No. 21-60314

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DANIEL GIRMAI NEGUSIE,

Petitioner,

v.

MERRICK GARLAND, U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order
of the Attorney General
Agency No. 015-575-924

BRIEF OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS AMICUS CURIAE SUPPORTING PETITIONER

ALICE FARMER
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
1800 Massachusetts Avenue, N.W., Suite 500
Washington, DC 20036
(202) 243-7621
(202) 296-5660 (fax)
farmera@unhcr.org

MICHAEL J. MESTITZ
ANA C. REYES
WILLIAMS & CONNOLLY LLP
725 12th Street, N.W.
Washington, DC 20005
(202) 434-5000
(202) 434-5029 (fax)
mmestitz@wc.com

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PARTIES

(1) Case number 20-60314, *Negusie v. Garland*;

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of the Court may evaluate possible disqualification or recusal.

(3) The United Nations High Commissioner for Refugees (UNHCR) has an interest in the outcome of the case as *amicus curiae*.

(4) Attorney and law firms representing the *amicus* are:
- Ana C. Reyes, Williams & Connolly LLP
- Michael J. Mestitz, Williams & Connolly LLP
- Alice Farmer, UNHCR

(5) The following (parties and counsel) have an interest in the outcome of the case:
- Daniel Girmai Negusie
- Hiroko Kusuda, Loyola University New Orleans College of Law, Law Clinic and Center for Social Justice
- John Etter
- Merrick B. Garland, U.S. Attorney General
- Paul Franklin Stone
- Office of Immigration Litigation, U.S. Department of Justice

DATED: August 4, 2021 *<u>/s/ Michael J. Mestitz</u>*
Attorney of Record for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The United Nations High Commissioner for Refugees ("UNHCR") has a direct interest in this matter as the organization entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees, and, together with Governments, for seeking permanent solutions. Statute of the Office of the UNHCR ¶ 1(a), U.N. Doc. A/RES/428(v) (Dec. 14, 1950) ("UNHCR Statute"). According to its Statute, UNHCR fulfills its mandate by, inter alia, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." *Id.* ¶ 8. UNHCR's supervisory responsibility is also reflected in the Preamble and Article 35 of the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 ("*1951 Convention*") and Article II of the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 ("*1967 Protocol*"), which obligate States to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role.

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[1] No party's counsel authored any part of this brief. No one contributed money intended to fund the brief's preparation or submission. All parties have consented to UNHCR filing this brief.

UNHCR has won two Nobel Peace Prizes for its work caring for people affected by forced displacement. There are 82.4 million such people in the world today, including 20.7 million refugees under UNHCR's mandate. The views of UNHCR are informed by its seven decades of experience supervising the treaty-based system for refugee protection. UNHCR's interpretation of the *1951 Convention* and the *1967 Protocol* are both authoritative and integral to promoting consistency in the global regime for the protection of refugees and others of concern.

UNHCR exercises its supervisory responsibility, among other ways, by issuing interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the *1951 Convention*. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979, re-edited Jan. 1992; reissued Dec. 2011; reissued Feb. 2019) ("*Handbook*") represents the first comprehensive example of such guidance and has subsequently been complemented by a number of UNHCR Guidelines on International Protection ("*Guidelines*"). UNHCR also exercises its supervisory responsibility through the issuance of guidance on the application

of international law, including the *1951 Convention* and the *1967 Protocol*, to refugees and asylum-seekers.

This case concerns whether a duress exception applies to the "persecutor bar" found in the Immigration and Nationality Act ("INA"), § 101(a)(42), 8 U.S.C. § 1101(a)(42); *see id.* § 208(b)(2)(A)(i), 8 U.S.C. § 1158(b)(2)(A)(i). These provisions reflect the exclusion clauses under Article 1F of the *1951 Convention*, which provide for the denial of international refugee protection to persons who would otherwise meet the so-called "inclusion criteria" of the refugee definition, but who are excluded from protection. UNHCR has developed specific guidance on Article 1F of the *1951 Convention*. *See, e.g.*, U.N. High Comm'r for Refugees, Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003) ("*Exclusion Guidelines*"); 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 on Exclusion*").

