No. 07-499

In The
Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,
Petitioner

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL OF THE UNITED STATES
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS FIRST, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, HUMAN RIGHTS WATCH, AND U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS IN SUPPORT OF PETITIONER

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JUNE 2008

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INTEREST OF THE *AMICI*

Amici are human rights organizations, legal services organizations, and refugee resettlement organizations, all of whom work with and/or advocate for refugees. *Amici* are filing this brief in support of the petitioner to bring to the Court's attention the impact affirmance of the lower court's decision in this case would have on refugees who have been subject to coercion at the hands of persecutors.

Human Rights First has worked since 1978 to protect and promote fundamental human rights. Human Rights First grounds its refugee protection work in the standards set forth in the 1951 Refugee Convention, its 1967 Protocol, and other international human rights instruments, and advocates adherence to these standards in U.S. law and policy. Human Rights First has had a longstanding interest in the proper application of the "exclusion" clauses of the Refugee Convention, and has conducted research, convened legal experts, and provided guidance to assist in the development of effective and fair methods for excluding those who are not entitled to refugee protection. It coordinated a special issue of the International Journal of Refugee Law, 12 IJRL Special Supplementary Issue on Exclusion (2000), as part of a multi-year research project on exclusion that resulted in the publication of the report *Refugees, Rebels & the Quest for Justice* (2002). Human Rights First also operates a *pro bono* asylum program that provides free legal representation to indigent asylum applicants.

The American Immigration Lawyers Association ("AILA") is a national association with more than

10,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law in this field; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the legal and ethical standards of the immigration bar. AILA's members practice regularly before the Department of Homeland Security and the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

Human Rights Watch started in 1978 as Helsinki Watch, to monitor the compliance of Soviet bloc countries with the human rights provisions of the Helsinki Accords. It is now the largest human rights organization based in the United States, and conducts fact-finding investigations into human rights abuses in all regions of the world. Human Rights Watch documents abuses related to armed conflicts, advocates for the protection of civilians, and works to hold perpetrators accountable for violations of international human rights and humanitarian law. Since 1994, Human Rights Watch has documented the recruitment and use of children as soldiers by all parties to armed conflict in countries including Angola, Chad, Colombia, Liberia, Myanmar (Burma), Nepal, Sierra Leone, Sri Lanka, Sudan, and Uganda. Human Rights Watch seeks to address the root causes that force people to flee, advocates for greater protection for refugees and internally displaced persons, and calls on the United Nations and on governments

everywhere to uphold their obligations to protect refugees and to respect their rights.

The U.S. Committee for Refugees and Immigrants ("USCRI") is a non-governmental organization that works to address the needs and rights of persons in forced or voluntary migration worldwide by advancing fair and humane public policy, facilitating and providing direct professional services, and promoting the full participation of migrants in community life. USCRI works through a nationwide network of partner agencies, state and local governments, and private enterprises to provide essential services to refugees and immigrants. USCRI's National Children's Center works with the private bar to provide *pro bono* legal representation to unaccompanied immigrant children before the immigration courts.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Human Rights First and its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The issue in this case is whether a refugee who was forced, by threats of severe harm or violence, to inflict harm on another, must be excluded from asylum, and may be returned to a country where his life and freedom would be threatened, without regard for the fact that he acted under duress. The Fifth Circuit in this case held that whether a refugee acted under coercion—even including credible threats of imminent death or torture—is entirely irrelevant to the application of the persecutor bar. *Negusie v. Gonzales*, 231 Fed. Appx. 325 (5th Cir. 2007). It is the position of *amici* that excluding a refugee from the protection of asylum and withholding of removal as a persecutor of others without regard to whether he acted under duress does violence to the text of the statute, negates the humanitarian objectives that motivated Congress's passage of the Refugee Act of 1980, and violates the treaty obligations of the United States under the 1967 Refugee Protocol, which Congress in passing the Refugee Act intended to fulfill. This brief seeks to illustrate the impact of such an interpretation on the asylum seekers the Refugee Act was enacted to protect.

As the examples described in this brief will show, the holding of the Fifth Circuit in this case has grave implications for refugees with compelling claims to protection under U.S. law, including victims of torture and former child soldiers. These examples are taken from the cases of actual asylum seekers represented by *amici* and their members, and from the reporting of the U.S. government and non-governmental organizations on human rights condi-

tions in the countries many of these refugees have fled. Ignoring the presence of duress in such cases not only distorts the statutory text, but also frustrates the legitimate purposes underlying exclusion from refugee protection by compounding the violation of rights the United States has committed itself to protect.

ARGUMENT

I. The INA's persecutor bar was phrased and intended to exclude refugees who made a moral choice to assist in the persecution of others.

This case concerns the proper interpretation of the provisions of the Immigration and Nationality Act ("INA") that require the exclusion from the protections of asylum and withholding of removal of anyone who is 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); 8 U.S.C. § 1231(b)(3)(B)(i).[1] Incorporated into the INA by the Refugee Act of 1980 ("Refugee Act"), these provisions stand as exceptions to the asylum status that derives from the INA's definition of a "refugee," and to the

[1] The "persecutor bar" to withholding of removal presents an immaterial difference in wording, referring to the "an individual" rather than "any person." The prohibition at 8 U.S.C. § 1158(b)(2)(A)(i) also appears as an exception to the definition of a "refugee" at 8 U.S.C. § 1101(a)(42), thereby barring the resettlement in the United States under 8 U.S.C. § 1157 of persecutors of others who would otherwise be eligible for refugee status.

