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DETAINED

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

In the Matter of:	)	
R-K-	)	**File No.: A__-___-___**
In removal proceedings	)	

BRIEF *AMICUS CURIAE* OF HUMAN RIGHTS FIRST IN SUPPORT OF RESPONDENT R-K-

INTEREST OF AMICUS

Human Rights First submits this brief *amicus curiae* in support of Respondent R-K-, in order to address the issue identified by the Board in its request for supplemental briefing: whether a person who involuntarily provides funds to a terrorist organization while under duress or coercion has provided material support within the meaning of section 212(a)(3)(B)(iv)(VI) of the Immigration and Nationality Act ("INA"), thus rendering him inadmissible under section 212(a)(3)(B)(i)(I) of the Act and therefore ineligible for asylum and withholding of removal."

Since 1978, Human Rights First (formerly known as the Lawyers Committee for Human Rights) has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees, including the right to seek and enjoy asylum. Human Rights First grounds its refugee protection work in the standards set forth in the 1951 Convention Relating to the Status of Refugees (the "Refugee Convention"), the 1967 Protocol Relating to the Status of Refugees (the "1967 Protocol"), the Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, and other international human rights instruments, and advocates adherence to these standards in U.S. law and policy. Human Rights First also operates one of the largest *pro bono* asylum representation programs in the country, providing legal representation without charge to hundreds of indigent asylum applicants.

Human Rights First is committed to ensuring that the protections guaranteed to refugees and asylum seekers under the Convention and the Protocol remain available to them in the United States. Human Rights First has also had a longstanding interest in the proper application of the "exclusion" clauses of the Refugee Convention, which place refugees who have committed serious violations of the human rights of others or other serious crimes, outside the protection of the international refugee regime. Human Rights First has conducted research,

convened legal experts, and provided guidance to assist in the development of effective and fair methods for excluding from refugee protection those who are not entitled to the protection of the Convention and Protocol. *See, e.g.*, Lawyers Committee for Human Rights, *Refugees, Rebels & the Quest for Justice* (2002).

This case raises an issue of particular importance to Human Rights First, to its clients, to other asylum seekers whose cases are currently pending in the United States, and to refugees around the world who are victimized by terrorist groups that extort money, goods or services from them through threat of violence. The interpretation of the material support bar currently before the Board also has profound implications for U.S. compliance with its obligations under the Refugee Convention and Protocol. For these reasons, Human Rights First has a deep interest in the outcome of this case, and believes, given its expertise, that it is well-situated to assist the Board in resolving the important issues presented.

SUMMARY OF ARGUMENT

The issue in this case is whether refugees who are targeted by armed groups and forced to pay money or provide services to them—even under threat of bodily injury or death—have provided "material support to a terrorist organization" within the meaning of INA section 212(a)(3)(B)(iv)(VI) so as to exclude them from all forms of refugee protection. The asylum applicant in the present case is a Sri Lankan fisherman who after refusing to turn over his boat to guerrillas, was abducted by them and forced to pay 50,000 rupees for his own ransom. The Immigration Judge (IJ) "recognize[d] that the respondent assisted the LTTE under coercion," and the Department of Homeland Security (DHS) does not dispute this. IJ Decision at 8; Government's Opposition to Respondent's Appeal at 3-6. But the IJ held, and DHS argues, that

this fact is legally irrelevant because the material support provisions of the INA do not provide for an explicit exception for duress or coercion.

The IJ's interpretation is contrary to the plain meaning of the statute, is contrary to Congress's purpose in enacting the terrorism bars, and rests on a flawed comparison with an explicit exception to an unrelated ground of inadmissibility. The failure to recognize duress as an implicit defense to the INA's material support bar is contrary to longstanding precedents acknowledging duress and other common-law defenses as implicit not only in criminal statutes, but also in civil statutes that have criminal parallels or carry comparable consequences for defendants. The IJ's absolutist interpretation of the material support bar is also inconsistent with U.S. case law interpreting the persecutor bar. If adopted by the BIA, the application of the material support bar to refugees who acted under duress would place the United States in violation of its obligations under the Refugee Convention and Protocol, which allow exclusion from refugee protection and return to persecution only when a refugee bears individual responsibility for excludable conduct or presents a danger to the security of his host country. As required under U.S. law, the BIA should avoid placing the statute in conflict with the international legal obligations of the United States by limiting the application of the material support bar to refugees who acted voluntarily.