Given UNHCR's long engagement on the scope, application and interpretation of Article 1F both in the United States and globally, it has a specific interest in this matter. As discussed below, this Court should consider the United States' obligations to asylum-seekers under international law in construing the provisions of the INA at issue in this case. UNHCR presents its views on the international law principles governing the exclusion of asylum-seekers to assist the Court in construing the Act. Consistent with its approach in other cases, UNHCR submits this brief amicus curiae to provide guidance to the Court based on the relevant international standards and not to offer an opinion directly on the merits of Respondent's claim.

SUMMARY OF ARGUMENT

International law obligates States to protect the human rights of persons fleeing persecution. At the core of this case is the United States' obligation to protect individuals, including asylum-seekers, from *refoulement*. The United States cannot meet that obligation if it prohibits refugees who participated in the persecution of others—against their will—from raising a defense of duress. This Court should therefore construe the Immigration and Nationality Act to permit for such a defense.

I. The United States is party to international instruments governing the admission of refugees, including *1967 Protocol*, which incorporates the substantive provisions of the *1951 Convention*. UNHCR has supervisory authority for construing States' obligations under the *1951 Convention* and the *1967 Protocol*. It has issued authoritative guidance on States' international law obligations to protect refugees and asylum-seekers. In interpreting the statutes at issue in this case, all of which implicate the rights of asylum-seekers, this Court should consider these obligations, as reflected in UNHCR's interpretive guidance.

II. The Attorney General's Opinion, as expressed in *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020) ("A.G. Op."), that the bar to eligibility for asylum and withholding of removal based on the persecution of others does not include an exception for coercion or duress, is inconsistent with international law. Under international law, States cannot exclude from refugee status asylum-seekers who can establish that their assistance in persecution was the product of duress.

III. UNHCR emphasizes that the failure to recognize a duress defense ensures that the United States will deny protection to individuals with valid claims to refugee status. This would undermine the United

States' compliance with the principle of *non-refoulement*, which requires States to refrain from returning refugees to countries where their lives or freedom would be threatened.

ARGUMENT

I. THE IMMIGRATION AND NATIONALITY ACT SHOULD BE INTERPRETED CONSISTENTLY WITH THE INTERNATIONAL LAW PRINCIPLES GOVERNING THE EXCLUSION OF ASYLUM-SEEKERS

The United States has bound itself to international instruments that govern the eligibility criteria for refugee status, including the grounds which may justify the exclusion of asylum-seekers from international refugee protection. In deciding the questions presented by this case, this Court must construe the applicable statutes consistently with the United States' international law obligations to asylum-seekers to the fullest extent possible. In doing so, it should consider UNHCR's authoritative guidance on the state of international law as it relates to the exclusion of asylum-seekers.

The legal grounds under the Immigration and Nationality Act 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 principles of exclusion articulated in Article 1F(a) of the *1951 Convention*, which provides for the exclusion from refugee status of individuals for whom there are serious reasons for considering that they have committed a crime against peace, a war crime or a crime against humanity.

A. The United States Is Party to International Instruments That Govern the Exclusion of Asylum-Seekers

The United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 and the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 are the key international instruments that govern the legal obligations of States to protect refugees. The *1967 Protocol* binds parties to comply with the substantive provisions of Articles 2 through 34 of the *1951 Convention*. *1967 Protocol* art. 1, ¶¶ 1–2. The *1967 Protocol* universalizes the refugee definition in Article 1 of the *1951 Convention*, removing the geographical

and temporal limitations. *Id.* ¶¶ 2–3.[2] Under the *1951 Convention* and *1967 Protocol*, a refugee is a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." *1951 Convention* art. 1A(2); *1967 Protocol* art. I, ¶¶ 2–3.

The core of the *1951 Convention* and *1967 Protocol* is the obligation of States to respect the principle of *non-refoulement*, which is the obligation not to return a refugee to any country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion. *1951 Convention* art. 33, ¶ 1. Given the declaratory nature of the refugee status,

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[2] The Attorney General noted that the United States is not a party to the *1951 Convention*. A.G. Op. at 138. As he conceded, however, the United States is party to the *1967 Protocol*. *Id.* The Refugee Convention, which was drafted in the aftermath of World War II, applied only to people displaced due to events occurring before January 1, 1951 and, at a State's option, that occurred in Europe. The *1967 Protocol* removed the Refugee Convention's temporal and geographical restrictions so that the Convention applied universally. Countries that ratify it are bound by Articles 2-34 of the *1951 Convention* as well—even if they are not a party to that Convention. *1967 Protocol*, at Art. I.

