CENTER FOR
Gender & Refugee
STUDIES

Amicus Brief Filed by CGRS in *I-J-*

Overview of the Attached Brief

The attached amicus brief was filed by the Center for Gender & Refugee Studies (CGRS or Center) to the Board of Immigration Appeals (BIA) on May 21, 2008 in the matter of *I-J-*. Identifying information has been redacted in accordance with the wishes of the applicant. The brief addresses whether the persecutor of others bar to asylum under U.S. law should be applied to deny refugee status to a young woman who was victimized by female genital cutting (FGC) and was forced to perform FGC on another individual.

Organizational Overview

The Center provides legal expertise, training, and resources to attorneys representing asylum seekers, advocates to protect refugees, advances refugee law and policy, and uses domestic, regional and international human rights mechanisms to address the root causes of persecution.

Technical Assistance Provided by CGRS

As part of our core programs, CGRS engages in technical assistance and country conditions research for attorneys with gender-based, LGBTI, and child asylum claims. We provide free invaluable resources: legal consultation, country conditions information, practice advisories, unpublished immigration judge and Board of Immigration Appeals decisions, sample briefs, and expert witness affidavits developed by leading authorities in their fields in collaboration with CGRS. CGRS appears as amicus counsel or co-counsel in high impact cases. **To request assistance from CGRS, please visit our website at http://cgrs.uchastings.edu/assistance/.**

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

In the Matter of:	**FILE No.: XXXXXXXX**
XXXXXXXXX	
In Removal Proceedings	

BRIEF OF AMICUS CURIAE

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Statement of Amicus Curiae

Amicus Center for Gender & Refugee Studies ("CGRS"), based at the University of California, Hastings College of the Law, has a direct and serious interest in the development of immigration law and in the issues under consideration here. Founded in 1999, CGRS provides legal expertise and resources to attorneys representing women asylum-seekers fleeing gender-related harm. CGRS's attorneys are recognized experts on asylum law in general, and women's asylum cases in particular, and have a strong interest in the development of United States jurisprudence consistent with relevant domestic and international refugee and human rights law. The question presented in this case implicates matters of great consequence to *amicus*, because it involves a statutory bar to immigration relief that, if applied incorrectly, will have the undesired effect of denying asylum to a deserving refugee only because she was forced to take part in her persecutors' acts. Such a result would be inconsistent with CGRS's interest in developing the jurisprudence of the persecutor of others bar in a protection-oriented manner, and would run afoul of domestic and international law, and the very principles that underlie the Refugee Act.

Question Presented

The Immigration and Nationality Act ("INA") prohibits the Secretary of Homeland Security and the Attorney General from granting asylum to, or withholding of removal of, a refugee who has "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." INA §§208(b)(2)(A), 241(b)(3); 8 U.S.C. §§1158(b)(2)(A), 1231(b)(3).

The question presented here is whether this "persecutor of others" bar applies to a refugee who was compelled against her will, by threats of death and by psychological coercion, to perform the female genital cutting ("FGC") of another, despite her lack of intent to act on account of a statutorily protected ground, her repeated refusal to perform FGC, and her attempt to escape from the individuals forcing her to participate in FGC.

Statement of Selected Facts

I. The Sande Society and the Sowei in Sierra Leone.

Isatu XXXXXXX was born into a family with great influence in the Sande society, a centuries-old women's group with enormous power in Sierra Leone.[1] A woman in Sierra Leone cannot marry, have children, or be considered fully adult unless she has been initiated into the Sande society. Affidavit of Expert Witness Doctor Mariane Ferme ("Ferme Affidavit") ¶9. A woman's initiation into the Sande society begins when she undergoes FGC, a procedure that involves cutting of the female genitalia and ranges from excision of the clitoris to excision of the clitoris and labia in their entirety. Ferme Affidavit ¶11. FGC is performed with razor blades, glass shards, scissors and knives, often without anesthesia. Affidavit of Expert Witness Hanny Leighfoot-Klein ("Klein Affidavit") ¶17. Up to 90 percent of women in Sierra Leone undergo FGC, and women from every ethnic

[1]The Sande are also known as the Bondo or Bundu Society.

group except one are initiated into the Sande society. Ferme Affidavit ¶9; Exhibit ("Ex.") 3, 2005 Sierra Leona Country Report on Human Rights Practices, at 11-12; Ex. 7, Operational Guidance Note, Sierra Leone, at 4. Ms. XXXXXXX is a member of the Fula, an ethnic group that practices FGC. Transcript ("Tr.") at 58; Ferme Affidavit ¶9. Although a number of organizations have attempted to eradicate the practice of FGC in Sierra Leone, active resistance by societies such as the Sande has curtailed these efforts. Ex. 3, 2005 Sierra Leone Country Report on Human Rights Practices, at 11-12. Young women in Sierra Leone feel pervasive peer pressure to conform to, and participate in, the Sande society. Ferme Affidavit ¶9.

The "Sowei" is the group of women within the Sande society responsible for initiating young girls into the society by performing FGC on them. Tr. at 102; Ferme Affidavit ¶12. The Sowei are both respected and feared in their communities because they are considered very powerful. Tr. at 103. Ms. XXXXXXX's grandmother is the head of the Sowei in Allen Town. *Id.* at 62, 65. She lives in a house with six other Sowei, and supports herself by performing FGC on young women. *Id.* at 63, 100. She is the only Sowei allowed to perform the cutting of young women; the other Sowei assist her by, among other things, holding down the girls and women. *Id.* at 119-20. Residents of Allen Town fear Ms. XXXXXXX's grandmother because of her powerful position. *Id.* at 63. For example, when her grandmother takes girls to the river for their morning baths, the residents of Allen Town clear the road and stay indoors until the grandmother is

finished. *Id.* Members of the community believe that the Sowei will harm anyone who challenges them or speaks badly of them. *Id.* at 65-66.

