No. 07-499

In The Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,

Petitioner,

v.

MICHAEL MUKASEY,
United States Attorney General,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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

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INTEREST OF THE *AMICUS CURIAE*[1]

The Office of the United Nations High Commissioner for Refugees ("UNHCR") has been charged by the United Nations General Assembly with responsibility for providing international protection to refugees and other persons within its mandate and for seeking durable solutions to their problems. *See* Statute of the Office of U.N. High Comm'r for Refugees, G.A. Res. 428 (V), Annex, U.N. Doc. A/RES/428(V), ¶¶ 1, 6 (1950). In particular, the Statute of the Office of the High Commissioner specifies that the High Commissioner's duty to provide protection for refugees includes supervising the application of international conventions for the protection of refugees. *Id*. ¶ 8(a) (1950). UNHCR's supervisory responsibility is formally recognized in the 1951 Convention relating to the Status of Refugees, art. 35, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 ("1951 Convention" or "Convention"), and in the 1967 Protocol relating to the Status of Refugees, art. II, Jan. 31, 1967, 19 U.S.T. 6223, 606

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

U.N.T.S. 267 ("1967 Protocol" or "Protocol"), to which the United States became a party in 1968.[2]

The views of UNHCR are informed by more than fifty years of experience supervising the Convention and Protocol. UNHCR, with a presence in 110 countries and currently serving over thirty-two million people, provides guidance to States in establishing and implementing national procedures for refugee status determinations and conducts such determinations under its own mandate. UNHCR's interpretation of the provisions of the Convention and Protocol are integral to the global regime for the protection of refugees. The Convention and Protocol serve as the foundation of United States asylum law; thus, UNHCR's understanding of these treaties should provide substantial guidance to this Court in applying United States asylum law.[3]

This case concerns the application of the grounds for excluding an individual from refugee protection under United States law. These provisions correspond to the exclusion clauses under Article 1F of the 1951

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[2] Art. I of the 1967 Protocol incorporates by reference Articles 2-34, the substantive provisions of the 1951 Convention.

[3] This Court has consistently granted UNHCR leave to submit an *amicus curiae* brief when interpreting provisions of the 1980 Refugee Act, e.g., in *INS v. Stevic*, 467 U.S. 407 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *INS v. Doherty*, 502 U.S. 314 (1992); *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) and *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2006), *cert. dismissed*, 128 S. Ct. 828 (2007).

Convention. Failure to fully comply with the criteria for determining whether an individual is, in fact, excludable, also gives rise to a potential violation of the fundamental principle of *non-refoulement* – not returning a refugee to persecution – under Article 33 of the 1951 Convention. As such, this case presents questions squarely within the core mandate of UNHCR.[4] In addition, this Court's ruling will likely influence the manner in which other countries apply similar provisions implementing the treaty.

In furtherance of its core mandate, UNHCR seeks to promote a common approach to the application of the 1951 Convention and 1967 Protocol,[5] including the exclusion clauses, thus providing consistency and predictability in refugee determinations internationally and reducing the possibility of conflict

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[4] UNHCR submits this brief *amicus curiae* to explain the analytic framework for resolving issues related to exclusion from international refugee protection, not to offer an opinion on the merits of the Petitioner's particular claim.

[5] The most recent efforts in this regard were the Global Consultations on International Protection organized by UNHCR in 2000-2002 to address key questions relating to the 1951 Convention. The Consultations enjoyed broad participation by governments, including the government of the United States, the International Association of Refugee Law Judges, legal practitioners, non-governmental organizations and academia. The purpose was to take stock of the state of law and practice, to consolidate the various positions taken based on best practices, and to develop concrete recommendations on how to achieve more consistent global understandings of key issues. The bases for exclusion from refuge protection were among the issues comprehensively addressed in the Global Consultations.

between decisions made by different States, between decisions made by a State and the UNHCR, or both.

SUMMARY OF ARGUMENT

The legal grounds under the Immigration and Nationality Act ("INA") at issue here bar an individual from receiving the protection of asylum and withholding of removal if the individual has been determined to have "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." 8 U.S.C. § 1158(b)(2)(A)(i) (asylum bar) and 8 U.S.C. § 1231(b)(3)(B)(i) (withholding of removal bar). Congress included this exception to refugee protection to be consistent with the exclusion clause under Article 1F(a) of the 1951 Convention, which provides for the exclusion from refugee status of individuals who have committed a crime against peace, a war crime or a crime against humanity.