the obligation to safeguard against *refoulement* applies to all refugees, regardless of whether the individual has been formally recognized as a refugee, which includes asylum-seekers whose status has not yet been determined.[3] *See Handbook* ¶ 28 ("A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition.").[4]

As particularly relevant here, Article 1F of the *1951 Convention* provides that States are to deny refugee protection to individuals who have committed heinous acts or serious common crimes. *1951 Convention*, art. 1(F). Article 1F of the Convention excludes from international refugee protection any person who would otherwise qualify for refugee status but whose actions are so grave that they render them unworthy of it (including where the commission of war crimes, crimes against humanity or other serious crimes or heinous acts contribute to the creation of refugees), and to prevent refugee status from being used as a shield

[3] *Handbook* at ¶ 28; ExCom Conclusions No. 6 (c); No. 79 (j); No. 81 (i).

[4] *Handbook* at ¶ 28; *see also G v. G* [2021] UKSC 9, 81 (appeal taken from Eng.) ("Under the 1951 Geneva Convention recognition that an individual is a refugee is a declaratory act.").

against lawful prosecution in the home state. *Exclusion Guidelines* ¶ 2; *Background Note on Exclusion* ¶ 3.

The exclusion clauses must be applied scrupulously to protect the integrity of the institution of asylum; for good reason, however, international law requires that States adopt a restrictive approach. *Background Note on Exclusion* ¶ 4. Article 1F excludes from eligibility for refugee status an individual who is otherwise determined to be in need of refugee protection. In view of the serious possible consequences for the individual—return to persecution and the denial of the benefits of refugee status—the exclusion clauses require an individualized assessment of all relevant circumstances, and must be interpreted "restrictive[ly]" and applied "with great caution." *Handbook* ¶ 149; *Exclusion Guidelines* ¶ 2; *Background Note on Exclusion* ¶ 4.

The United States acceded to the *1967 Protocol* in 1968, *see* 19 U.S.T. 6223, thereby binding itself to the international refugee protection regime contained in the *1951 Convention*. Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, which amends the INA, expressly to "bring United States refugee law into conformance with the

[*1967 Protocol*]." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987); *see also Negusie v. Holder*, 555 U.S. 511, 537 (2009).

Turning to the provisions at issue here, the legislative history demonstrates Congress' intent that the persecutor bar be consistent with Article 1F(a) of the *1951 Convention*, notwithstanding the difference in terminology between the statutory bar and Article 1F(a).[5] In adding "language specifically to 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). This Court should therefore interpret 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.

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

B. UNHCR Has Supervisory Responsibility for Implementation of the Refugee Law Instruments and the Human Rights Protections Embedded Therein

The United Nations High Commissioner for Refugees is entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees and, together with governments, for seeking permanent solutions.[6] According to its Statute, UNHCR fulfills its mandate by, among other things, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."[7] UNHCR's supervisory responsibility is also reflected in the Preamble and Article 35 of the *1951 Convention*,[8] and in Article II of the *1967 Protocol*,[9] which obligate States to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role.

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[6] Statute of the Office of the UNHCR ¶ 1, U.N. Doc. A/RES/428(V) (Dec. 14, 1950), *available at* http://www.unhcr.org/refworld/dcid/3ae6b3628.html.

[7] *Id.* ¶ 8(a).

[8] *Available at* http://www.unhcr.org/3b66c2aa10.html.

[9] *Available at* http://www.unhcr.org/3b66c2aa10.html.

UNHCR exercises its supervisory responsibility in part by issuing interpretative guidance on the meaning of provisions and terms contained in the *1951 Convention* and the *1967 Protocol*. The *Handbook*[10] represents the first comprehensive volume of such guidance. UNHCR prepared the *Handbook* in 1979 at the request of Member States of the Executive Committee of the High Commissioner's Programme, which includes the United States, to provide guidance to governments in applying the terms of the *1951 Convention* and *1967 Protocol*.[11]

In 2000, UNHCR launched the Global Consultations on the International Protection of Refugees ("Global Consultations"), a consultative process that enjoyed broad participation by State parties including representatives of the United States Government, the International Association of Refugee Law Judges, other legal practitioners, non-governmental organizations, and academics. The Global Consultations took stock of

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[10] *Available at* http://www.unhcr.org/refworld/docid/4f33c8d92.html.