FACTUAL CONTEXT

R-K-, the Respondent in this case, is a Tamil citizen of Sri Lanka. Based on the undisputed facts in the record, his asylum claim illustrates the dilemma of many Sri Lankan Tamil civilians, caught between government forces who target them based on their ethnicity, and the Liberation Tigers of Tamil Eelam (LTTE) who demand their support and treat any refusal as treason. These opposing forces have been locked in a state of intermittent civil war since 1983.

The LTTE, which seeks to establish an independent state for the Tamil ethnic minority, controls large areas of the north and east of the country where it exercises government-like functions. The LTTE, designated as a foreign terrorist organization by the U.S. government under section 219 of the Immigration and Nationality Act (INA), is notorious for human rights abuses including politically motivated killings, suicide bombings, torture, and recruitment of child soldiers. U.S. State Department, *Country Report on Human Rights Practices (Sri Lanka)—2004*. (Hearing Exhibit 8.) The LTTE visits these abuses on civilians, including fellow Tamils who oppose or fail to support its agenda. The LTTE detains civilians, often holding them for ransom, forcing them to provide manual labor and beating them. *Id.*

The security forces of the Sri Lankan government, meanwhile, commit serious abuses of their own. *Id.* The U.S. State Department characterizes the use of police torture to extract admissions and confessions as "routine and conducted with impunity." Methods of torture include "beatings, often with wire or hose, electric shock, the suspension of individuals by the wrists or feet in contorted positions, burning, slamming testicles in desk drawers, and near-drowning," resulting in broken bones, other serious injuries, and 13 reported deaths in custody from torture in 2004. *Id.* The human rights situation in Sri Lanka has worsened greatly since this case was heard, with a resumption of open hostilities, a surge in politically motivated disappearances at the hands of the security forces, and large numbers of arrests under Emergency Regulations, the majority of those arrested being Tamils. U.S. State Department, *Country Report on Human Rights Practices (Sri Lanka)—2005*.

R-K- was a fisherman in a coastal area of the Jaffna Peninsula controlled by the government but contested by the LTTE, which maintained an active presence there. As described more fully in his testimony and in his briefs on appeal, the events that precipitated his

flight from Sri Lanka began in November 2004, when LTTE guerrillas, one of them carrying "a big gun," came to his home and demanded his boat. He refused. Tr. at 35. Three days later, the LTTE kidnapped him from the seashore, took him to their camp, and held him in a dark room until he agreed to pay 100,000 rupees for his own ransom. Tr. at 35-36. After being released, he handed over 50,000 of that sum, and was ordered to pay the remainder by early January, 2005. He feared that if he did not comply, the LTTE would kidnap him again, detain him at their camp, and torture him. Tr. at 37. At the end of December, 2004, the tsunami hit Sri Lanka, destroying his boat, his house, and his livelihood. R-K- was terrified of the consequences of his inability to pay the remainder of his ransom to the LTTE. He was afraid to seek protection from the government, because in 1996, he had been the victim of a round-up of Tamil men by the Sri Lankan army at a Hindu temple. Tr. 25-27. The army had accused him then of being an LTTE supporter. When he denied this, they tortured him. *Id.*

As the IJ found, "[t]he respondent testified that he left his country because he was scared. He was specifically scared of the LTTE. He did not feel that he could complain to the authorities about the LTTE, because of his prior encounter with the Sri Lankan army. He believed that had he filed any sort of complaint against the LTTE with the army or the police, they would probably conclude that [he] was assisting the LTTE, and respondent testified that the LTTE mode of operation is to kill and shoot those who oppose them." IJ Decision at 5. Faced with these alternatives, R-K- fled Sri Lanka hoping to find safety in Canada or in the United States. He was detained upon arrival in the United States and has now been in DHS custody for over 18 months, where he waits for the Board's decision whether to recognize his claim of duress as a defense to the charge that his ransom payment to the LTTE constituted material support to a terrorist organization.