Women in Sierra Leone are selected to become Sowei on the basis of various criteria. A hereditary link to Sowei, such as Ms. XXXXXXX's link to her grandmother, can be a critical factor. Ferme Affidavit ¶13. At times purported spiritual and supernatural forces, such as premonitory dreams, spirit possessions and omens by community religious leaders, also can dictate a young woman's fate as a future Sowei. *Id.* Women like Ms. XXXXXXX, who are disempowered both because of their gender and their young age,[2] face great obstacles in trying to stand up and object to their fate within the Sande society. *Id.* at ¶10.

II. Ms. XXXXXXX was forcibly subjected to FGC.

Ms. XXXXXXX has always been opposed to the practice of FGC. Tr. at 66, 106. Ms. XXXXXXX's mother, who was herself subjected to FGC as a young woman, protected her daughter from FGC by prohibiting Ms. XXXXXXX from going near her grandmother. *Id.* at 67, 106. After her mother died, however, Ms. XXXXXXX was sent to live with her grandmother in Allen Town. Ms. XXXXXXX believed that her grandmother would respect her decision not to be cut, and would respect the will of her dead mother. *Id.* at 71.

On the day that Ms. XXXXXXX was subjected to FGC, she was awoken before dawn by the Sowei and forcibly dragged to a stone where they typically cut young women. Two women sat on each of her legs while a third woman sat on

[2]Ms. XXXXXXX fled Sierra Leone at the age of 19.

her chest and held her arms. *Id.* at 67. The women blindfolded Ms. XXXXXXX and stuffed her mouth with cloth. *Id.* Ms. XXXXXXX fought back because she did not want to be cut. *Id.* at 68. Despite Ms. XXXXXXX's resistance, her grandmother performed FGC on her. *Id.* She performed an incomplete Type II FGC[3] by cutting Ms. XXXXXXX's entire clitoris, as well as the upper third of her labia minora. Report of Dr. Julie Drolet at 1. Afterwards, rather than using standard disinfectants, the Sowei treated Ms. XXXXXXX's wounds with the juice of a banana tree, which "burned like when you put alcohol in a wound." Tr. at 69. Ms. XXXXXXX testified that she will live with the physical and emotional pain of her FGC until she dies. *Id.* at 107.

III. Ms. XXXXXXX attempted to escape the Sowei.

Some time after the Sowei performed FGC on Ms. XXXXXXX, she learned that she had been chosen to replace her grandmother as the head Sowei. *Id.* at 70-71. The Sowei had consulted a black magic "doctor," who told them that Ms. XXXXXXX would be their next leader. *Id.* at 71. Ms. XXXXXXX knew that she would be forced to comply with the "doctor's" decision, and that she was the only one who had been selected as her grandmother's successor. *Id.* at 79, 120. Ms. XXXXXXX was extremely upset by this decision. *Id.* at 71. She also learned that her own FGC had not been performed completely. *Id.* at 70. The Sowei said that because Ms. XXXXXXX had been chosen to replace her

[3]Type II FGC, also known as excision, "involves the removal of parts or all of the clitoris and parts or all of the labia minora." Klein Affidavit ¶13.

grandmother as the head Sowei, she would need to be cut again because it was "a shame" and "a taboo" for the head Sowei to be incompletely cut. *Id.* at 70.

Soon after Ms. XXXXXXX learned the devastating news of her selection as a future head Sowei, she decided to escape. *Id.* at 71. One morning, as she was walking to the stream to gather water, she set down her water container and fled Allen Town. *Id.* at 72. She walked for about three hours, until she saw a truck coming, which she flagged down. *Id.* at 72-73. She begged the driver for a ride, and was taken to a nearby rural farming area called Misiaka, where she hid for about a week. *Id.* at 73. She spent the nights hiding in an abandoned shed made of palm leaves, and foraged for food in the jungle during the day. *Id.* at 73-74, 113.

One day, as Ms. XXXXXXX was walking by the road in search of help, a car slammed to a stop in front of her. *Id.* at 73. Several Sowei got out and dragged Ms. XXXXXXX, who refused to come with them, into the car and back to her grandmother's house. *Id.* at 73-75. Ms. XXXXXXX's right hand is permanently scarred and hyperpigmented from the abrasion of being dragged across the ground. *Id.* at 75; Affidavit of Expert Witness Dr. Kenneth F. Woerthwen ("Woerthwen Affidavit") ¶¶8, 10.

When Ms. XXXXXXX arrived at her grandmother's house, her grandmother yelled at her and stabbed her in the left foot with a rice-cleaning stick, telling her that with a broken leg she would never be able to run away. Tr. at 76. Ms. XXXXXXX's toe is permanently injured from her grandmother's violent

act. Woerthwen Affidavit ¶¶8, 11. The grandmother threatened that if Ms. XXXXXXX tried again to run away, she would catch her and kill her, or have her killed. Tr. at 76. Ms. XXXXXXX testified that she knew at the time of other women and girls who had been killed for "embarrassing their families" in similar ways. *Id.*

After she was apprehended, Ms. XXXXXXX became very depressed. *Id.* at 77. In the evenings, she would sneak out to see a local nurse named Auntie Mama, who gave her medication for her depression. *Id.* The medication made Ms. XXXXXXX drowsy. *Id.*