[11] The Executive Committee ("ExCom") is an intergovernmental body currently comprised of 107 Member States of the United Nations and the Holy See. The U.S. was part of the precursor to ExCom, the UNHCR Advisory Committee, established in 1951, and as such was a founding member of ExCom and has served ever since. Chief among its duties, the ExCom advises UNHCR in the exercise of its protection mandate.

the state of law and practice in several areas of refugee status adjudication in order to consolidate the various positions taken and to develop concrete recommendations to achieve more consistent understanding and application of these interpretative issues. Flowing from the Global Consultations, in 2002 UNHCR began issuing *Guidelines on International Protection* as envisaged under the 2002 UNHCR Agenda for Protection, which the Executive Committee[12] and the United Nations General Assembly[13] endorsed. More recently, the United Nations General Assembly has reiterated the need for and role of UNHCR guidance on protection issues in the New York Declaration for Refugees and Migrants[14] and the Global Compact on Refugees.[15] The *Guidelines* complement the *Handbook* and draw upon applicable international legal standards, regional

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[12] UNHCR Executive Committee, *General Conclusion on International Protection*, 8 Oct. 2002, No. 92 (LIII) – 2002, *available at* http://www.unhcr.org/refworld/docid/3dafdce27.html.

[13] UN General Assembly, Office of the UNHCR, *Resolution Adopted by the General Assembly*, 6 Feb. 2003, A/RES/57/187, ¶ 6, *available at* http://www.unhcr.org/refworld/docid/ 3f43553e4.html.

[14] U.N. General Assembly, *71/1 Declaration for Refugees and Migrants*, 3 Oct. 2016, A/RES/71/1, ¶ 52, *available at* https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1.

[15] U.N. General Assembly, *Report of the United Nations High Commissioner for Refugees: Part II Global Compact on Refugees*, 2 Aug. 2018, U.N. Doc. A/73/12 (Part II), at para. 63.

and State practice and jurisprudence, to provide guidance regarding particular topics arising under the *1951 Convention* and *1967 Protocol*. Particularly relevant here, the *Guidelines on International Protection No.5* cover the "Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees" ("*Exclusion Guidelines*").

By design, the *Handbook* and *Guidelines* provide legal interpretive guidance for governments, legal practitioners, and decision makers, including the judiciary.[16] Among UNHCR guidance documents, the *Handbook* carries the highest doctrinal authority because "Congress was aware of the criteria articulated in the *Handbook* when it passed the [Refugee] Act in 1980, and . . . it is appropriate to consider the guidelines in the *Handbook* as an aid to construction of the Act." *M.A. v. INS*, 899 F.2d

[16] *See, e.g., Sec'y of State for the Home Dep't v. K & Fornah v. Sec'y of State for the Home Dep't*, [2006] UKHL 46, [15], [52], [85], [98], [100-03], [109], [118], [2007] 1 A.C. 412 (appeal taken from Eng.), *available at* http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd061018/sshd-1.htm; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (Can.); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005).

304, 321 n.6 (4th Cir. 1990) (quoting Memorandum from Theodore B. Olson, Asst. Att'y Gen., OLC, to David Crossland, Gen. Counsel, INS (Aug. 24, 1981)).

In analyzing exclusion from refugee status under Article 1F(a), UNHCR relies on the *1951 Convention* and *1967 Protocol*, and is guided by its Executive Committee.[17] UNHCR formulated its *Exclusion Guidelines* and the accompanying *Background Note on Exclusion,* which forms an integral part of the Guidelines, 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 complement the discussion of exclusion found in the *Handbook*. The *Exclusion Guidelines* and the *Background Note on Exclusion* inform UNHCR's 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.

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[17] UNHCR Executive Committee, *Conclusion on Safeguarding Asylum*, 17 Oct. 1997, No. 82 (XLVIII) – 1997, *available at* https://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae68c958, at para d(v.)

C. The United States Should Construe the INA Consistently with Its International Law Obligations and the UNHCR Handbook and Guidelines

Courts have a responsibility to construe federal statutes in a manner consistent with United States treaty obligations to the fullest extent possible. "It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . .'" *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (omission in original); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained . . . by the courts . . . of appropriate jurisdiction . . . ."). This Court thus should construe the INA consistently with the United States' obligations under the *1967 Protocol*.