INA's guarantee of protection against return to persecution, both core elements of the international refugee protection regime which the Refugee Act made part of the domestic law of the United States.

As this Court has noted:

> If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968.

INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987).

The exclusion from protection of refugees guilty of very serious wrongdoing—crimes against peace, war crimes, crimes against humanity, serious non-political crimes, or acts contrary to the purposes or principles of the United Nations—is also a principle of the 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 ("Refugee Convention"), and the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 ("Refugee Protocol"), which incorporates by reference the substantive provisions of the Convention. So too are limited exceptions to the obligation of *non-refoulement*, contained in Article 33(2) of the Convention, in the case of a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who,

having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

The Fifth Circuit's decision does not comport with the text or the purpose of the persecutor bar. For the reasons described in greater detail in the briefs of petitioner and of *amici* international law scholars and the United Nations High Commissioner for Refugees ("UNHCR"), the persecutor bar was intended to apply to persons who made a moral choice to assist in the persecution of others, and the INA reflects this intention. The statutory phrase "ordered, incited, assisted, or otherwise participated" itself indicates that "otherwise participated" covers forms of conduct different in form from ordering, inciting, or assisting, but equally voluntary. *See Begay v. United States*, 128 S. Ct. 1581 (2008) (provision defining a "violent felony" as a crime "that is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*" (emphasis added) excludes felony drunk driving). The concept of "persecution" itself refers to conduct objectively judged to be culpable.[2] In keeping with this, lower courts have recognized that *scienter* matters in evaluating whether a person can fairly be deemed to have assisted in the persecution of others. *Castañeda-Castillo v. Gonza-*

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[2] This does not mean that the persecutor must be motivated by a subjective animus against the victim—there are a number of common situations, including for example cases of forced religious conversion or forced marriage, where those perpetrating these abuses may understand themselves to be acting for the good of their victims. *See, e.g.*, *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

les, 488 F.3d 17, 20 (1st Cir. 2007) (rejecting government's argument that lack of an explicit *scienter* requirement in the statute made culpable knowledge irrelevant); *Gao v. U.S. Atty. Gen.*, 500 F.3d 93, 103 (2d Cir. 2007).

Moreover, as also argued in detail in the briefs of petitioner and other *amici,* the context of this provision as one of a series of statutory bars to protection based on serious wrongdoing, the general recognition in U.S. law that statutes that impose harsh consequences on conduct should not apply to involuntary actions, and the clear intent of Congress to conform to the Protocol, all compel the conclusion that the persecutor bar targets only those morally and criminally guilty of "acts …so grave as to render their perpetrators undeserving of international protection as refugees." UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees ¶ 2. Even if the statute were ambiguous, the long-established precedents of this Court would require it to be interpreted in a manner consisted with international law wherever fairly possible. *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 81 (1804).

The development of the concept of exclusion sprang from three main concerns: (1) to ensure that the Refugee Convention did not clash with a State's existing obligations under extradition law; (2) to avoid distorting the humanitarian image and essential objectives of asylum by allowing those who commit serious crimes and human rights violations to benefit from the protection intended for their victims;

and (3) to ensure that those who commit serious crimes are identified, removed from the refugee population, and held accountable for the harm they have caused. Lawyers Committee for Human Rights, *Refugees, Rebels, and the Quest for Justice* (2002) 10-11.[3] The refugee crises resulting from civil wars in West Africa and the aftermath of the 1994 genocide in Rwanda showed the importance of these purposes to combat impunity and to ensure the physical security of deserving refugees in situations of mass influx. *Id*. i-xxii, 1-19, 55-76.

But interpreting the persecutor bar to target refugees who acted under duress does not advance any of these objectives. Refugees who were forced to take part in violations of the rights of others under coercion, or under other circumstances that negate individual responsibility, are not proper or probable targets of the criminal law. Moreover, as the examples in this brief will illustrate, a reading of the statute that refuses to accord any legal relevance to duress leads to results that not only defy the statutory text, but put the text and purpose of the law at war with each other.

II. Refusing to recognize the legal relevance of duress means denying protection to refugees whose forced commission of human rights violations was part of the persecution they themselves suffered.

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[3] The Lawyers Committee for Human Rights was the former name of Human Rights First.

In many situations that give rise to the strongest claims of duress, being coerced into violating the rights of others is something that happens as part of—or is directly intended to be—persecution *of the person being coerced.* Yet the Fifth Circuit's decision in the present case would mean that while a person who feared being forced to take part in such illegal acts might establish a claim to protection on that basis, a refugee who had already suffered that form of persecution could be disqualified from asylum on those same grounds, without regard to the degree of coercion under which he acted.