IV. Ms. XXXXXXX was forced to perform FGC.

Shortly after she was captured and forcibly returned to her grandmother, Ms. XXXXXXX was initiated, against her will, into the Sowei as her grandmother's replacement. One morning, six Sowei brought Ms. XXXXXXX a young woman, held her down, and ordered Ms. XXXXXXX to cut her. *Id.* at 78, 156. Ms. XXXXXXX refused. *Id.* at 78. The Sowei shouted and yelled at her. *Id.* The Sowei then performed a ceremony, in which they produced a dark black water with leaves inside. *Id.* They made Ms. XXXXXXX drink the water, shouting at her that she would die if she refused. *Id.* at 78-79, 156. They told Ms. XXXXXXX that if she did not perform FGC on the young woman immediately, her stomach would swell and she would die. *Id.* at 78, 118. Ms. XXXXXXX believed them and felt terrified. *Id.*

Ms. XXXXXXX feared that she would die if she did not perform the FGC, both because of the Sowei's coercive behavior and her grandmother's previous death threats. *Id.* at 78-79. She knew that her grandmother believed strongly in the Sowei and in performing FGC, and that her grandmother would stop at nothing to maintain her position and respect. *Id.* She therefore reluctantly cut the young woman and then began to cry. *Id.* at 119, 157.

Soon thereafter, Ms. XXXXXXX furtively traveled to the neighboring village of Kalaba Town, where she used a public telephone to call her friend Miriama and ask for help. *Id.* at 81-82. Miriama had fled Sierra Leone because of FGC and had moved to the United Kingdom. *Id.* at 82. Miriama agreed to help Ms. XXXXXXX flee the Sowei. *Id.* She sent Ms. XXXXXXX the money for a plane ticket to Amsterdam and the passport of her aunt, which Miriama said would help Ms. XXXXXXX get away from Allen Town. *Id.* at 82-83. Miriama met Ms. XXXXXXX in Amsterdam, and gave her a ticket to Philadelphia, where Ms. XXXXXXX was detained by immigration authorities. *Id.* at 84-85.

V. Doctor Denise Michultka testified that Ms. XXXXXXX suffers from post-traumatic stress disorder because of her forced participation in FGC.

Dr. Denise Michultka, a licensed psychologist and the director of the Liberty Center for Survivors of Torture, testified at the hearing before the Immigration Judge ("IJ"). *Id.* at 209. Dr. Michultka has worked in West Africa and is familiar with the customs and beliefs that underlie FGC and with the individuals who perform it. *Id.* at 216. She has extensive experience working

with survivors of trauma, and particularly with individuals who have been compelled, against their will, to carry out violent acts against others. *Id.* at 215. Her work in this field includes distinguishing between individuals who have been forced to carry out acts of violence from those who have performed such acts voluntarily. *Id.* In making this distinction, Dr. Michultka focuses on a number of factors, including the individual's beliefs at the time she committed the act in question; the influence and power exerted over her; the options available to avoid committing the act; her ability to protect herself; the political, social and religious context of the situation; her psychological reaction; her symptoms after perpetrating the act; and her previous and subsequent history of violence. *Id.* at 215-16.

After personally evaluating Ms. XXXXXXX, Dr. Michultka considered these factors, and concluded that Ms. XXXXXXX's presentation "absolutely" comports with that of an individual who was forced to act against another in a harmful way. *Id.* at 215, 216. She testified that Ms. XXXXXXX's account of her grandmother's social power, and of the Sowei's threats of the consequences of refusing to perform FGC, is consistent with what she has observed in communities in West Africa. *Id.* at 217. Specifically, she noted that Ms. XXXXXXX "was told that terrible, horrible things would happen to her" after she swallowed the potion concocted by the Sowei "if she did not go along with her part in the ceremonial rite," and that this "very much goes along with" what Dr. Michultka knows about

West Africa, where spirituality and prophesy are central to social belief systems. *Id.* at 226, 216-17.

Dr. Michultka diagnosed Ms. XXXXXXX with post-traumatic stress disorder ("PTSD"). *Id.* at 216-17, 233, 237; Michultka Evaluation at 4. She found that Ms. XXXXXXX's symptoms, which include "traumatic dreams, persistent insomnia, flashbacks, [and] very visceral, very physical kinds of memories," are linked specifically to the FGC she was forced to perform at the hands of the Sowei. Tr. at 217, 240. She observed that Ms. XXXXXXX is frightened when she sees other women becoming agitated and when she sees violent films or news reports, images of violence against women, or displays of knives. *Id.* at 237. Ms. XXXXXXX's reactions to these "triggering" stimuli, which include a racing heart rate, sweaty hands and difficulty breathing, are consistent with a history of trauma. *Id.* at 238.

VI. Doctor Mariane Ferme testified that Ms. XXXXXXX reasonably feared death for not complying with the Sowei's orders that she perform FGC.

Dr. Mariane Ferme, an anthropologist and expert on Sierra Leone and the practice of FGC, also testified before the IJ. Dr. Ferme is a tenured Associate Professor of Anthropology and African Studies at the University of California at Berkeley. She is known nationally and internationally as a leading scholar on gender in Sierra Leone. Ferme Affidavit ¶2. Dr. Ferme explained that secret societies such as the Sowei are "quite terrifying" for non-members, and are taken very seriously by the general public. For example, the Sowei might cordon off

various areas during their ceremonies, and non-members understand that transgression may result in "very, very, very serious sanctions." Tr. at 255. Citizens fear both death and various supernatural punishments at the hands of these secret societies. *Id.* Indeed, members of the societies themselves are often fearful of their superiors, because the societies are extremely hierarchical. *Id.* at 256. In particular, female members realize that the senior Sowei "are going to make it very clear to others what they can and cannot do," and that the peer pressure to join the society "is absolutely enormous." *Id.* The society's ceremonies and initiations are particularly frightening and intimidating. *Id.* at 256-57.