In construing statutes pertaining to immigration law, the Supreme Court has relied on UNHCR guidance to discern the United States' international law obligations to protect asylum-seekers. *See, e.g.*, *Negusie*, 555 U.S. at 536–37 (referring to the *Handbook*, "to which the Court has looked for guidance in the past"); *Cardoza-Fonseca,* 480 U.S. at 438–39 (looking to the *Handbook* for guidance).

In his Opinion, the Attorney General discounted the relevance of the *Handbook* and *Background Note*,[18] claiming that they are "of limited value when compared to the distinct development of this nation's domestic law and the strong textual evidence that the persecutor bar added by the Refugee Act in 1980…has no exception for duress or coercion." Op. at 140–41. Respectfully, the view that the Handbook and other UNHCR guidance are of limited value has been rejected by judicial bodies throughout the world, including the U.S. Supreme Court. The U.S. Supreme Court has recognized that while the *Handbook* does not carry the force of law, it does provide "significant guidance" in construing the *1967 Protocol* and in giving content to the obligations established therein. *Cardoza-Fonseca*, 480 U.S. at 439 n.22. The Supreme Court recognized

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[18] The Attorney General also claims that, "the Board [of Immigration Appeals] has previously recognized that the U.N. Handbook does not always adopt the most accurate interpretation of the 1967 Protocol." A.G. Op. at 141 n.17. Neither of the decisions he cites in support stand for that proposition. To be sure, in each the Board disagreed with the UNHCR's interpretation, but nowhere did the Board criticize the *Handbook* as somehow unreliable in general. *See Matter of M-E-V-G-*, 26 I&N Dec. 227, 248–49 (BIA 2014) (adopting differing view of "particular social group"); *Matter of Acosta*, 19 I&N Dec. 211, 228 (BIA 2012) (agreeing with the *Handbook* as to one part of the definition of "persecution," but not a separate part). To the contrary, the Board has repeatedly relied on the *Handbook* in support of its opinions. As the Attorney General was forced to concede, it did so extensively in this matter. AG Op. at 139–40.

that "one of Congress' primary purposes" in passing the 1980 Refugee Act" was to bring United States refugee law into conformance with the [1967 Protocol], to which the United States acceded in 1968." *Id.* at 436–37 (citing H.R. Conf. Rep. No. 96-781, p. 19 (1980), U.S. Code Cong. & Admin. News 1980, p. 160; H.R. Rep. No. 96-608 at 9). The Supreme Court went on to state that it was "guided" by the *Handbook's* interpretation of the refugee definition. *Id.* at 438–39.

Following suit, this Court has also looked to the *Handbook* as guidance when evaluating immigration law. *See, e.g., Ali v. Lynch*, 814 F.3d 306, 314 n. 7 (5th Cir. 2016).[19] In fact, like the Supreme Court, many of the Circuit Courts have relied on UNHCR guidance to discern the United States' international law obligations to protect asylum-seekers. *See, e.g., Mejilla-Romero v. Holder*, 614 F.3d 572, 572–73 (1st Cir. 2010); *Mena Lopez v. Holder*, 468 F. App'x 57, 59 (2d Cir. 2012); *Cantarero Castro v. Attorney General*, 832 F. App'x 126, 134 (3rd Cir. 2020); *Del Carmen Amaya-De Sicaran v. Barr*, 979 F.3d 210, 217–18 (4th Cir. 2020); *Cece v. Holder*, 733 F.3d 662, 676–77 (7th Cir. 2013); *Diaz-Reynoso v. Barr*, 968

[19] This Court has noted that the *Handbook* is not binding, *see Martinez-Nataren*, 745 F. App'x 546, 547–48 (5th Cir. 2018), but has relied on it for guidance, *Ali*, 814 F.3d at 306.

F.3d 1070, 1083 (9th Cir. 2020); *Rivera Barrientos v. Holder*, 658 F.3d 1222, 1230–31 (10th Cir. 2011); *N-A-M v. Holder*, 587 F.3d 1052, 1061 (10th Cir. 2009) (Henry, J., concurring) (noting that "our Supreme Court has consistently turned for assistance [to UNHCR] in interpreting our obligations under the Refugee Convention").