As in the present case, many of the asylum cases in which claims of duress arise involve flight from military service or forced conscription into governmental or rebel armies. The lower courts and the BIA have recognized that a person fearing punishment for desertion or draft evasion may qualify for refugee protection where conscription would force the applicant to take part in conduct considered illegal under international standards. *See, e.g., Mekhoukh v. Ashcroft*, 358 F.3d 118. 126 (1st Cir. 2004); *Mojsilovic v. INS*, 156 F.3d 743 (7th Cir. 1998); *Ramos-Vasquez v. INS*, 57 F.3d 857 (9th Cir. 1995); *Matter of A-G-*, 19 I.&N. Dec. 502 (BIA 1987).[4]

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[4] This principle is one of the exceptions to the rule that forced conscription, or punishment for avoiding conscription, will generally not constitute persecution on account of the conscript's race, religion, nationality, membership in a particular social group, or political opinion. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Foroglou v. INS*, 170 F.3d 68, 71 (1st Cir. 1999); *Krastev v. INS*, 101 F.3d 1213, 1217 (7th Cir. 1996).

The courts have considered this principle to apply with particular force where the targets of such illegal conduct would be people similarly situated to the applicant. *See, e.g., Islami v. Gonzales*, 412 F.3d 391, 397 (2d Cir. 2005) ("for those individuals who seek to avoid serving in a military whose brutal and unlawful campaigns are directed at members of their own race, religion, nationality, or social or political group, the requirements for stating a persecution claim are met at a significantly lower threshold of military wrongdoing"); *Vujisic v. INS*, 224 F.3d 578, 581 (7th Cir. 2000) (recognizing asylum claim of ethnic Serb born in Slovenia who fled Yugoslavia to escape serving in Serbian military because he had many Croatian, Muslim, and Slovenian friends and opposed ethnic cleansing against them).

These cases reflect an understanding of the psychological harm inherent in being forced, under circumstances of genuine coercion, to harm those one cares about. The Third Circuit made this explicit in the case of a former child soldier from Uganda, recognizing as harm rising to the level of persecution the fact that the applicant, a child conscript of the Lord's Resistance Army ("LRA"), in addition to suffering other abuses at the LRA's hands, was forced by his rebel commanders to kill a friend. *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003).

For A.K., his forced participation as a child in the Ethiopian civil war was the last chapter in a history of persecution by his own government.[5] A.K. was

[5] The full names of the refugees whose cases are discussed here have been withheld at their request. Some have not yet been granted protection in the United States, and also fear for

first imprisoned in 1985, when he was 13 years old, after he joked about the Marxist regime of Mengistu Haile Mariam, put up posters demanding freedom for youths, and wrote an article critical of the government in a school newspaper.[6] A.K.'s family had a history of political activism; two of his close relatives were executed and his father jailed by the Mengistu regime. Later that same year, in a class on political education, A.K. questioned why students must study Marxism and complained that the Marxists were killing children by forcing them to fight his own Oromo people and the Eritreans. For expressing these thoughts, A.K. was imprisoned and repeatedly tortured.

His jailers hung him upside down, beat him on the soles of his feet, burned him, sprayed a mixture of salt and Coca-Cola on his wounds, and then forced him to walk in extreme pain on his injured feet. They deprived him of food or water as "political education instructors" tried to brainwash him. He was finally released after several months, but was rearrested and jailed after the authorities searched his home and found Western news magazines like *Time*

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the security of relatives who remain in their home countries. Most also have legitimate privacy concerns; one is still in high school. For these same reasons, the fact that a person has applied for asylum in the United States is protected from disclosure by the U.S. government under 8 C.F.R. §§ 208.6 and 1208.6.

[6] A.K. has been represented *pro bono* for close to 15 years by the law firm of Kramer, Levin, Naftalis & Frankel, LLP, on referral from Human Rights First. He resides within the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, which has not ruled on the question presented in this case.

and *Newsweek*, a short-wave radio tuned to Voice of America, and some political posters. This time A.K. was subjected to beatings that scarred his arms, buttocks, back, and legs. The Ethiopian government finally gave A.K. a "choice." He could remain in prison and continue to suffer this abuse, or he could do what he had protested against in class only a year before: be conscripted into the Ethiopian army and sent as a child soldier to the Eritrean front. Faced with these alternatives, A.K. opted for the army. He was sent straight from prison into the army without being allowed to see his family. He was then 14 years of age.

During his forced service in the Ethiopian army, A.K. and his fellow soldiers, many of them children like him, were ordered to shoot at people in civilian clothing. A.K.'s testimony makes clear that he considered all these people to be victims of the same government that had jailed and tortured him, and fired only under threat of immediate execution:

> I knew that if I did not do as I was told, I would be shot. I remember one day Tesefaye, a fifteen-year-old soldier in my brigade, refused to fire his machine gun at some Eritreans. The colonel shouted to him, "shoot them now!" Tesefaye only pretended to pull the trigger. The colonel then shot Tesefaye in the chest, and we buried him in the sand.
>
> Because I did not want to kill civilians, I hoped I would be able to escape from the army, but I was unable to do so. Those who did try to escape usually were caught

> and executed. I remember that my friend Tederos, whom I had met in the convoy that took me from Addis Ababa to Eritrea, was captured trying to escape. Army officers forced him onto a scaffold in front of two thousand soldiers. They insulted him and abused him, and asked him why he did not love his country. Then they shot him, and told us that if we tried to escape, the same thing would happen to us. I also remember what happened to ten students from Abiot Junior High School. They paid someone to help them escape, but their guide turned out to be from the army. All ten students were killed.[7]

Under these conditions, A.K. did fire his weapon along with the other soldiers, and saw people fall; it is unclear whether he himself actually hit any of them.[8]

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[7] Affidavit of A.K. in Support of his Application for Asylum (March 23, 1990) (on file with Human Rights First).