Given the grave consequences of excluding a refugee from international protection – return to persecution – the exclusion clauses must be applied restrictively and with the utmost caution. Under international law, in order to exclude someone based on Article 1F, not only must the act in question fall within the exclusion clauses, there must be an assessment of whether the refugee applicant is individually responsible for the excludable conduct. To be

individually responsible, the applicant must have committed the act or made a substantial contribution to its commission. Additionally, there must be a finding that the applicant had the requisite *mens rea* including both intent and knowledge regarding the conduct and its consequences. If such a finding is made, there must be a further examination of whether there are any grounds for rejecting individual responsibility, including any appropriate defenses such as duress.

Without such analysis, refugees may erroneously be denied essential international protection and be subject to *refoulement*, or return to a country where their "life or freedom would be threatened," in violation of United States' obligations under the 1967 Protocol and Article 33 of the 1951 Convention.

In contravention of United States' international obligations, both the Board of Immigration Appeals ("BIA") (Pet. App. at 6a) and the Fifth Circuit Court of Appeals (*id*. at 2a) specifically ruled that whether the Petitioner had been compelled to assist authorities was irrelevant.

ARGUMENT

I. CONGRESS CLEARLY INTENDED THAT THE "PERSECUTOR OF OTHERS" BAR TO ASYLUM AND WITHHOLDING OF REMOVAL BE APPLIED CONSISTENTLY WITH UNITED STATES' OBLIGATIONS UNDER THE 1967 PROTOCOL.

Under the 1980 Refugee Act,[6] an individual who has "ordered, 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" is barred from receiving asylum[7] or withholding of removal.[8] As will be shown, Congress intended that exclusion from asylum and withholding of removal be applied in a manner consistent with United States' international law obligations under the 1951 Convention and 1967 Protocol. As will also be shown, this Congressional intent is firmly established. Thus, the Convention and Protocol are relevant sources of international refugee law that should guide the Court in applying the "persecutor of others" bar.

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[6] The 1980 Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980) is incorporated in the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1102, *et seq*., and as such will be cited by its location in the U.S. Code and its correlative cite in the INA.

[7] 8 U.S.C. § 1158(b)(2)(A)(i); INA § 208(b)(2)(A)(i).

[8] 8 U.S.C. § 1231(b)(3)(B)(i); INA § 241(b)(3)(B)(i).

When Congress included the "persecutor of others" bar in the 1980 Refugee Act, it legislated against the backdrop of the long-established rule that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (Marshall, C.J.); *cf The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction."). This Court and lower federal courts have reaffirmed the "*Charming Betsy*" presumption on numerous occasions. *See, e.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *United States v. Suerte*, 291 F.3d 366, 373-74 (5th Cir. 2002).

The text of the INA generally, and the "persecutor of others" bar specifically, evince no intent to violate international law. To the contrary, as this Court reaffirmed in *INS v. Aguirre-Aguirre*, "'one of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol. . . ." 526 U.S. at 427 (1999) (quoting *INS v. Cardoza-Fonseca,* 480 U.S. at 436-37 (citing H.R. Rep. No. 96-781, at 19 (1980)) (internal citation omitted); *see also* H.R. Rep. No. 96-608, at 9 (1979) (stating Congress' intention to "bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the . . . Convention and Protocol").

Congress' intention that the Refugee Act comport with the 1967 Protocol was not limited to the definition of "refugee" or eligibility for asylum. Congress specifically expressed its intent that the provisions of the Refugee Act obligating the Attorney General to withhold deportation of a refugee "[conform] to the language of Article 33" of the 1951 Convention. *INS v. Stevic*, 467 U.S. at 421 (discussing 8 U.S.C. § 1253(h) (1976), now codified at 8 U.S.C. § 1231(b)(3)).

It is equally clear that Congress intended the bars to asylum and withholding of removal under United States law to be consistent with exclusion from refugee protection under international law. Indeed, the conferees included these exceptions in the Refugee Act based on their explicit "understanding that [they were] based directly upon the language of the Protocol" and would "be construed consistent with the Protocol." H.R. Conf. Rep. No. 96-781, at 20 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 161.