Governments and courts around the world have also relied on UNHCR guidance to interpret the *1951 Convention* and *1967 Protocol*.[20] The Supreme Court of the United Kingdom has stated that "the guidance given by the UNHCR is not binding but 'should be accorded considerable weight', in the light of the obligation of Member States under article 35 of the Convention to facilitate its duty of supervising the application of the provisions of the Convention."[21] The Supreme Court of Canada has

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[20] UNHCR has been granted intervener status in, among others, the European Court of Human Rights, the Court of Justice of the European Union, the Supreme Court of the United States, the Supreme Court of the United Kingdom (as well as the former House of Lords), the Supreme Court of Norway, the Dutch Council of State and has submitted legal positions on questions before the German Federal Constitutional Court.

[21] *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, [36], [2013] 1 A.C. 745 (appeal taken from Eng.). In this case, the Supreme Court of the United Kingdom specifically considered, among others, UNHCR's *Exclusion Guidelines* and *Background Note on Exclusion*.

similarly held that UNHCR's *Handbook* and *Guidelines* should be accepted as a valid source of interpretation under Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties, in reflecting "subsequent practice in the application of the treaty."[22] Of the last fifty or so cases in which UNHCR filed amicus briefs in the previous five years, approximately seventy percent of the decisions cite the *Handbook* or *Guidelines*.[23]

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[22] *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, Can. T.S. 1980 No. 37 as discussed in relation to the *Handbook* in *Pushpanathan v. Canada* (Minister of Citizenship & Immigr.) [1998] 1 S.C.R. 982 para. 54 (Can.).

[23] *See, e.g., Q. N. & G. M. v. The State of the Republic of Lithuania*, 14 July 2015, Supreme Court, Civil Case No. e3K-3-412-690/2015 (Lithuania); Judicial Procedure No. 2-68-3-39174-2013-9, *available at* https://www.refworld.org/cases,LTU_SC,581a02904.html; *WA (Pakistan) v. Sec'y of State for the Home Dep't*, [2019] EWCA (Civ.) 302 [45], *available at* www.refworld.org/cases,GBR_CA_CIV,5c80e7e14.html; *Decision 201701423/1/V2*, 21 Nov. 2018, ABRvS (Neth.), *available at* https://www.refworld.org/cases,NTL_COS,5c000af54.html; UNHCR, *Observaciones de ACNUR ante la Corte Constitucional de la República de Colombia en respuesta al Oficio OPTB – 1443/19, Expedientes T-7.206.829 y T-7.245.483 AC* (July 2019), *available at* https://www.refworld.org.es/topic,57f5047218,57f5090b79,5d4082524,0,UNHCR,AMICUS,.html.

II. INTERNATIONAL LAW RECOGNIZES DURESS AS AN EXCEPTION TO THE EXCLUSION CLAUSES

Under international law, a duress defense is a necessary part of adjudicating exclusionary issues such as the persecutor bar where it is pleaded by an asylum-seeker or the circumstances of the case indicate that he or she may have acted under duress. Individual responsibility is not established if any defenses to criminal responsibility apply. *Exclusion Guidelines* ¶ 22; *Background Note* ¶ 66. The Attorney General's Opinion fails to grapple with this fundamental fact. It treats the person who acted under duress as the culpable party, but neither the INA nor well-recognized international law support such an interpretation.

A. Exclusion Clauses Apply Only To Culpable Individuals

An individual is excluded from receiving refugee protection only if the adjudicator finds there are serious reasons for considering that she or he has committed a crime that falls within the exclusion clauses contained in Article 1F of the Convention.

The proper application of the exclusion clauses requires that an applicant for refugee status be found individually responsible for the criminal conduct. "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." *Id.* 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.

B. Individuals Acting Under Duress Are Not Subject To The Exclusion Clauses

As relevant here, Article 1F(a) of the *1951 Convention* excludes from protection an individual who already meets the so-called "inclusion criteria" of the refugee definition, but also participated in the persecution of others by committing, or participating in the commission of, a war

crime, a crime against humanity, or a crime against peace. This persecutor bar only applies if the applicant was individually responsible for the act in question. *Exclusion Guidelines* ¶ 22 (highlighting that criminal defenses are relevant to application of exclusion clauses); *Background Note* ¶ 66 (stating the same). Thus, the *Exclusion Guidelines* and the *Background Note* direct consideration of duress as a defense to the criminal offenses on which the exclusion of persecutors is based. *Exclusion Guidelines* ¶ 22; *Background Note* ¶¶ 69–70.