In his long wait for a correct interpretation of the material support bar, R-K- joins hundreds of asylum seekers and thousands of refugees in need of resettlement who have been forced to pay ransom, to perform forced labor, or to give other goods or services to armed groups including the LTTE in Sri Lanka, the paramilitaries and the Revolutionary Armed Forces of Colombia (FARC), and the numerous rebel movements that sowed tragedy across Liberia and Sierra Leone between 1989 and 2003. All of these groups are considered "terrorist organizations" under the INA. Many of them control—or at one time controlled—large expanses of territory, where they engage in extortion, forced conscription, kidnappings, and other abuses of civilians. The national governments of the countries in question are typically unable to protect their citizens against these groups, even when their own security forces are not targeting these same civilians for other reasons, as in R-K-'s case.

The paradox of the IJ's interpretation of the material support provision, which is also being applied by DHS adjudicators in affirmative applications for asylum under section 208 and applications for refugee status under section 207 of the INA, is that it turns the very abuses that drove so many of these applicants to seek the protection of the United States into a ground for excluding them from that protection. Under this interpretation, a Liberian woman gang-raped and held hostage by Liberians United For Reconciliation and Democracy (LURD) rebels who forced her to cook and do their laundry, has had her refugee resettlement case placed on indefinite hold based on DHS's determination that the cooking and washing she did constituted "material support" to LURD. Georgetown University Law Center, *Unintended Consequences: Refugee Victims of the War on Terror* (May 2006).

A recent fact-finding mission to Ecuador found that the great majority of the Colombian refugees interviewed there who had knowingly provided material support to an armed group did

so under duress. *Id.* at 22. These included a couple who after repeatedly refusing to pay "war taxes" to the FARC, finally yielded to the pressure, only for the husband to be killed because he made the payment late; a man forced to pay a ransom to save the life of his six-year-old son, kidnapped in retaliation for his wife's effort to press charges against paramilitaries who raped her; and a woman who did not dare refuse 14 heavily armed FARC guerrillas who descended on her farm at night when she was home alone with her children and demanded a meal. *Id.* at 24-25.

The report of the fact-finding mission quotes a Colombian taxi-driver hijacked by armed guerrillas and forced to drive them into the mountains: "The thing was that I couldn't really do anything against them or tell them no. I did what any human being would do." The issue in this case is whether the Colombian taxi-driver, R-K- the Sri Lankan fisherman, and thousands of other victims of terrorist violence should be excluded from refugee protection for doing what any human being in their shoes would do.

ARGUMENT

I. Duress is an implicit defense to the material support bar of INA § 212(a)(3)(B)(iv)(VI)

In enacting the material support bar, Congress's intent, as reflected both in the statutory text and in the legislative history, was to deny relief to persons who made a moral choice to assist those who have engaged in terrorist activity as defined under the INA. Nothing in the statute, in its legislative history, or in rational public policy justifies denying relief to a victim of a terrorist organization from whom the organization extorted property or services. Moreover, Congress in enacting these provisions was legislating against the backdrop of the common law, which provides an implied defense of duress to criminal and analogous civil statutes. This interpretation is also consistent with the case law interpreting the persecutor bar, which focuses on personal culpability.

A. The plain meaning and legislative history of the statute makes clear that Congress did not intend to exclude asylum seekers who involuntarily gave funds to a terrorist organization

Under section 212(a)(3)(B)(iv) of the Immigration and Nationality Act,

"the term 'engage in terrorist activity' means, in an individual capacity or as a member of an organization—

. . .

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

> (aa) for the commission of a terrorist activity;
> (bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;
> (cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or
> (dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization."