[8] Indeed, it appears that the invocation of the "persecutor bar" in his case stems in large measure from A.K.'s own repeated condemnation of the conflict he was forced to take part in and his insistence in his testimony that he saw the people on the other side—including those who may actually have been combatants—as innocent compatriots. A.K.'s status as a child at the time of these events also raises a separate set of considerations not at issue in petitioner's case but relevant to an assessment of individual culpability. These issues are discussed in Part III of this Brief.

After about three months, A.K. was wounded. His ensuing hospitalization provided him with an opportunity to flee. He arrived in this country in 1987, at the age of 15. While living in foster care, he applied for asylum and spontaneously described the facts recited above. Based on this same testimony, which the immigration court has found to be credible, the immigration judge concluded that he was barred from asylum and withholding of removal as a persecutor of others. Seventeen years and two administrative appeals and remands later, A.K.'s case is again pending before the immigration court on this same issue. Over the course of this time, A.K. has become a part of the community. He currently works full-time to support himself while completing a bachelor's degree in electrical engineering, attends a church in his area, and volunteers for local charities. But because of his brief and forced participation as a child in a conflict he abhorred, A.K. remains threatened with deportation to Ethiopia, a country that holds little for him now but painful memories, and where he continues to fear persecution based on his family's history of Oromo activism.

Forced participation in human rights violations as a form of persecution also occurs outside the context of military conscription, in many different countries and in different forms. A report on sexual violence during the recent civil war in Côte d'Ivoire notes how rebel forces forced men they were targeting for political, ethnic, and religious reasons to rape their own sisters or daughters. Those who refused were punished and even killed. Human Rights Watch, "*My Heart is Cut": Sexual Violence by Rebels*

and Pro-Government Forces in Côte d'Ivoire (August 2007), (available at http://hrw.org/reports/2007/cdi0807/). A middle-aged man described his detention by rebel forces:

> They [the rebels] asked me to sleep with my sister. And after that they put us in their vehicle and brought us to their camp. They started to beat us again. My sister was in their hands. They were doing whatever they wanted with her. They took me, they asked me to sleep with her again, publicly, and I was obliged to do it.

Id. at 32. A young woman described how rebels killed her brother in front of her for refusing to do the same thing. *Id.*

The military authorities in Burma's Chin State for a number of years forced Christian villagers to take part in the destruction of the churches, graveyards, and religious monuments of their own communities, replacing them with military camps and Buddhist pagodas often built with the forced labor of these same villagers. U.S. Dep't of State, *Burma International Religious Freedom Report* 2001.

Authorities in the People's Republic of China and Eritrea have used the relatives of those whose religious or spiritual practices the government seeks to suppress to put pressure on them to recant or cease their observance. *See* U.S. Dep't of State, *China International Religious Freedom Report* 2001 (describing how authorities have held the family members of known Falun Gong practitioners responsible for pre-

venting the spiritual practice of their relatives); U.S. Dep't of State, *Eritrea International Religious Freedom Report* 2007 (describing reports that people detained for religious reasons were required to recant as a condition for release, and that in some cases where detainees refused, their relatives were told to convince them to change their minds).

In Iraq under Saddam Hussein, authorities sought to arrest a woman who had returned to the country after years abroad. When they did not find her, they seized her brother, and made him lead them to the house where she was staying. They then arrested the woman and jailed her without charge for a month. Amnesty International, *Iraq: Victims of Systematic Repression* (Nov. 24, 1999) at 10. Given that regime's notorious use of torture and arbitrary detention against the relatives of its political targets, the brother in such a case should surely not be deemed to have "assisted or otherwise participated" in the persecution of his sister without an evaluation of the pressures under which he was acting.

Refusing to recognize the relevance of coercion in assessing the cases of refugees who were forced to take part in such abuses turns the persecution they suffered into grounds for excluding them from protection. The need to consider the same kinds of exculpatory factors that would apply to an assessment of criminal liability is particularly urgent since what is at issue in many of these cases is whether a person otherwise eligible for protection as a refugee may be returned, not to the legitimate penalties of criminal law, but to forms of harm that are condemned under

U.S. and international law due to their discriminatory motivation and, in many cases, their cruelty.

Nor is there any security justification for the government's blinkered reading of the persecutor bar. Separate statutory provisions bar from both asylum and withholding of removal any person whom there are reasonable grounds for regarding as a danger to the security of the United States. 8 U.S.C. § 1158(b)(2)(A)(iv); 8 U.S.C. § 1231(b)(3)(B)(iv). These provisions correspond to the exception to the obligation of *non-refoulement* under Article 33(2) of the Convention in the case of a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is."

III. Interpreting the persecutor bar to exclude consideration of individual culpability would have a severe impact on former child soldiers.