Generally, under international law, 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. To be sure, the scope of what constitutes duress needs to be established in each individual case. *Background Note* ¶ 70. But a refugee has the fundamental right to present the defense. Otherwise, he would be excluded from protection for no other reason than that he suffered the additional persecution of being forced to persecute others.

The Supreme Court has highlighted that the practices of other State Parties are, "entitled to considerable weight" in interpreting treaties. *Air France v. Saks*, 470 U.S. 392, 404 (1985). State practice recognizes the availability of the defense of duress in cases implicating Article 1F. For example, in a case strikingly similar to Petitioner's, the Federal Court of Canada upheld the Immigration and Refugee Board's 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 & Immigr. v. Asghedom*, [2001] F.C. 972, ¶¶ 20–22, 25 (Can.); *see also Ezokola v. Minister of Citizenship & Immigr.*, [2013] 2 S.C.R. 678, ¶ 86 (Can.) (underscoring that "the contribution to the crime or criminal purpose must be voluntarily made" and that "[t]he voluntariness requirement captures the defence of duress which is well recognized in customary international criminal law").

Cases from other common law jurisdictions, including Australia, the United Kingdom, and New Zealand, have also recognized that the

duress defense is available to negate a finding of individual responsibility under the Convention's exclusion clauses. *Sryyy v. Minister for Immigr. & Multicultural & Indigenous Affairs* (2005) 220 A.L.R. 394, ¶ 127 (Austl.) (examining the applicability of defenses, including duress, and stating that "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. Sec'y of State for the Home Dep't* [2003] EWCA (Civ) 654, [1]-[15] (Eng.) (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); *AB v. Sec'y of State for the Home Dep't* [2016] UKUT 00376 (Eng.) (recognizing a defense of duress); *Refugee Appeal No. 2142/94 VA* [1997], NZRSAA 12 (N.Z.) (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); *Refu-*

gee Appeal No. 74646 [2003] NZRSAA [54] (N.Z.) (recognizing the previous acceptance of a defence of coercion with respect to Article 1F). The Attorney General's Opinion incorrectly dismisses this well-settled law.

C. The Attorney General's Opinion Incorrectly Dismisses Well-Settled Law

In his Opinion, the Attorney General dismisses the above authorities by claiming that decisions made after Congress passed the Refugee Act and enacted IRRIRA "do not warrant a different decision." A.G. Op. at 141. That assertion is not consistent with international law and Congress' intent when enacting the INA. Congress enacted the INA to conform with international law as reflected in the *1951 Convention* and *1967 Protocol*. The fact that States interpreted those treaties in later years does not make the interpretations irrelevant. To the contrary, the consistent interpretation of Article 1F by multiple States over numerous decades that a duress defense exists only confirms that that interpretation is correct. The Attorney General did not cite a single international treaty

or State case in which the duress exception has been held not to be relevant in the context of exclusion from refugee status.[24] For its part, UNHCR is not aware of any.

The Attorney General also asserts that, "the 1967 Protocol is not self-executing and does not itself create any private, enforceable rights." A.G. Op. at 141. That may be so, but that is irrelevant in the interpretation of the INA. The U.S. Congress passed the INA with the intention of ensuring that U.S. law be made consistent with the *Protocol*, and the U.S. Supreme Court, as have Circuit Courts throughout the United States and judicial bodies throughout the world, has relied upon it in interpreting States' obligations with respect to refugees.

Finally, the Attorney General makes much of the U.S. Supreme Court's observation that the United States acceded to the *1967 Protocol* after concluding it "was largely consistent with existing law." A.G. Op.

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[24] Nor did the Attorney General identify a single legal system that makes the duress defense entirely unavailable to refugees. He did quote a separate opinion in *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, ¶ 67 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 7, 1997). The issue there was whether duress affords a "complete defence" to acts "involving the killing of innocent persons" in criminal prosecutions. It does not address the availability of a duress defense involving lesser acts and in the context of seeking asylum in the various legal systems.

at 142 (quoting *INS v. Stevic*, 467 U.S. 407, 417–18 (1984)). But he omits to acknowledge that in the same opinion the Supreme Court found that Congress "believed that apparent differences between the Protocol and existing statutory law [as to withholding of removal] could be reconciled by the Attorney General in administration and did not require any modification of statutory language." *Stevic*, 467 U.S. at 417–18. And, "to the extent that domestic law was more generous than the Protocol, the Attorney General would not alter existing practice; to the extent that the Protocol was more generous than the bare text of § 243(h) would necessarily require, the Attorney General would honor the requirements of the Protocol and hence there was no need for modifying the language of § 243(h) itself." *Id.* at 428 n.22. Congress intended the INA to reflect the full protections afforded under the *1967 Protocol*.