Dr. Ferme has personally known women who have fled Sierra Leone to protect their daughters from the Sowei, and knows one woman in particular who, like Ms. XXXXXXX, fled to avoid initiation into the higher ranks of the Sowei. *Id.* at 257. Dr. Ferme testified that she has heard of cases in which women were compelled to perform FGC under threat of death, and that the consequences of refusing to join the Sowei could include death. *Id.* at 254-55, 258-59. She noted that a young woman selected to become a Sowei would be forced to carry out her role even if she refused. *Id.* at 301. Dr. Ferme concluded that based on her knowledge of Sierra Leone, it was not only "completely unlikely," but in fact impossible, that Ms. XXXXXXX would be able to avoid punishment at the hands of her grandmother and the Sowei of Allen Town for refusing to participate in their organization. *Id.* at 260.

Decision of the Immigration Judge

The IJ found that Ms. XXXXXXX testified credibly regarding the FGC forcibly performed on her and the FGC that she was forced to perform. September 20, 2007 Decision of the Immigration Judge ("IJ Decision") at 9-10. The IJ concluded that Ms. XXXXXXX suffered past persecution, and has a well-founded fear of future persecution, both because (1) she was subjected to FGC, and could be subjected to additional FGC if returned to Sierra Leone; and (2) she opposes FGC and has been selected as a head Sowei. *Id.* at 11-17. The IJ also concluded that statutory bars to asylum cannot preclude Ms. XXXXXXX from relief, because, although she performed FGC on a young woman, there is no evidence that she did so "on account of" the woman's status as a member of a defined social group. *Id.* at 16-17.

Argument

I. The IJ correctly concluded that Ms. XXXXXXX did not participate in persecution, because her actions did not satisfy the nexus requirement of the "persecutor of others" bar.

The Immigration and Nationality Act (INA) prohibits the Secretary of Homeland Security and the Attorney General from granting asylum to, or withholding of removal of, a refugee who has "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." INA §§208(b)(2)(A), 241(b)(3); 8 U.S.C. §§1158(b)(2)(A), 1231(b)(3) (emphasis added). The IJ properly concluded that Ms. XXXXXXX cannot be deemed a

persecutor of others because there is no evidence that Ms. XXXXXXX harmed anyone "on account of" membership in a particular social group. IJ Decision at 16-17.

A. There is no evidence that the young woman on whom the FGC was performed was a member of a "particular social group."

The IJ found that Ms. XXXXXXX did not engage in persecution because there is no evidence in the record that the young woman on whom Ms. XXXXXXX performed FGC was a member of a "particular social group." *Id.* As this Court has noted, FGC can constitute persecution on account of social group membership when the individual subjected to the procedure does not wish to undergo it. *See Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (concluding that "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice" constitute a particular social group).

There is no evidence here in the record that the young woman on whom the FGC was performed opposed FGC and did not wish to undergo the procedure. Ms. XXXXXXX testified that she did not know whether the young woman was opposed to FGC, and that some women underwent the procedure voluntarily. Tr. at 160. The record is wholly lacking in detail regarding the young woman's tribal affiliation (if any), or even her name. The evidence here would be insufficient to support a finding that the young woman was a member of a particular social group. *Cf. Matter of Kasinga*, 21 I&N Dec. at 365. Accordingly, the IJ correctly

concluded that there is no evidence that the young woman was a member of a "particular social group" for the purposes of the "persecutor of others" bar. IJ Decision at 16-17.

B. Ms. XXXXXXX performed FGC because she was forced to and not because she was motivated to act by the young woman's membership in a particular social group.

Even if the young woman on whom Ms. XXXXXXX performed FGC was a member of a particular social group, Ms. XXXXXXX must have performed FGC "on account of" the woman's membership in that group in order to be considered a "persecutor of others." INA §§208(b)(2)(A), 241(b)(3); 8 U.S.C. §§1158(b)(2)(A), 1231(b)(3). Because Ms. XXXXXXX was motivated to perform the FGC only because she was forced to, and not because she wished to harm the young woman for any other reason, the IJ correctly found that there was no nexus. IJ Decision at 16-17.

1. Ms. XXXXXXX is not a "persecutor of others," because she did not intend to harm the young woman on account of the woman's characteristic or belief.

This Court has made clear that a finding that a refugee has persecuted others "requires some degree of intent on the part of the persecutor to produce the harm that the [victim] fears in order that the persecutor may overcome a belief or characteristic of the [victim]." *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 815 (BIA 1988). In contrast, harm that results "incidentally from behavior directed at another goal" is not persecution "on account of" a protected ground, because the alleged persecutor lacks the requisite intent. *Id.* Thus, in *Rodriguez-*

Majano, the applicant's participation in a guerilla organization in the context of a civil war was found not to constitute persecution, because there was no showing that the applicant intended to inflict harm on account of a protected ground. *Id.* at 815-16; *see also Matter of McMullen*, 19 I&N Dec. 90, 96-97 (BIA 1984) (Provisional Irish Republican Army's political assassinations constitute persecution "on account of" political opinion for the purposes of the "persecutor of others" bar, while "indiscriminate bombing campaigns" do not); *Miranda-Alvarado v. Gonzales*, 449 F.3d 915, 930-32 (9th Cir. 2006) (interrogations that are part of legitimate criminal prosecutions, or part of generalized civil discord, are not "persecution" on account of a statutorily protected ground for the purposes of the "persecutor of others" bar), *cert. denied*, 127 S. Ct. 505 (2006).