Of the asylum claims where the persecutor bar is raised which present strong claims of duress, a number involve refugees recruited or conscripted as children into armed forces, including both government armies and rebel groups. Interpreting the persecutor bar to exclude former child soldiers from refugee protection without regard to their immaturity or to the presence of duress is contrary to the general recognition in U.S. law of the special status of children. It stands in tension with the recognition under international law that these children are victims of war crimes. It also goes against the rehabilitative focus of efforts, supported by the United States, to assist former child soldiers who are demobilized or escape

from the forces that have used them. This misinterpretation is jeopardizing the lives and futures of refugees whose experiences—illustrative of abuses widely documented in war zones around the world—demonstrate the need for an individualized assessment of culpability in applying the persecutor bar, with consideration of duress and other exculpatory circumstances.

All U.S. jurisdictions recognize that youth is a substantial mitigating factor with respect to criminal activity, and may constitute a complete defense to criminal liability. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 116 n. 12 (1982). In a more recent review of the reasons for special treatment of juveniles under the law, this Court noted that "[t]heir own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Roper v. Simmons*, 543 U.S. 551, 570 (2005). These same principles apply all the more strongly to children caught up in wars where their loss of "control over their immediate surroundings" is absolute, and where attempts to "escape negative influences" can result in death.

International law has long recognized the particular vulnerability of children, and has afforded them special rights and protections in situations of armed conflict.[9] In the years since A.K.'s flight to

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[9] *See* Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 75 U.N.T.S. 287, Art. 51 (excluding persons under 18 from enlistment or forced labor by an occupying power); Protocol Additional to the

this country, the international community has focused increased attention on the problem of the use and recruitment of children as soldiers. The recruitment or use of children under the age of 15, whether by governmental or non-governmental armed forces, is now firmly recognized as a war crime and a crime against humanity. The Rome Statute of the International Criminal Court ("I.C.C") defines "conscripting or enlisting of children under the age of fifteen years into the national armed forces or using them to participate in the hostilities" as a war crime subject to the jurisdiction of the I.C.C. Rome Statute of the International Criminal Court Art. 8(2)(b)(xxvi), U.N. Doc. A/Conf. 183/9, July 17, 1998, 2187 U.N.T.S. 90.

In 1999, the United States was one of the first countries to ratify the International Labor Organization Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, which recognizes the forced recruitment of children under the age of 18 for use in armed conflict as one of the worst forms of child labor. I.L.O 182, June 17, 1999, 38 I.L.M. 1207. The following year, the Optional Protocol to the Convention on the

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Geneva Conventions of August 12, 1949, and relating to the Protection of victims in International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 608 (providing that "children shall be the object of special respect and shall be protected against any form of indecent assault"); Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977 (extending same principle to situations of non-international armed conflict (i.e. civil war), and prohibiting use or recruitment of children under the age of 15).

Rights of the Child on the Involvement of Children in Armed Conflict (hereinafter "Optional Protocol') set 18 as the minimum age for direct participation in hostilities, prohibited the conscription (compulsory recruitment) of persons under the age of 18 by government forces, and barred non-state armed groups from recruiting or using in hostilities children under the age of 18 under any circumstances. CA Res./54/263, U.N. Doc. A/RES/54/49, Annex I (May 25, 2000). The United States ratified the Optional Protocol in December 2002.

The experiences of children in conflicts unfolding during this same period illustrate the urgency of these efforts, and the need for consideration of duress and other exculpatory factors in evaluating the possible exclusion from protection of any refugee.

K.S., for example, was nine years old and playing soccer after school in Sierra Leone when rebel soldiers from the Revolutionary United Front ("RUF") seized him and his playmates around the same age.[10] This was the beginning of K.S.'s ordeal as a child soldier of the RUF. About a month after his abduction, K.S. tried to escape, but was caught. The rebels held him down and branded his upper arm with a hot iron. The other children they had captured were made to watch, as a warning of what would happen to them if they tried to run away. The rebels told K.S. that if he tried to escape again, they would cut off his arm.

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[10] K.S. is represented the law firm of Mayer Brown LLP, on referral from the National Immigrant Justice Center. The facts that follow are taken from his application for asylum and the extensive testimonial and country conditions evidence submitted in support thereof.

They later slashed his hands and chest with a razor, and did the same to the other conscripts, as a means of forever identifying them to other Sierra Leoneans as having been part of the RUF. They burned K.S. with cigars for minor infractions, beat him over the head with their guns, kicked him, and hit him.

Still just a child, K.S. was witness to terrible violence: he saw the rebels shoot and kill children who failed to follow orders, saw the rebels shoot and kill his best friend for refusing to shoot a man, and saw the extreme brutality inflicted by the RUF on the civilian population of Sierra Leone. The RUF deliberately used drugs to desensitize the children in their command, neutralize their terror, and increase their dependence. Under these conditions, K.S. was made to take part in what he and the government agree were atrocities. K.S. continues to suffer terrible guilt and sadness and recurring nightmares about the things he was forced to do.

K.S. was finally freed by U.N. forces. He had lost all sense of time while with the RUF. It was only when he was told the date that he realized he was 13 years old and had spent about four years in rebel captivity. Most of K.S.'s immediate family had been killed in the war. Unsure where to turn and fearing that he would become a target of retribution based on his status as former child soldier, K.S. fled first to Guinea and then to Senegal. Finding no security in either country, he stowed away on a ship that brought him to the United States, where he asked for asylum. Still a minor at the time of his arrival, he was first placed in a children's home and then with a foster family to whom he has grown close. He is now

an avid reader and a dedicated student at his high school, and despite having lost so many years of schooling, is on track to graduate with his class. He continues to struggle with the trauma of his past and with his feelings of shame and remorse.