As is laid out in Respondent's brief, the plain meaning of the phrase "to commit an act that . . . affords material support" requires voluntary conduct on the part of the actor. In the common understanding of the English language, the Sri Lankan fisherman who gives money to the LTTE for his own ransom, the Colombian man forced to pay a ransom to paramilitary forces who kidnapped his six-year-old son, the Liberian widow forced to cook for the rebels who raped her and killed her family, do not fall within its scope.[1]

The definition of "engaging in terrorist activity" now contained in INA § 212(a)(3)(B)(iv)(VI) first entered the law as part of the Immigration Act of 1990. Pub. L. No. 101-649, 104 Stat. 4978, § 601. The USA PATRIOT Act in 2001, and the REAL ID Act in

[1] Furthermore, as explained in Part I.B.1 below, whether or not voluntariness is an element of the conduct prohibited by a statute would determine who would bear the burden of proving duress, not whether or not an implied duress defense exists. *See Dixon v. United States,* 126 S.Ct. 2437, 2006 U.S. LEXIS 4894 (June 22, 2006).

2005, expanded significantly the range of organizations covered by the material support bar. Pub. L. 107-56, § 411, 115 Stat 272, at 346 (2001); Pub. L. 109-13, § 103, 119 Stat. 243, at 307 (2005). But even in the midst of these expansions, the focus remained on *willing* supporters of terrorist organizations.[2] Nothing in the legislative history of the 1990 Act or subsequent legislation indicates that Congress intended to punish civilian victims of armed terrorist organizations, or to bar such civilians from seeking refuge in the United States.

B. A defense based on duress or coercion is implicit in the statute

1) Duress is recognized as a defense to criminal conduct even though it is not mentioned in the criminal statute

The material support provision of INA § 212(a)(3)(B)(iv)(VI) has a criminal counterpart, codified at 18 U.S.C. § 2339B. Although the range of groups defined as terrorist organizations under the INA is considerably broader than the list of designated foreign terrorist organizations targeted by 18 U.S.C. § 2339B, the similarity between these two material support provisions makes the principles of statutory interpretation applicable to 18 U.S.C. § 2339B particularly relevant to understanding the defenses available under INA § 212(a)(3)(B)(iv)(VI).

It is well settled that "Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law." *United States v. Bailey,* 444 U.S. 394, 415 (1980)(citing *Morissette v. United States,* 342 U.S. 246 (1952)). As a result, "Congress's failure to provide specifically for a common-law defense in drafting a criminal statute does not necessarily preclude a defendant charged with violating that statute from relying on such a defense. This conclusion is unassailable; statutes rarely enumerate the defenses to the crimes they describe." *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982) The courts have

[2] The conference report to the PATRIOT Act, for example, explained: "The Act provides that an alien is inadmissible and deportable for *contributing* funds or material support to, or soliciting funds for or membership in, . . . a terrorist organization." 107 H.R. Rep. 236, at 63 (2001) (Conf. Rep.)(emphasis added).

found the standard common-law defenses to be available "in spite of [a statute's] absolute language and lack of a *mens rea* requirement." *Id.* (citing *Bailey*). The Supreme Court has noted that this principle also applies to statutory crimes that have no common-law counterpart. *See Dixon v. United States,* 126 S.Ct. 2437, 2006 U.S. LEXIS 4894 (June 22, 2006); *see also United States v. Newcomb,* 6 F.3d 1139, 1134 (6th Cir. 1993) (recognizing necessity as defense to charge under 18 U.S.C. § 922(g) of being a felon in possession of a firearm).