Turning to the specific exclusion provision at issue in the present case – the "persecutor of others" bar – the legislative history demonstrates Congress' clear intent that the bar be consistent with Article 1F(a) of the 1951 Convention, notwithstanding the difference in terminology between the statutory bar and Article 1F(a).[9] In adding "language specifically to

[9] Article 1F(a) does not specifically refer to persecution of others; however, the crimes which it enumerates – crimes against peace, war crimes, and crimes against humanity – would encompass acts of this nature.

exclude from the definition of 'refugee' those who themselves engaged in persecution," Congress understood such a formulation to be "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' . . . "). H.R. Rep. No. 96-608, at 10 (1979).

Plainly, Congress intended that the "persecutor of others" bar be construed to comport with United States' obligations under international law. The clear legislative history, coupled with the absence of any statement to the contrary, points to the conclusion that any application of the bar that fails to adhere to United States' obligations under international law is incorrect. This Court should therefore apply the "persecutor of others" bar in light of Congress' express commitment to ensure United States' adherence to international refugee law and in a manner in keeping with its own precedents.

II. PROPER APPLICATION OF THE EXCLUSION CLAUSES REQUIRES THAT AN APPLICANT FOR REFUGEE STATUS BE FOUND INDIVIDUALLY RESPONSIBLE FOR THE CRIMINAL CONDUCT.

Under the 1951 Convention, an individual is excluded from refugee protection only if he or she has committed a crime that falls within the exclusion clauses contained in Article 1F of the Convention. The rationale for these clauses is to exclude any

individual who has committed an act so grave as to be undeserving of international refugee protection. U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,* ¶ 140, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979, re-edited Jan. 1992) ("UNHCR *Handbook*").

In view of the serious possible consequences for the individual – return to persecution, the most extreme sanction under the relevant international refugee instruments – international law requires that the exclusion clauses be applied with the utmost caution and only after a full assessment of the individual circumstances of the case.. U.N. High Comm'r for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, ¶ 2, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003) ("*Exclusion Guidelines*"); *see also* UNHCR *Handbook* ¶ 149.

Article 1F of the 1951 Convention contains three clauses which exhaustively enumerate the acts that may result in the exclusion of an individual from refugee protection. It provides that the 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 or principles of the United Nations.

1951 Convention, Article 1F. A person who participates in what might be classified as "persecution of others" – but otherwise meets the refugee definition – is therefore subject to exclusion from international refugee protection only if the acts committed meet the legal criteria under one or more of the clauses in Article 1F. Those criteria include the requirement that there be a finding that there are serious reasons for considering that the applicant was individually responsible for the act in question.

In analyzing exclusion from refugee status, UNHCR relies on the 1951 Convention and 1967 Protocol, and is guided by its Executive Committee, of which the United States is a long-time member. UNHCR also relies on its own *Exclusion Guidelines* and the accompanying U.N. High Comm'r for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 15 Int'l J. Refugee L. 3 (2003) ("*Background Note*"), which forms an integral part of the Guidelines. These documents were formulated and issued to help ensure a proper understanding of the exclusion clauses in light of contemporary concerns and to provide States with more comprehensive and up-to-date analytical tools

to supplement the discussion of exclusion found in the UNHCR *Handbook*.[10]

The UNHCR *Exclusion Guidelines* and *Background Note on Exclusion* are based on State practice, case law, UNHCR's experience, the *travaux préparatoires* of the relevant international instruments, and the opinions of expert commentators. *Background Note* ¶ 2. The *Exclusion Guidelines* and the *Background Note* inform our analysis of the issue before this Court, which focuses on the requirement to assess individual responsibility for excludable acts, and, in particular, on the need for considering the grounds for rejecting such responsibility based on the defense of duress.