The Ninth Circuit similarly has concluded that an alleged persecutor's intent is critical to a finding of nexus. In *Vukmirovic v. Ashcroft*, 362 F.3d 1247 (9th Cir. 2004), the Ninth Circuit rejected the IJ's and BIA's finding that a Bosnian Serb was a "persecutor of others" because he had beaten Croats who entered his town to commit ethnically motivated violence. *Id.* at 1249. The Ninth Circuit held that the IJ's conclusion that acts of true self-defense may constitute persecution "r[a]n afoul of the 'on account of' requirement" of the persecutor of others bar, was "untenable on its face" and would have the result of denying safe harbor to meritorious applicants. *Id.* at 1252-53.

A finding that Ms. XXXXXXX is a "persecutor of others" would have the undesired effect of denying protection to a woman who faces persecution in her

native country because she was forced to take part in the very harm she fled. *Rodriguez-Majano*, 19 I&N Dec. at 816 (cautioning that a broad application of the persecutor of others bar would have the effect, surely not intended by Congress, of barring members of armed opposition groups from seeking haven in the United States); *Vukmirovic*, 362 F.3d at 1252-53 (refusing to allow self-defense to excuse allegedly persecutory acts would "preclude entire classes of legitimate asylum seekers from safe harbor"). As in *Rodriguez-Majano* and *Vukmirovic*, here there is no evidence that Ms. XXXXXXX was motivated to perform FGC on the young woman "on account of" a protected ground. *See* INA §208(b)(2)(A); 8 U.S.C. §1158(b)(2)(A). Ms. XXXXXXX was strongly opposed to FGC. Tr. at 71. She attempted unsuccessfully to flee her fate as a Sowei, and performed the FGC only after she was forcibly dragged back to her grandmother's house, beaten, threatened with death, made to drink a ceremonial beverage and then told that she would die if she did not perform the cutting. *Id.* at 71, 73-75, 78. She performed the FGC *only* because of the Sowei's threats and coercion, not to "overcome a belief or characteristic of" the young woman brought to her by the Sowei. *Id.*; *Rodriguez-Majano*, 19 I&N Dec. at 815. The testimony of Drs. Michultka and Ferme confirms that Ms. XXXXXXX acted against her will in performing the FGC and that her fear of death at the hands of the Sowei was reasonable. *See* pp.2-4, *supra*. Accordingly, she cannot be statutorily barred from asylum as a "persecutor of others." *See Rodriguez-Majano*, 19 I&N Dec. at 815.

2. Provisions of the INA that mirror the language of the "persecutor of others" bar also support the conclusion that Ms. XXXXXXX is not a "persecutor of others."

The "on account of" requirement in the "persecutor of others" bar mirrors the INA's qualification that a refugee claiming that she has been persecuted must show that the persecution occurred "*on account of* race, religion, nationality, membership in a particular social group, or political opinion." INA §101(a)(42)(A); 8 U.S.C. §1101(a)(42)(A) (emphasis added). Accordingly, in determining whether a refugee has participated in the persecution of others, this Court looks to the "on account of" requirement as it has been interpreted under 8 U.S.C. §1101(a)(42)(A). *Rodriguez-Majano*, 19 I&N Dec. at 815 (relying on cases brought under 8 U.S.C. §1101(a)(42)(A) to clarify "on account of" requirement of "persecutor of others" bar); *Miranda-Alvarado*, 449 F.3d at 930-32 (same). Harmful acts constitute persecution "on account of" a statutorily protected ground only when race, religion, nationality, membership in a particular social group, or political opinion was "at least one central reason for persecuting" the victim. INA §208(b)(1)(B)(i); 8 U.S.C. §1158(b)(1)(B)(i); *see also Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003) ("A persecutor may have multiple motivations for his or her conduct, but the persecutor must be motivated, at least in part, by one of the enumerated grounds").

The Supreme Court, the BIA, and the Third Circuit have declined to find the "on account of" requirement of 8 U.S.C. §1101(a)(42)(A) fulfilled where, as here, the alleged persecutor did not intend to harm his victim on account of a

statutorily protected ground. *See, e.g.*, *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (finding that applicant failed to show that guerillas would harm him on account of his political neutrality, and not because of his refusal to fight for their organization); *Lie v. Ashcroft*, 396 F.3d 530, 535-36 (3d Cir. 2005) (upholding BIA's decision that petitioner, who had been robbed and simultaneously called a "Chinese pig," had not been persecuted on account of ethnicity or religion, because the robbers were motivated by a desire to steal from her); *Lukwago*, 329 F.3d at 170 (upholding BIA's conclusion that child soldier was abducted because of rebel army's need for labor, not because he was a member of a particular social group); *Chang v. INS*, 119 F.3d 1055, 1060 (3d Cir. 1997) (prosecution for violation of a law of general applicability is not persecution, unless the law is applied for invidious reasons); *Matter of Acosta*, 19 I&N Dec. 211, 231-34 (BIA 1985) (same), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212-17 (BIA 2007) (ethnic Tutsi family dispossessed of land and threatened with anonymous phone calls in Rwanda was involved in "personal dispute" and did not demonstrate past or future persecution "on account of" a protected ground). These cases, which interpret language identical to the language of the "persecutor of others" bar, further support the argument that Ms. XXXXXXX cannot be deemed a "persecutor of others," because she acted out of fear for her life, and not an invidious motivation tied to any protected status of the young woman.