In the criminal context, a person forced to give money, other goods or services to an armed group would be considered a victim of criminal extortion, not a participant in the crimes of his aggressors. Duress "excuses criminal conduct . . . 'because given the circumstances other reasonable men must concede that they too would not have been able to act otherwise.'" *United States v. Bailey,* 444 U.S. 394, 411 n.8 (1980). The defense applies "where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law." *Id.* at 409.[3]

The reasonableness of the defendant's conduct, and the imminent and inescapable nature of the threat, must be examined in context. *See United States v. Contento-Pachon,* 723 F.2d 691 (9th Cir. 1984) (allowing defendant to present evidence of police corruption and infiltration by narco-traffickers in Colombia in support of argument that seeking protection from the authorities while still in that country was not a reasonable possibility). Whether or not the facts in a particular case amount to coercion is a practical determination that juries, in the criminal context, are called upon to make. In immigration court, IJ's should evaluate these facts and the credibility of the applicant's claim of duress, just as they evaluate whether or not an applicant

[3] Or, under the Model Penal Code's formulation, duress is "an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or the threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist." American Law Institute, Model Penal Code § 2.09(1).

has a well-founded fear of persecution. *See, e.g., Perinpanathan v. INS,* 310 F.3d 594 (8th Cir. 2002) (finding that asylum seeker who initially testified he fought with the LTTE would be barred from asylum on that ground, where his later claims of coercion were deemed not credible).

There is thus no question that duress is a defense to a prosecution for material support to a terrorist organization under 18 U.S.C. § 2339B. The relevance of this fact to the interpretation of INA § 212(a)(3)(B)(iv)(VI) is reinforced by the recognition of duress as an implied defense to other civil statutes, as described below.

2) Duress has likewise been recognized as a defense to liability under civil statutes that carry severe consequences for the defendant

The Third Circuit, within whose jurisdiction this case arises, recently noted in dicta the applicability of common-law defenses to a charge of deportability for having engaged in terrorist activity under INA § 237(a)(4)(B). *McAllister v. Attorney General*, 444 F.3d 178 (3d Cir. 2006). McAllister had challenged the INA's definition of "terrorist activity" as unconstitutionally vague and overbroad, citing the hypothetical examples of a young child taking a baseball bat to protect himself from bullies, a patient in a mental hospital attacking a doctor, and a woman using force to protect herself against an attack of domestic violence. In dismissing this challenge, the Third Circuit concluded that none of these examples would in fact constitute "terrorist activity" under the INA's definition, given that "the definition of terrorist activity does not include situations in which an alien has acted in self-defense or in which the alien lacks the capacity to meet the requisite intent." *Id.* at 186.[4] The Third Circuit's conclusion is consistent with a body of case law applying the criminal defenses of the common law to civil statutes.

[4] Although the section of the INA under which McAllister was charged, section 212(a)(3)(B)(iii)(V), contains a specific intent requirement, the Supreme Court has recognized duress as an affirmative defense even when the "statute itself . . . requires no heightened *mens rea* that might be negated by any defense of duress or coercion."

The courts have recognized an implicit duress defense in civil statutes that impose harsh consequences for defendants' actions. This is true especially where the civil statute is paralleled by a criminal statute targeting the same or similar conduct. Thus the Court of Appeals for the Eleventh Circuit has repeatedly recognized duress as a defense to liability for carrier fines under 8 U.S.C. § 1323. *United States v. Sanchez*, 520 F. Supp. 1038 (11th Cir. 1981), *aff'd* 703 F.2d 580 (11th Cir. 1983), *reh. denied*, 709 F.2d 1353 (11th Cir. 1983); *Pollgreen v. Morris*, 770 F.2d 1536 (11th Cir. 1985). In these cases arising out of the Mariel boatlift, the court held that boat owners could claim a defense of duress where they had been ordered by armed Cuban soldiers to take onto their vessels additional Cuban nationals who lacked valid documentation for admission to the United States. In *Sanchez*, the district court noted that

> "while technically these cases are civil actions, the imposition of a fine as a penalty for violation of the law can be considered 'quasi-criminal' in nature. The term 'quasi-criminal' is not here used to imply that the full panoply of constitutional protections attendant to a true criminal proceeding should apply in this context."