Because the Article 1F exclusion clauses are based on criminal violations, principles of criminal

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[10] UNHCR issued its *Handbook* in 1979 at the request of its Executive Committee to provide States with guidance on the application and interpretation of the 1951 Convention and its 1967 Protocol. This Court has found that, while not legally binding, the UNHCR Handbook may be a "useful interpretive aid", *see INS v. Aguirre-Aguirre*, 526 U.S. at 427, and provides "significant guidance" in construing the 1967 Protocol and in giving content to the obligations established therein, *see Cardoza-Fonseca*, 480 U.S. at 439 n.22. *See also Rodriguez-Roman v. INS*, 98 F.3d 416, 425 (9th Cir. 1996) (noting the BIA "is bound to consider the principles for implementing the Protocol established by" UNHCR); *In re S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996) (noting that in adjudicating asylum cases the BIA must be mindful of "the fundamental humanitarian concerns of asylum law," and referencing the UNHCR Handbook).

law are applicable in assessing whether a refugee is excludable based on one of its grounds. In accordance with fundamental principles of criminal law, exclusion from international refugee protection under Article 1F requires a determination of "individual responsibility" before any of the delineated grounds can be found to be applicable. *Exclusion Guidelines* ¶ 18.

"In general, individual responsibility 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." *Background Note* ¶ 51. *See also Exclusion Guidelines* ¶ 18. "The individual need not physically have committed the criminal act in question. Instigating, aiding and abetting and participating in a joint criminal enterprise can suffice." *Exclusion Guidelines* ¶ 18. The person's degree of involvement must be carefully analyzed in each case. *Background Note* ¶ 51. Even, and perhaps especially, when "acts of an abhorrent and outrageous nature have taken place," it is important to focus on the role and responsibility of the individual. *Id*.

For a finding of individual criminal responsibility under Article 1F, it must be established that the applicant committed the material elements of the offense with "intent" and "knowledge" regarding the conduct and its consequences. *Exclusion Guidelines* ¶ 21. The UNHCR *Background Note* discusses "intent" as requiring that the person meant to engage in the conduct at issue or to bring about a particular

consequence, or was aware that the consequence would occur in the ordinary course of events. ¶ 64. Addressing the meaning of "knowledge," the *Background Note* defines it as an awareness that certain circumstances exist or that a consequence would occur in the ordinary course of events. *Id*. When the person concerned did not have the *mens rea* required for a particular offense,[11] a fundamental aspect of the criminal offense is missing, and, therefore, no individual responsibility arises for the crime in question.[12] *Id*. If, on the other hand, it is determined that the individual is responsible, further examination must be undertaken to determine whether any defenses to the conduct in question are applicable.

[11] The requisite *mens rea* will not be present if the person lacks the mental capacity due to such reasons as insanity, mental handicap, involuntary intoxication or, in the case of children, immaturity. *Background Note* ¶ 65.

[12] Specific considerations apply to crimes against peace which must be "committed in the context of the planning or waging of aggressive wars or armed conflicts. Armed conflicts are only waged by States or State-like entities, [thus,] traditionally, personal liability under this provision can only attach to individuals in a position of high authority representing a State or State-like entity." *Background Note* ¶ 50. This limitation does not apply to "war crimes, crimes against humanity and serious non-political crimes." *Id.*

III. INDIVIDUAL RESPONSIBILITY CANNOT BE ESTABLISHED IF ANY DEFENSES TO CRIMINAL LIABILITY SUCH AS DURESS ARE APPLICABLE.

Individual responsibility is not established if any defenses to criminal responsibility apply. *Exclusion Guidelines* ¶ 22; *Background Note* ¶ 66. The defense most relevant to the issue before the Court is that of duress.

The defense of duress applies where the act in question "results from the person concerned necessarily and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm to him- or herself or another person, and the person does not intend to cause greater harm than the one sought to be avoided." *Exclusion Guidelines* ¶ 22; *Background Note* ¶ 69.

State practice recognizes the availability of the defense of duress in cases implicating Article 1F. For example, recently in a case strikingly similar to Petitioner's, the Federal Court of Canada upheld the Immigration and Refugee Board's ("IRB") decision that an Eritrean who was forcibly recruited into the Ethiopian military and forced to stand guard while civilian homes were raided for ammunition and weaponry and to assist in the transport of people to a camp where he was aware they would be tortured did not fall under the exclusion clauses of the Convention because he acted under duress. *Minister of Citizenship & Immigration v. Asghedom*, [2001] F.C. 972,

(Can.). In that case, the IRB found that the refugee applicant had knowledge of acts which were deemed to constitute crimes against humanity and war crimes implicating Article 1F(a) but that he had established the defense of duress and, therefore, was not complicit in those crimes. *Id*. ¶ 20. The IRB based this conclusion on the following facts:

> – the respondent was forcibly recruited into the Ethiopian Army;
>
> – he held no rank other than a mere soldier;
>
> – he did not have any opportunity to leave the army until he was released in late 1988, early 1989;
>
> – he was compelled to do the duties that he was told to do, namely stand guard on people who were being arrested after having weapons found in their house, and also burying dead bodies;
>
> – a soldier in a similar situation had tried to escape and had been killed;
>
> – the respondent's evidence and the documentary evidence showed that if the respondent tried to desert, he would have faced severe punishment, including death;
>
> – the respondent left at the first available moment that he could, namely upon his release after serving two years.

Id. ¶ 22.

Other recent cases from common law jurisdictions have also recognized that the duress defense is available to negate a finding of individual responsibility under the Convention's exclusion clauses. *See, e.g.*, *Sryyy v. Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 220 A.L.R. 394 (Austl.) (Federal Court of Australia stating, "Article 1F(a) refers to serious reasons for considering that the relevant person 'has committed a crime.' We are unable to accept the proposition that a person may be said to have committed a crime when that person has a defence which, if upheld, will absolve or relieve that person from criminal responsibility."); *Gurung v. Secretary of State for the Home Department* [2003] EWCA (Civ) 654, [1]-[15] (Eng.) (The United Kingdom Immigration Appeal Tribunal finding that even when a refugee applicant is complicit in an act giving rise to exclusion, an Article 1F assessment must take into account defenses including duress); Refugee Appeal No. 2142/94 VA, N.Z. Refugee Status Appeals Authority (Mar. 20, 1997) (The New Zealand Refugee Status Appeals Authority applying the rule that when an individual's conduct falls under Article 1F, he or she may not be excludable if there is a significant degree of compulsion or duress surrounding the conduct).

The defense of duress is often at issue in the context of forcibly conscripted soldiers. "When duress is pleaded by an individual who acted on the command of other persons in an organization," such as in the instant case, "consideration should be given as to whether the individual could reasonably have been

expected simply to renounce his or her membership, and indeed whether he or she should have done so earlier if it was clear that the situation in question would arise. Each case should be considered on its own facts." *Id*. Especially in forced conscription cases, "the consequences of desertion plus the foreseeability of being put under pressure to commit certain acts are relevant factors." *Background Note* ¶ 70.

The text itself, as well as the legislative history of the relevant statutory provisions, demonstrate Congress' clear intent that the "persecutor of others" bar is to be construed consistently with United States' international obligations. The determination by the Fifth Circuit Court of Appeals that when applying the "persecutor of others" bar it is irrelevant to consider whether an individual was "compelled to assist authorities" fails to comport with these obligations.[13]

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[13] In coming to this conclusion, the Fifth Circuit relied upon *Fedorenko v. United States,* 449 U.S. 490 (1981). It is beyond the scope of this brief to analyze the applicability of this Court's decision in *Fedorenko* to the "persecutor of others" bar under United States law. However, we note that the definition of "displaced persons," including certain enumerated exclusion grounds, which was at issue in *Fedorenko*, should not be treated as equivalent to the definition of "refugee" and the exclusionary clauses of Article 1F in the 1951 Convention. The definition of "displaced persons" stemmed from the Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 1009 (1948), which adopted this definition from that of "refugees or displaced persons" contained in the Constitution of the International Refugee Organization ("IRO") Annex I, Aug. 20, 1948, 62 Stat. 3037-3055, T.I.A.S. No. 1846, which is not applicable here.

Because an individual found to have engaged in the persecution of others would be barred from withholding of removal, the United States' equivalent of protection against *refoulement*, it is even more crucial that this bar be applied in strict compliance with Article 1F. An erroneous application of the "persecutor of others" bar could lead not only to a genuine refugee being deemed undeserving of international protection but to *refoulement* in violation of the core principle of United States' obligations under the Protocol and Article 33 of the 1951 Convention.

CONCLUSION

For the foregoing reasons, amicus respectfully urges this Court to reverse the judgment of the court of appeals, to hold that duress is available as a defense to the "persecutor of others" bar to asylum and withholding of removal, and to remand to the agency to articulate the standard for duress and how that standard would apply in Petitioner's case.

Respectfully submitted,

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