C. The government relies on the wrong legal standard.

The government mistakenly conflates the questions of (1) whether Ms. XXXXXXX intended to harm the young woman *on account of* a statutorily protected ground, and (2) whether Ms. XXXXXXX's *conduct* amounted to participation or assistance in persecution. These questions are categorically distinct. *See, e.g.*, *Miranda-Alvarado*, 449 F.3d at 925-32 (addressing factually distinct issues of whether applicant's conduct amounted to "assistance in persecution" and whether the acts were "on account of" political opinion); *Vukmirovic*, 362 F.3d at 1251-53 (treating assessment of individual accountability and assessment of nexus as factually distinct issues). Indeed, many of the cases erroneously relied on by the government were not even brought under the INA's "persecutor of others" bar, but under statutes that do not have an "on account of" requirement. DHS Brief at 19-21 (citing *Fedorenko v. United States*, 449 U.S. 490 (1981);[4] *United States v. Breyer*, 829 F. Supp. 773 (E.D. Pa. 1993), *aff'd in part and vacated in part*, 41 F.3d 884 (3d Cir. 1994) (brought under the Displaced

[4]The government erroneously refers to *Fedorenko* as the "most important" case brought under the "persecutor of others" bar. DHS Brief at 21. *Fedorenko*, however, involved the de-naturalization proceedings of a former Nazi prison guard, and was brought under the Displaced Persons Act of 1948 (the "DPA"), a statute that "enabled European refugees driven from their homelands by World War II to emigrate to the United States without regard to traditional immigration quotas." 449 U.S. 490. The DPA provided that any person "who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States," and the applicable definition of "displaced persons" excluded individuals who "assisted the enemy in persecuting civil[ians]" or had "voluntarily assisted the enemy forces" in their operations. *Id.* The DPA had no "on account of" language and no nexus requirement.

Persons Act, 8 U.S.C. §1451(a)); *Kulle v. INS*, 825 F.2d 1188 (7th Cir. 1987) (brought under the Holtzman Amendment, 8 U.S.C. §1251(a)(19)); *Matter of Laipenieks*, 18 I&N Dec. 433 (BIA 1983) (same), *rev'd*, 750 F.2d 1427 (9th Cir. 1985); *United States v. Osidach*, 513 F. Supp. 51 (E.D. Pa. 1981) (same)). Here, the IJ correctly concluded that there is no nexus to a statutorily protected ground, and that the "persecutor of others" bar therefore cannot apply to Ms. XXXXXXX. *See Rodriguez-Majano*, 19 I&N Dec. at 815. Although the IJ did not need to reach the question of whether Ms. XXXXXXX's conduct amounted to participation or assistance in persecution, Ms. XXXXXXX would prevail on this ground as well, because her conduct was not sufficiently voluntary to rise to the level of persecution of others.[5] *See* pp. 20-25, *infra*.

[5]The government relies on *Bah v. Ashcroft*, 341 F.3d 348 (5th Cir. 2003), a case in which the Fifth Circuit concluded that "the syntax" of the "persecutor of others" bar "suggests that the alien's personal motivation is not relevant" in determining whether he engaged in persecution on account of political opinion. *Id.* at 351. *Bah* conflates the nexus requirement with the question of whether the applicant's conduct amounted to "assistance in persecution." *Bah*'s failure to address these questions separately is at odds with the language of the INA and the decisions of the BIA and the other Federal Courts of Appeals to have addressed the issue. *See Miranda-Alvarado*, 449 F.3d at 925-32 (addressing factually distinct issues of whether applicant's conduct amounted to "assistance in persecution" and whether the acts were "on account of" political opinion); *Vukmirovic*, 362 F.3d at 1251-53 (treating assessment of individual accountability and assessment of nexus as factually distinct issues); *In re A-H*, 23 I&N Dec. 774, 784-85 (BIA 2005) (treating question of nexus and question of individual culpability as factually distinct).

II. The circumstances under which Ms. XXXXXXX was forced to perform the FGC preclude applying the "persecutor of others" bar, because she did not voluntarily assist in persecution.

Even if the IJ erroneously concluded that Ms. XXXXXXX was not a "persecutor of others" because she did not perform FGC "on account of" a statutorily protected ground, the "persecutor of others" bar is inapplicable, because Ms. XXXXXXX did not purposefully assist in persecution. The Attorney General has emphasized that it is "appropriate to look at the totality of the relevant conduct" in determining whether a particular individual can be deemed a "persecutor of others," even where, unlike here, the requisite nexus to a protected ground unquestionably exists. *In re A-H*, 23 I&N Dec. 774, 784-85 (BIA 2005) (leader-in-exile of armed Islamist groups whose acts of bombing civilian targets and murdering journalists amounted to persecution *may* be found to have "incited," "assisted" or "participated in" the acts of persecution *if* his individual culpability is sufficiently established). The determination of an individual's culpability requires "a particularized evaluation of both personal involvement and *purposeful assistance*" in order to ascertain culpability. *Miranda Alvarado*, 449 F.3d at 927 (emphasis added). Here, although the Sowei may have had the intent to persecute the young woman who was subjected to FGC, it is clear that Ms. XXXXXXX did not, and that she acted under duress and coercion.[6] She was

[6]There is no federal statute defining the elements of the duress defense in the criminal law. The elements have been characterized in the case law as follows:

(1) The defendant was under an unlawful and imminent threat of such a

merely another of the Sowei's victims, and was not individually responsible for participating in the Sowei's persecution.