K.S.'s application for asylum is currently pending before the immigration court, where the Department of Homeland Security ("DHS"), citing to the Fifth Circuit's decision in *Bah v. Ashcroft*, 341 F.3d 348 (5th Cir. 2003), and to this Court's decision in *Fedorenko v. U.S.*, 449 U.S. 490 (1981), has taken the position that he is statutorily barred from refugee protection for having assisted in the persecution of others. DHS argues that "[t]he persecutor bar applies to any person, regardless of age because it omits any reference to the age of the perpetrator." Government's Pre-Trial Brief in the case of K.S. (on file with Human Rights First).

Children have suffered variants on K.S.'s nightmare in some of the world's worst zones of conflict. The recruitment and use of children as soldiers is by no means a new phenomenon. Since the end of the Cold War, however, the changing nature of armed conflict combined with the easy availability of light weapons physically usable by children has contributed to a significant increase in the exploitation of children as soldiers. UNICEF, *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* (December 2003) at 7. Both boys and girls are used, both in combat and in support roles. Girls in particular are often also exploited as sex slaves by older combatants. While the civil wars in West Africa were notorious for their use of children, this

abuse has been a serious problem in ongoing conflicts in countries including Burma, Chad, Colombia, the Democratic Republic of the Congo, Somalia, and Sudan. Coalition to Stop the Use of Child Soldiers, *Summary Child Soldiers Global Report 2008* (available at http://www.childsoldiersglobalreport.org/files/country_pdfs/FINAL_2008_Global_Report.pdf.)

Child recruits accused of the slightest infractions may be subject to extreme physical punishments. Their involuntary drugging or intoxication by their commanders has also been a common feature of several conflicts where child soldiers have been used in large numbers. Human Rights Watch, *Coercion and Intimidation of Child Soldiers to Participate in Violence* at 1 (April 2008) (available at http://hrw.org/backgrounder/2008/crd0408/). Some children are forced to take part in atrocities against their own families or communities in order to stigmatize them and prevent them from returning home. The use or threat of violence to compel child recruits to harm other fighters and to commit human rights violations against civilians is geographically widespread and common to government armies, paramilitaries, and armed opposition groups. *Id*. at 2. These practices, in themselves damaging to children, could also, under the Fifth Circuit's holding in this case, prevent former child soldiers forced to take part in such abuses from finding protection against the persecution they fear themselves.

E.O., a citizen of Uganda, became a child soldier of the Lord's Resistance Army ("LRA") at the age of 11, after the LRA attacked his village, burned down

his home, and kidnapped his family.[11] He was made to join in armed raids against villagers who were members of his own Acholi ethnic group and to take part in abuses against civilians. He was 13 when he escaped from the LRA, and fled to the United States soon afterwards. The immigration judge who heard his case, applying the Eighth Circuit's decision in *Hernandez v. Reno,* 258 F.3d 806 (8th Cir. 2001), determined that application of the persecutor was inappropriate, noting that "[w]e are talking about acts carried out by an 11- to 13-year-old," and referring also to the LRA's well-documented use of extreme violence against its own child soldiers. *Matter of E.-O.-*, I.J. at 17. The BIA upheld this decision against a DHS appeal, holding that "because the respondent was a boy between the ages of 11 and 13 during the relevant period, we are not persuaded that he had the requisite personal culpability for ordering, inciting, assisting, or otherwise participating in the persecution of others."[12] BIA Dec. in *Matter of E.-O.-* (on file with Human Rights First).

Several of the former child soldiers described here committed acts of violence at very young ages

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[11] E.O. was represented by Julia M. Morgan of the Hennepin County Office of Multi-Cultural Services in Minneapolis, Minnesota.

[12] DHS had also raised the separate "national security" bar in E.O.'s case. 8 U.S.C. § 1158(b)(2)(A)(iv); 8 U.S.C. § 1231(b)(3)(B)(iv). The immigration judge rejected this, stating: "There is just nothing in the record that would indicate that the respondent has engaged in any activities in the United States that would cause him to be a security risk. He apparently has been a good student and is liked at his school. He has participated in Job Corps and has had no criminal record in the United States." I.J. at 18. DHS dropped this claim on appeal.

under forms of duress few adults would have been able to withstand. As both the Immigration Judge and the BIA intimated in E.O.'s case, however, cases involving children often raise other issues in addition to duress, including a lack of *mens rea*. Children often lack the intellectual and political background to place their actions, and the actions of the forces that exploit them and target others, in broader context. They will then lack the capacity to distinguish ordinary civil strife from persecution, or to critically evaluate a commander's claim, for example, that all their targets are enemy guerrillas.

These age-based deficiencies are precisely what make children attractive as soldiers to armies that seek to violate the laws of war without question or interference. *See* U.N. Secretary-General, Report of the Expert of the Secretary-General, Ms. Graça Machel, on Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children, ¶ 34, delivered to the General Assembly, U.N. Doc. A/51/306 (Aug. 26, 1996). This problem is exacerbated and prolonged by the fact that children, once recruited or conscripted, are generally made to live under conditions that hamper their physical, moral, and intellectual development. *Id.* ¶¶ 44-47.