In sum, the Attorney General's suggestion that the *1967 Protocol* is irrelevant to the analysis—because international law evolves over time, the *Protocol* is not self-executing and Congress passed the INA to be "largely consistent with existing law"—has it exactly backwards.

III. THE COURT SHOULD READ THE INA TO AVOID REFOULEMENT

Under international law any person who meets the definition articulated in Article 1 of the Convention and Protocol "shall" be considered a refugee. *See 1951 Convention*, art. 1A(2). Furthermore, States have an obligation under the *1951 Convention* and *1967 Protocol* to respect the principle of *non-refoulement.* That is, Article 33(1) prevents a State from returning a refugee—whether or not his or her refugee status has been formally recognized—to any country in which his or her life or freedom would be threatened. *1951 Convention*, art. 33 ¶ 1.[25]

The Attorney General's Opinion quotes *INS v. Stevic* for the proposition that "the 1967 Protocol (incorporating provisions of the 1951 Convention) 'did not require admission at all, nor did it preclude a signatory

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[25] International refugee law permits exceptions to the principle of *non-refoulement* where there are reasonable grounds for regarding a refugee as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country. *1951 Convention*, art. 33 ¶ 2. Unlike Article 1F which is concerned with persons who are not eligible for refugee status, Article 33(2) is directed to those who have already been determined to be refugees and concerns measures which States may take to address the future risk that a recognized refugee may pose to the host country of asylum. *Background Note on Exclusion,* ¶ 10.

from exercising judgment among classes of refugees within the Protocol definition in determining whom to admit.' *Stevic*, 467 U.S. at 428 n.22. Instead, it 'merely called on nations to facilitate the admission of refugees *to the extent possible*,' using language that was 'precatory and not self-executing.'" *Id.* at 428–29 n.22. But the Attorney General omitted the key part of that quotation, replacing the original "Article 34 'merely called on…'" with "*it* 'merely called on…" This is a significant omission, because Article 34 refers only to the naturalization of refugees, not their admission for protection under some different immigration status.[26] But the article at issue here is Article 33, which prohibits *refoulement*.

As to Article 33, the Supreme Court was unambiguous. In the same footnote the Attorney General excerpted, it concluded by quoting the then-U.S. Secretary of State, noting that he, "correctly explained at the time of consideration of the *Protocol*: '[F]oremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article

[26] *1951 Convention*, "Article 34: Naturalization. The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened.…' S. Exec. K, 90th Cong., 2d Sess., VIII (1968)."

The exclusion clauses of Article 1F form part of the eligibility criteria for refugee status under Article 1 of the *1951 Convention*. Failure to recognize a defense of duress in the context of an exclusion examination will lead to refugees erroneously being denied international protection and may result in a violation of a State's obligations of *non-refoulment* under Article 33, in violation of the United States' fundamental obligations under the *1951 Convention* and the *1967 Protocol*.

CONCLUSION

For the foregoing reasons, UNHCR respectfully urges the Court to consider the relevant international standards and the views of UNHCR in determining a framework for examining defenses to persecutor bars to ensure that the United States fulfills its obligations under the *1951 Convention* and its *1967 Protocol*.

Respectfully submitted,

By: *Michael J. Mestitz*

MICHAEL J. MESTITZ
ANA C. REYES
WILLIAMS & CONNOLLY LLP
725 12th Street, N.W.
Washington, DC 20005
(202) 434-5000
(202) 434-5029 (fax)
areyes@wc.com

ALICE FARMER
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
1800 Massachusetts Avenue, N.W.
Suite 500
Washington, DC 20036
(202) 243-7621
(202) 296-5660 (fax)
farmera@unhcr.org

AMICUS CURIAE IN SUPPORT OF PETITIONER

Dated: August 4, 2021

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(b)(4) because it contains 6,486 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it uses 14-point Century Schoolbook font.

Dated: August 4, 2021

By: *Michael J. Mestitz*