520 F. Supp. at 1040.

Like material support to a terrorist organization, knowingly transporting undocumented aliens also exists as a criminal offense, as do other types of conduct which are legislated against in the civil context and to which courts have found implicit duress defenses. Courts have acknowledged that duress can be a defense to civil tax fraud, *Furnish v. Commission of Internal Revenue,* 262 F.2d 727 (9th Cir. 1958), civil contempt, *In re Grand Jury Proceedings Empaneled May 1988, Appeal of Dennis Freligh*, 894 F.2d 881 (7th Cir. 1989), and civil penalties for violating export sanctions, *Office of Foreign Asset Control v. Voices in the Wilderness*, 329 F. Supp. 2d 71 (D.D.C. 2004).

United States v. Bailey, 444 U.S. at 415 (recognizing duress as implied defense to criminal charge of escape from custody under 18 U.S.C. § 751(a), for which the Court found *mens rea* to be no more than prisoner's knowledge that he was escaping); *see also Dixon v. United States,* 126 S.Ct. 2437 (2006).

This recognition of duress as a defense to widely varying civil statutes provides further support for recognizing it as a defense to section 212(a)(3)(B)(iv)(VI). The INA's material support bar is a civil counterpart to 18 U.S.C. 2339B, and carries consequences for asylum seekers and other non-citizens that are far harsher than the civil penalties at issue in the cases cited above. When the United States imposes this bar on a refugee in R-K-'s situation, this can mean returning him to forms of harm that no U.S. criminal statute would ever countenance. These consequences should not be visited on a refugee who acted under duress.

3) The fact that an unrelated bar to admission based on membership in totalitarian parties includes an explicit exception for involuntary membership does not affect the analysis of the material support bar

In finding no implied defense of duress to section 212(a)(3)(B)(iv)(VI) of the INA, the IJ relied on the fact that section 212(a)(3)(D) of the Act provides an exception to inadmissibility based on membership in or affiliation with a totalitarian party if such membership "is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether [sic] necessary for such purposes." INA § 212(a)(3)(D)(ii). This comparison is inapposite, both because section 212(a)(3)(D) and 212(a)(3)(B)(iv)(VI) are unrelated provisions passed by different Congresses as part of different statutory schemes, and because the involuntariness exception of 212(a)(3)(D) is not based on duress or coercion.

It is a general rule of statutory construction that Congress is presumed to act intentionally and purposely when it includes particular language in one section of an act but omits it from another. But this principle applies with greatest force where the two sections are closely related thematically and were enacted in close proximity in time to one another. *See, e.g., Ki Se Lee v. Ashcroft,* 668 F.3d 218, 223-224 (3d Cir. 2004); *Doe v. National Bd. of Medical Examiners,* 199

F.3d 146, 155 (3d Cir. 1999). Here, in contrast, we are dealing with two provisions that were enacted 40 years apart, to address different concerns, and with very different consequences for the aliens they cover.

The ground of inadmissibility for members of the Communist or other totalitarian parties predates the Immigration and Nationality Act, having been enacted through the Internal Security Act of 1950, Ch. 1024, 64 Stat. 987, at 1006. This legislation was then clarified through an act directing the Attorney General to consider only voluntary membership as grounds for exclusion or deportation. Pub. L. 82-14, 65 Stat. 28 (1951). The latter amendment is the origin of the current exception codified at INA § 212(a)(3)(D). The terrorism bars generally, and the material support bar specifically, were enacted decades later, as part of the Immigration and Nationality Act of 1990. In addition, both the Communist/totalitarian exclusion and its exception have always been quite different in scope from the material support bar and the common-law defenses implicit in it. The Communist/totalitarian exclusion does not apply to applicants for nonimmigrant visas, nor has it ever been a bar to asylum or withholding of removal.

Moreover, the "involuntariness" exception of 212(a)(3)(D)(ii) is not a codification of a common-law conception of duress, but creates a fairly broad exception covering anyone who joined the party, for example, for purposes of obtaining employment. *See Matter of Rusin,* 20 I.&N. Dec. 128 (BIA 1989) (allowing adjustment of status of Polish applicant based on finding that she was required to join Communist organization in order to keep her employment). While the broad and detailed involuntariness exception to the Communist exclusion may have required an explicit legislative statement, the enactment of that explicit exception is not relevant to the existence of an implied defense of duress to the material support bar.