These circumstances must be considered in assessing the culpability of former child soldiers, as has been done in the criminal context in countries that might have been tempted to ignore them. In Sierra Leone, a country which suffered terribly at the hands of child combatants, the national government stated while hostilities were still ongoing that it did not intend to prosecute child soldiers. William O'Neill,

Conflict in West Africa: Dealing with Exclusion and Separation, 12 IJRL Special Supplementary Issue on Exclusion 171, 181 (2000) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=916141). After the end of the war, the prosecutor of the Special Court for Sierra Leone made the same decision, stating that the objective of his office was "to prosecute the people who forced thousands of children to commit unspeakable crimes." Office of the Prosecutor, Special Court for Sierra Leone, Press Release: Prosecutor Says He Will Not Prosecute Children (Nov. 2, 2002) (available at http://www.sc-sl.org/press-otp.html.).[13] The Appeals Chamber of the Special Court later concluded that the prohibition on the recruitment or use of children under the age of 15 was already recognized under customary international law during the period when the military leaders on trial before the Special Court had been using them. Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) in *Prosecutor v. Sam Hinga Norman* (Case No. SCSL-2004-14-AR72(E)).

As this Court has noted in the criminal context, "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Roper*, 543 U.S. at 570. Consistent with this understanding,

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[13] Set up jointly by the Government of Sierra Leone and the United Nations, the Special Court for Sierra Leone is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone since November 30, 1996.

the United States has contributed over $10 million through the U.S. Agency for International Development "to international programs aimed at preventing the recruitment of children and reintegrating child ex-combatants into society." Initial Report of the United States of America to the U.N. Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, U.N. Doc. CRC/C/OPA/USA/1 (June 22, 2007). Many of the former child soldiers affected by the government's interpretation of the persecutor bar vividly illustrate through their new lives in this country the value of such a rehabilitative approach.

While the exact number of current and former child soldiers worldwide is unknown but generally agreed to be large, only a very small fraction find their way into the U.S. refugee protection system. But for those who do, it is critical that their status as children at the time of their involvement in armed conflict and the presence of duress be taken into account in any consideration of the application of the persecutor bar.

IV. A rule holding duress to be irrelevant to the application of the persecutor bar would have particularly perverse effects on victims of torture.

If the involuntariness of a person's actions is *irrelevant* to whether or not he can be said to have "assisted or otherwise participated" in the persecution of others, what does this mean for refugees who were forced under torture to denounce others? Torture is

the ultimate form of duress, and is absolutely prohibited under U.S. and international law. The United States was an early proponent of the Convention Against Torture and actively participated in its drafting. United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85; *see* S. Exec. Rep. No. 101-30, at 2. The Convention Against Torture codified the long-established *jus cogens* norm absolutely prohibiting torture, and aimed actually to prevent and punish this form of abuse, through provisions the United States has incorporated into domestic legislation. 18 U.S.C. §§ 2340-2340A; Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-227, Div. G, Tit. XXII, § 2242, 112 Stat. 2681, 2681-761, 2681-822.

In view of this, does the government believe that refugees who broke under torture and were made to provide information whose "objective effect" was to lead to the persecution of others should be excluded from protection under the Fifth Circuit's rule? [14]

The use of torture as an means of interrogating and punishing political opponents, a notorious feature of the totalitarian regimes in whose shadow the Refugee Convention came into being, was still taking

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[14] This phrase, taken from the BIA's decision in *Matter of Fedorenko*, 19 I. & N. Dec. 57, 69 (BIA 1984), and repeated in its later decision in *Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811, 814-15 (BIA 1988), appears nowhere in this Court's *Fedorenko* decision, but has been invoked to negate the relevance of voluntariness in persecutor bar determinations.

place during the period when the U.S. incorporated its treaty obligations towards refugees into domestic legislation.

On August 1, 1982, José Eduardo Becerra Lanza, a medical student and student leader in Honduras, was abducted by agents of the Honduran Directorate of National Intelligence (DNI). DNI had previously arrested and detained one of his fellow student activists. Under torture, this student reportedly named Becerra Lanza as an active student leader with whom he worked. When the other student was then released, he warned Becerra Lanza that DNI had asked about him, and urged him to leave the country. Human Rights Watch et al., The Facts Speak for Themselves: The Preliminary Report of the National Commissioner for the Protection of Human Rights in Honduras (1994) 140-141. Becerra Lanza was subsequently abducted by DNI agents and never seen again.

If the other student had sought asylum in the United States—as a number of student activists from Honduras did during that period—what would have been his fate under the Fifth Circuit's rule? Assuming that his disclosure of Becerra Lanza's name led to the latter's arrest and presumed death—as he clearly feared it would—it warps the meaning of the persecutor bar to suggest that he could be considered to have "assisted in the persecution" of his fellow student. Notwithstanding its "objective effect," the fact that he made this disclosure under torture cannot be legally irrelevant, nor can the fact that he attempted to prevent the harm he feared he would ensue.