Federal appellate decisions support this conclusion. In *Hernandez v. Reno*, 258 F.3d 806 (8th Cir. 2001), the Eighth Circuit considered whether the "persecutor of others" bar applies to an individual who was kidnapped by guerillas and compelled against his will to open fire on a group of 100 civilians and participate in other violent activities. *Id.* at 809. The court noted that in making this determination, it was required to "evaluate the entire record in order to determine whether the individual should be held personally culpable for his conduct." *Id.* at 814. In finding that the BIA failed to do so, the court relied on the applicant's testimony that (1) his involvement with the guerillas was at all times involuntary and compelled by threats of death, and that he shared no persecutory motives with the guerillas; (2) the commander of the guerillas stood behind him during the group shooting and checked the magazine of his rifle afterwards; (3) immediately after the incident, he expressed his disagreement with the guerilla's actions; and (4) at the first available opportunity, he risked his life to escape the guerillas. *Id.* The court also found it significant that the evidence of

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> nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) the defendant had not recklessly or negligently placed herself in a situation in which it was probable that she would be forced to perform the criminal conduct; (3) the defendant had no reasonable, legal alternative to violating the law, that is, a chance both to refuse to perform the criminal act and also to avoid the threatened harm; and, (4) that a direct causal relationship may be reasonably anticipated between the criminal act and the avoidance of the threatened harm. (*Dixon v. United States*, 548 U.S. 1, 126 S. Ct. 2437, 2440 n.2 (2006))

the applicant's allegedly persecutory acts came entirely out of the mouth of the applicant himself. *Id.* Although the court remanded the case to the BIA for proper consideration of all of the relevant facts, it noted that the applicant could be seen to have met his burden that he did not assist or participate in the persecution of others, because "[i]t was his misfortune" that he was forced to participate in violent guerilla activities. *Id.* at 815.[7]

Here, as in *Hernandez*, all of the evidence that Ms. XXXXXXX performed FGC on the young woman came from her own voluntary testimony; there is nothing in the record to suggest that the government had any other source of information regarding the FGC Ms. XXXXXXX was forced to perform. *See* 258 F.3d at 814. And, all of the factors considered relevant by the *Hernandez* court in determining individual culpability are present. *See id.* Ms. XXXXXXX credibly testified that she was threatened with death by her grandmother, that she was told that she would die if she did not perform FGC on the young woman and that she believed these threats. Tr. at 78, 118; *see Hernandez*, 258 F.3d at 814. She testified that she performed the FGC while other Sowei surrounded her and then held down the young woman for her to cut. Tr. at 78-79, 156; *see Hernandez*, 258 F.3d at 814. She testified that she expressed her opposition to performing the FGC both before and during the act in question and that she cried afterwards. Tr. at 66,

[7]On remand, the BIA concluded that Mr. Hernandez's participation in guerilla activities did not bar him from eligibility for asylum. *Matter of Hernandez*, A72-717-694 (BIA July 19, 2002) (Exhibit A).

71, 78, 106. Finally, she testified that she twice escaped her grandmother and the Sowei—once unsuccessfully, and the second time despite threats that she would be killed if she ever again attempted to escape. *Id.* at 71-74, 76. Both Dr. Michultka and Dr. Ferme testified to the immense social power of the Sowei in Sierra Leone, and to the significant weight that their threats carried for Ms. XXXXXXX. *Id.* at 226, 216-17, 254-56, 258-59. Dr. Michultka testified that Ms. XXXXXXX had acted against her will in performing the FGC. *Id.* at 215-16. As in *Hernandez*, it was Ms. XXXXXXX's "misfortune," and not her free will, that led her to perform FGC on the young woman. *Id.* at 216-17, 233, 237; *see Hernandez*, 258 F.3d at 815. Accordingly, she cannot be found individually culpable for participating or assisting in persecution.

In contrast, when an individual makes no colorable claim that his actions were motivated by self-defense or other extenuating circumstances, his conduct may be considered "assistance in" persecution. *Miranda-Alvarado*, 449 F.3d at 929. In *Miranda-Alvarado*, the applicant had served as an interpreter for Peruvian officers who interrogated suspected Shining Path members and subjected the suspects to electric shock, torture, and beatings. *Id.* at 918. The applicant stated that if he spoke up against the acts of torture or refused to translate, "it would have affected [his] performance rating and [he] would not have been promoted." *Id.* The Ninth Circuit upheld the IJ's determination that the applicant had assisted in persecution, noting that (1) the applicant worked as a translator for six years, and there was no evidence that dire physical consequences would have ensued had he

sought to resign; and (2) the applicant made little effort to avoid assisting in the interrogations. *Id.* at 929; *see also Xie v. INS*, 434 F.3d 136, 143 (2d Cir. 2006) ("nothing in the record suggests that Xie did not have the ability to quit his job as a driver at any time in order to avoid the persecution of women that was part of his job. His reason for not doing so appears to have been the loss of wages he would incur. Xie has never suggested that he was *physically or psychologically coerced* . . .") (emphasis added; citation omitted).

Unlike the applicant in *Miranda-Alvarado*, Ms. XXXXXXX has clearly demonstrated that fear for her own life, and not a desire for monetary or other personal gain, was the reason for her performing FGC. *Cf.* 449 F.3d at 918, 929; *Xie*, 434 F.3d at 143. Ms. XXXXXXX also has demonstrated that "dire physical consequences" would have ensued had she refused to perform the FGC. *Miranda-Alvarado*, 449 F.3d at 929. Finally, Ms. XXXXXXX's significant efforts to avoid performing FGC included twice risking her life to escape the Sowei. *Cf. id.*; *Xie*, 434 F.3d at 143. Therefore, she cannot be deemed a "persecutor of others."

III. International law does not support application of the "persecutor of others" bar to Ms. XXXXXXX's case.

A finding that Ms. XXXXXXX is a "persecutor of others" would conflict not only with domestic law, but also with international law. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 437-41 (1987) (using international law norms to interpret domestic Refugee Act). Such a finding would fail to take into account all of the circumstances of Ms. XXXXXXX's allegedly persecutory act, and would

therefore contradict the guidance of the U.N., international law scholars and other countries' tribunals. Such a finding also would result in unduly harsh application of immigration law, in violation of the intent and principles underlying the Refugee Convention.