The IJ also cited to the Supreme Court's holding in the *Fedorenko* case in support of her decision to construe the material support bar by comparison with the Communist/totalitarian exclusion. *Fedorenko v. United States*, 449 U.S. 490 (1981). *Fedorenko*'s inference that the bar to persecutors of others under section 2(a) of the Displaced Persons Act did not require voluntary conduct was based on a comparison with section 2(b) of the same Act, whose exclusion of persons having assisted enemy forces, by its explicit terms, applied only to those who did so voluntarily. Displaced Persons Act of 1948 (DPA), 62 Stat. 1009. Given that sections 2(a) and 2(b) were taken from the definition of "refugees or displaced persons" of the Constitution of the International Refugee Organization and were incorporated into the DPA together, 2(b) was arguably more relevant to an interpretation of 2(a) than section 212(a)(3)(D) of the INA would be to an understanding of defenses available under section 212(a)(3)(B)(iv)(VI). But as subsequent cases have noted, and as described in more detail below, the focus of *Fedorenko* was not on voluntary versus involuntary conduct, but on culpability.

4) Recognition of a defense of duress to the material support bar is consistent with U.S. case law interpreting the persecutor bar

U.S. courts have looked to the Supreme Court's analysis of the DPA's persecutor bar in *Fedorenko* for guidance in interpreting the similarly-worded bar to asylum and withholding of removal under the INA, which applies to anyone who "ordered, incited, assisted, or otherwise participated in" the persecution of others. INA § 208(b)(2)(A)(i), 241(b)(3)(B)(i). *Fedorenko* was a denaturalization case involving a Ukrainian man who had been granted displaced person status after World War II and had gone on to become a U.S citizen. Years later U.S. authorities discovered that, while serving in the Russian army, Fedorenko had been captured by German forces and had then been put to work as an armed guard at the Treblinka death camp. Fedorenko

argued that he should not be subject to the persecutor bar of section 2(a) of the DPA because he had not voluntarily become a death camp guard.

Although the Supreme Court's decision, declining to find an exception under section 2(a) of the DPA for "involuntary assistance" to persecution, has been cited for the proposition that there is no duress defense to the persecutor bar, the Supreme Court, in upholding Fedorenko's denaturalization, focused on his personal culpability, including both the atrocity of the acts he had facilitated and the facts in the record indicating that although his original capture by German forces had not been voluntary, his actions as a guard at Treblinka (where he carried and used a gun, was regularly allowed out on leave, was paid, and was even awarded a "good service stripe" for his work) probably were. 449 U.S. at 500. Certainly there is no indication that Fedorenko even attempted to satisfy the basic elements of a duress claim, including an examination of what would have happened to him had he tried to leave his position as a guard, or of how those consequences would have compared with the consequences of his continuing to help run a camp in which close to 800,000 men, women, and children were murdered.

Fedorenko held that in order to determine whether or not he assisted in persecution, a person's culpability must be assessed along a continuum of conduct. 449 U.S. at 512 n. 34. This analysis, the Supreme Court held, should guarantee that those morally responsible for assistance in persecution are excluded while victims of that same persecution—including, in this case, camp inmates who could be held to have "assisted" in persecution as well because they were made to work for their persecutors—are not. *Id.* at 512 n. 33, 34.

Lower courts have taken up this focus on personal culpability, which is relevant also to the interpretation of the material support bar. Thus the Eighth Circuit reversed the denial of asylum to a Guatemalan man forcibly recruited by guerrillas and forced, under pain of death, to

be part of a firing squad ordered to execute villagers. The court held that "[u]nder Fedorenko, a court faced with difficult 'line-drawing' problems should engage in a particularized evaluation in order to determine whether an individual's behavior was culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution." *Hernandez v. Reno,* 258 F.3d 806, 813 (8th Cir. 2001). The court in *Hernandez* noted the differences between Hernandez's circumstances and actions and Fedorenko's, including the fact that Hernandez—like R-K- and unlike Fedorenko—was the one who told the U.S. government the facts that gave rise to the exclusion issue. *Id.* at 814.

