra*, ¶ 199. In fact, UNHCR notes that “[t]here may be many valid reasons why an applicant may provide false information and/or documents in support of an application. Therefore, the

applicant must be afforded an opportunity to explain and any explanation provided should be fully considered.” UNHCR, *Beyond Proof*, *supra*, at 215.

Tribunals in the UK and New Zealand have repeatedly recognized that evidence pertaining to exclusion issues may arise over the course of a hearing with no prejudice to the government’s case. *See AS (s.55 “exclusion” certificate - process) Sri Lanka*, [2013] UKUT 00571 (IAC) [28] (“It is the nature of litigation, certainly in the Immigration and Asylum Chamber, for new evidence or issues to arise during a hearing. If a party considers that they have not been given a sufficient opportunity to deal with the new point, an application for an adjournment can be made. If the respondent’s case on exclusion changes during a hearing this can be addressed in the same way, by an adjournment, short or longer, depending on the particular circumstances.”); *Kathiravel v. Canada* [2003] F.C.T. 680 [13] (Can.) (noting that where the Minister “is of the opinion that matters involving . . . Article 1[F] of the Convention . . . are raised,” the Minister may “question the person making the claim and other witnesses”). *See also SBBO v. Minister for Immigr. and Multicultural Affairs*, [2002] FCA 963 (Austl.) (remarking on the “need to exercise special care in deciding credibility issues arising from the inconsistency between statements made on arrival, and later statements”); *Sivalingam v. Minister for Immigr. and Multicultural Affairs*, [1998] FCA 157 (Austl.) (accepting that during “an initial interview at an airport in a strange country an applicant may not be as articulate and as forthcoming as he or she might be in a more relaxed and less threatening atmosphere”); *Refugee Appeal No. 74665/03*, [2004] NZRSAA (granting refugee status to applicant who, right before appeal hearing, added new ground to claim, namely that if he returned to Iran he would be at risk of persecution for reason of his sexual orientation, and admitted that one of his original grounds was false). *See generally* Hathaway & Foster, *supra*, at 144–46.

Moreover, it is unreasonable to demand that an asylum applicant, who was forced to engage in persecutory acts against her will, identify her conduct as “persecutory,” given her experience of coercion and her position as a victim, not a persecutor. In such cases, a “failure to be completely forthcoming from the start” does not reflect a lack of candor or honesty, as DHS argues, but rather a lack of understanding—a disconnect between the government’s and the applicant’s interpretation of the events that transpired. *See Hathaway & Foster, supra*, at 147, n. 351 (citing the Federal Court of Australia in *Singh v. Minister for Immigr. and Multicultural Affairs*, [1997] FCA 440 (Austl.), where the court signaled the need to avoid “adopting too harsh a view of . . . inconsistencies and memory lapses, especially in such claims where the conduct complained of as constituting persecution might itself provide the explanation for such matters”).

Pro se asylum applicants are especially vulnerable given the complexities of the asylum process. The International Association of Refugee Law Judges has recognized the challenges presented by lack of representation, emphasizing that “[c]redibility assessments may be fundamentally flawed where, through faulty or inappropriate procedures, claimants do not have the opportunity to present their claims and supporting evidence fairly and reasonably.” IARLJ, *Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive: Judicial Criteria and Standards* 44 (2012).

Finally, DHS’s practice in a related setting demonstrates the flaws in its proposed “first reasonable opportunity” standard. For the bar to protection for engaging in “terrorist activity” INA § 212(a)(3), DHS administers several different exemptions for conduct committed under duress. *See DHS, Exercise of Authority Under Section 212(d)(3)(B)(i) of the INA* (2011); DHS, *Exercise of Authority Under Section 212(d)(3)(B)(i) of the INA* (2011); DHS, *Exercise of Authority Under Section 212(d)(3)(B)(i) of the INA* (2007). In this context, DHS requires only that applicants

“fully disclose” relevant activity with no temporal requirement. *Id.* Requiring asylum applicants to disclose coerced conduct at the first opportunity or face an adverse credibility finding is thus inconsistent with domestic and international law as well as the fundamental purpose of refugee protection.

CONCLUSION

To be consistent with U.S. obligations under the Refugee Protocol, the BIA should interpret the persecutor bar to include the defense of duress and apply a standard for duress that is consistent with its source in international law.

Dated: November 7, 2016



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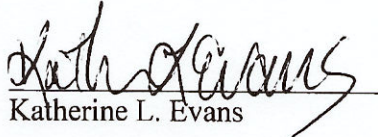
Counsel for *Amici Curiae*

PROOF OF SERVICE

On November 7, 2016, I, Katherine L. Evans, sent by courier service three copies of the Request to Appear as *Amici Curiae* and Proposed Brief on behalf of Scholars in International Refugee Law to the following address for the BIA to serve on the parties pursuant to its instructions in Amicus Invitation 16-08-08:

Amicus Clerk
Board of Immigration Appeals
Clerk's Office
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Falls Church, VA 22014

Dated: November 7, 2016


Katherine L. Evans

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