Congress enacted the "persecutor of others" bar as part of the 1980 Refugee Act, which was intended to harmonize domestic asylum law with international standards. The legislative history of the Refugee Act noted that the 1980 amendments would

> bring United States law into conformity with our international treaty obligations under the United Nations Protocol Relating to the Status of Refugees which the United States ratified in November 1968, and the United Nations Convention Relating to the Status of Refugees which is incorporated by reference into United States law through the Protocol. (S. Rep. No. 96-256, at 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 141, 144; *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 426-27 (1999))

Because of Congress's intent to conform to international law, international law norms are instructive in interpreting domestic immigration law. *See Cardoza-Fonseca*, 480 U.S. at 437-41.

Although it does not specify a "persecutor of others" bar, the Refugee Convention denies protection to individuals who have (1) committed crimes against peace, war crimes, or crimes against humanity; (2) committed serious non-political crimes; or (3) engaged in acts contrary to the purposes and principles of the United Nations. Article 1(F) of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259. The United Nations

Handbook, which provides guidance in construing the provisions added to the INA by the Refugee Act,[8] recognizes that these exclusion clauses should be applied "in a restrictive manner" due to "their nature and the serious consequences of their application to a person in fear of persecution." U.N. Handbook ¶180; *see also Cardoza-Fonseca*, 480 U.S. at 449 ("[d]eportation is always a harsh measure," and in enacting the Refugee Act of 1980, Congress sought to "give the United States sufficient flexibility" to respond to situations involving asylum seekers) (internal quotation marks omitted). Accordingly, the U.N. Handbook provides that "all relevant factors—including any mitigating circumstances—must be taken into account" in determining the applicability of exclusion clauses. U.N. Handbook ¶157.

Recent U.N. Guidelines, which are intended to complement the U.N. Handbook, make clear that traditional defenses to criminal responsibility should be considered in evaluating applicability of the exclusion clauses. United Nations High Commissioner for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 15 Int'l J. of Refugee L. 492, 498 ¶22 (2003) ("U.N. Guidelines"). The U.N. Guidelines specifically note that the defense of duress is relevant "where the act in question results from the person concerned necessarily

[8]The U.N. Handbook "provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *Cardoza-Fonseca*, 480 U.S. at 439 n.22; *see also Aguirre-Aguirre*, 526 U.S. at 426-27.

and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm . . . and the person does not intend to cause greater harm than the one sought to be avoided." *Id.* Leading international law commentators have echoed the U.N. James Hathaway notes that "intention is a necessary element" of a crime under the exclusion clauses, and that an applicant may invoke coercion when "motivated to perpetrate the act in question only in order to avoid grave and imminent danger." J. HATHAWAY, THE LAW OF REFUGEE STATUS 218 (Toronto: Butterworths 1991).

Other countries, looking to both the U.N. and scholarly commentary for guidance, have weighed individual culpability in determining the applicability of the exclusion clauses. In ***RRT Reference***: N96/12101 (Nov. 25, 1996), the Australian Tribunal set aside a decision to deny refugee protection to an individual who had been forcibly conscripted into the National Patriotic Front of Liberia ("NPFL"), and who had shot at the arms and legs of various civilians as part of six separate attacks on civilian villages by the NPFL. *Id.* The court concluded that although the acts committed by the applicant fell within the exclusion clauses, the applicant was not excluded from seeking the protections of the Convention because he had acted under duress. *Id.*; ***see also Moreno v. Canada (Minister of Employment & Educ.)***, No. A-746-91 (Can. Ct. App. Sept. 14, 1993) (***mens rea*** is an essential element of crimes against humanity; the exclusion clauses do not apply to an individual forcibly conscripted into the military, who stood by while a prisoner was tortured).

As discussed in Section I(C), this Court need not reach the issue of whether Ms. XXXXXXX acted under duress, because there is no evidence that she performed FGC on the young woman "on account of" any statutorily protected status of the woman's. *See* p.19, *supra*. However, if this Court reaches the issue, it should look to international law for guidance in applying the "persecutor of others" bar in two significant respects.

First, this Court should consider the ample evidence in the record that Ms. XXXXXXX performed the FGC under duress. She believed that she would be killed by her grandmother and the Sowei if she did not comply with their commands, and this belief, according to Drs. Ferme and Michultka, was objectively reasonable. Tr. at 78-79, 216-17, 226, 301; U.N. Guidelines ¶22 (the defense of duress is relevant "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").

Second, this Court should heed the admonitions of the U.N., echoed by both this Court and the Supreme Court, of the unduly harsh results of overly rigid application of our immigration laws. *See* U.N. Handbook ¶180; *Cardoza-Fonseca*, 480 U.S. at 449; *Rodriguez-Majano*, 19 I&N Dec. at 815-16. Ms. XXXXXXX was persecuted not only because she forcibly underwent FGC, but also because she had to relive that horror and violate her own deeply-held beliefs when she was forced to perform FGC on another woman. IJ Decision at 11-17. The very principles that the Refugee Act embodies would be turned on

their head if this Court concluded that Ms. XXXXXXX should be barred from relief because of a persecutory act that was inflicted on her. Therefore, this Court should uphold the IJ's conclusion that Ms. XXXXXXX is not a "persecutor of others" and is entitled to asylum.

Conclusion

For the foregoing reasons, *Amicus Curiae* respectfully requests that this Court affirm the Immigration Judge's decision that Ms. XXXXXXX was not barred from asylum relief under 8 U.S.C. §§1158(b)(2)(A).

Dated: May ___, 2008
San Francisco, CA

Respectfully submitted,

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