The use of torture to extract information has been a feature of official repression in a number of other countries that have forced their citizens to seek the protection of other states. Between October 1990 and January 1991, for example, the government then in power in Mauritania arrested as many as 3,000 black Mauritanians on the accusation that they were involved in an alleged coup attempt. These abuses were part of an organized campaign of what later became known as "ethnic cleansing," in which tens of thousands of black Mauritanians were forcibly expelled from their country. Human Rights Watch, *Mauritania's Campaign of Terror: State-Sponsored Repression of Black Africans* (April 1994), 58-59. Between 500 and 600 of those arrested were executed or tortured to death. They were tortured to extract confessions and information about others. A black officer stationed at one of the main military detention centers, who was also briefly detained, subsequently sought asylum in France and described what he had witnessed:

> I saw many cases of torture. A Lieutenant Baal, in December, for one. He was a pilot in the air force. I knew him for years. When I saw someone sleeping—I didn't even recognize him. They had beaten him for fifteen minutes with rubber tubing and stripped him naked. He had his arms spread and attached, also his legs. A cord was attached to his neck. They beat him on his chest and his genitals. There was blood flowing

> from his mouth. He screamed. Finally he said he was part of the coup and had arms hidden at his home. They walked on him and threatened to rape his wife. The torture lasted for more than two hours. They said, "You give us names of other officers with you." Then they sent a message to the army to check his house for arms—but they found no arms or anything at all. So they called him back. They began to beat him but realized that there was no point. He signed a confession.

Id. at 64.

Information obtained under such circumstances served as the basis for further arrests, including that of a military doctor who described himself as apolitical but was told he had been "denounced by others who had been arrested." *Id.* at 67. The U.S. Department of State reported that following a round-up of members of the political opposition, the "security forces apparently used confessions forced from persons they initially detained to arrest still more." The State Department noted the following example:

> Ali Ould Vill, an auto mechanic, claimed to have been tortured at the police station in El Mouteverjirat at Nouadhibou. Two newspapers printed testimony by Vill in which he claimed that police officers forced him to disrobe and to lie on the ground. He was then kicked and beaten while his captors in-

> sisted that he sign a statement incriminating certain [opposition party] leaders in the January 26 violence. When he refused, claiming he was not a [party] member and did not know the leadership, police forced hot peppers into his eyes and body openings. Vill signed a statement which was later used as a justification for a wave of arrests that took place the following day.

U.S. Dep't of State, *Mauritania: Country Reports on Human Rights Practices 1991* (Jan. 30, 1992) at 164.

Similar practices were notorious in Saddam Hussein's Iraq, where a man arrested in the wake of unrest in 1999 was accused by a friend, under torture, of being involved in the murder of the head of the Saddam Security Directorate. He himself then "confessed" to this killing under torture. Although the details of his "confession" convinced his interrogators that he was not in fact involved, they continued to hold him without trial and tortured him further to extract from him information about political opponents of the regime. *See* Amnesty International, *Iraq: Systematic Torture of Political Prisoners* (2001) at 5-6.

Some of the survivors of these abuses sought—and were granted—asylum in other countries, including the United States. Under the Fifth Circuit's holding in this case, what would the government propose to do with Ali Ould Vill if he were to seek protection in the United States today?

This is not an academic question. The use of torture to force denunciations of political opponents is ongoing at the time of this writing, in countries that even now are driving some of their citizens to flee to the United States for safety. A Zimbabwean man active in the Movement for Democratic Change ("MDC"), the main political opposition to President Robert Mugabe and the ruling Zimbabwe African National Union-Patriotic Front ("ZANU-PF"), recently described his experience of torture in the aftermath of that country's elections in March 2008. He was handcuffed and beaten for an entire night with iron rods, barbed wire, and logs. He explained: "I was then ordered to give them all the names of MDC polling agents and I did because I feared for my life." Human Rights Watch, *"Bullets for Each of You": State-Sponsored Violence Since Zimbabwe's March 29 Elections* (June 2008) at (available at http://hrw.org/reports/2008/zimbabwe0608/)

Villagers described a "re-education" meeting organized by Mugabe supporters on May 5, 2008, at which over 70 villagers were beaten and tortured, leaving six of them dead:

> The ZANU-PF supporters also had a list of about 20 MDC activists who they called out. They proceeded to beat these people and demand that they each reveal the names of at least five other activists. In pain, the victims would shout out the names of any people and they too would be called out and beaten.
>
> The ZANU-PF youths and supporters would bring forward three or four people at a time. They tied the legs of the

> victims and handcuffed their hands, before forcing them to lie prone on their stomachs. Three ZANU-PF youths with thick sticks would stand on either side of the victim and take turns beating the victims on the back, back of the legs and buttocks. The ZANU-PF youths and supporters either stripped the women naked or down to their underwear before beating them. In some incidents the perpetrators tied barbed wire around the genitals of the men and tied the other end of the wire around logs. The perpetrators then forced the men to use their genitals to pull the logs as they continued to beat them. Several men sustained serious injuries to their genitals as a result.

Id. at 36-37.

What will happen to the survivors of these events if they seek the protection of the United States? There is no basis in the statute, or in the treaty that statute sought to implement, for a rule that would exclude victims of torture from refugee protection based on what they did or said under circumstances like these.

CONCLUSION

Amici urge that the decision of the Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

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JUNE 2008