The Seventh Circuit, in denying the appeal of a Sikh man who while serving as a police officer in Punjab had been involved in persecutory acts against other Sikhs, emphasized the voluntary nature of his conduct ("during his lengthy term of employment he refused to quit the police force due to his need for a steady paycheck and his apparent desire to avoid searching for work with a different employer"). *Harpal Singh v. Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005). The Ninth Circuit has likewise held that in order to establish culpability under the persecutor bar, individual accountability must be established, and adjudicators must also evaluate the surrounding circumstances, including any applicable defenses. *See Vukmirovic v. Ashcroft,* 362 F.3d 1247 (9th Cir. 2004) (recognizing self-defense as defense to persecution of others); *see also Matter of A-H-,* 23 I.&.N. Dec. 774 (AG 2005) (citing *Hernandez* with approval for the proposition that "[i]t is appropriate to look at the totality of the relevant conduct in determining whether the bar to eligibility applies.").[5]

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[5] The only courts to have reached an apparently different conclusion have either not been faced with an argument of duress or have not squarely resolved it. *See Bah v. Ashcroft,* 341 F.3d 348, 351 (5th Cir. 2003) (where court's holding that "the alien's personal motivation is not relevant" was based on applicant's argument of lack of nexus, not duress, with respect to the persecutory acts); *Xie v. INS*, 434 F.3d 136, 144 (2d Cir. 2006) (expressing doubt that the INA's persecutor bar would include an implicit requirement of voluntariness if the DPA did not, but assessing asylum applicant's voluntariness nonetheless and finding no suggestion that his actions were physically or psychologically coerced or that he could not have obtained alternative employment).

The Ninth Circuit recently reaffirmed the relevance of personal culpability and possible defenses in denying the case of an asylum applicant who, as a policeman in Peru, had served as a Quechua interpreter for six years in police interrogations of suspected guerrillas being questioned under torture. *Miranda Alvarado v. Gonzales*, 449 F.3d 915 (9th Cir. 2006). Miranda testified that if he had refused, "it would have affected [his] performance rating and [he] would not have been promoted." *Id.* at 918. As the court noted, Miranda did not claim that he was "compelled to remain in the police force on account of factors other than duty, police regulations governing resignations, and career considerations." *Id.* at 920. Evaluating Miranda's culpability against the "continuum of conduct" indicated by the *Fedorenko* decision, the court correctly concluded that Miranda made "no colorable claim that his actions were motivated by self-defense or similar extenuating circumstances."

The example of Miranda, in fact, illustrates the difference between the defense of duress implicit in the material support bar, and the exception explicitly afforded by the statute to reluctant members of totalitarian parties. Miranda's reasons for continuing to assist in the horrific interrogations he took part in—concern about his performance rating and a reluctance to quit his job—might meet the threshold of "involuntariness" under 212(a)(3)(D). But they do not amount to coercion.

II. Denying protection to an otherwise eligible refugee who gave money to a terrorist organization under coercion would violate the Refugee Convention

The IJ's interpretation of section 212(a)(3)(B)(iv)(VI), barring victims of terrorist extortion from asylum and withholding of removal, would also place the statute in square conflict with international law, as expressed in the Refugee Convention, the Refugee Protocol, and the customary international and *jus cogens* protections against the *refoulement* of refugees.

As discussed in further detail below, these sources of international law have been incorporated into U.S. law, and uniformly mandate that countries offer protection to persons fleeing persecution. This obligation is subject only to limited exceptions, such as where the refugees in question are persecutors or terrorists themselves or present a threat to the security of the host country. U.S. courts presume that Congress intends its statutes to comply with international law, unless the statute unambiguously states otherwise. As the Supreme Court held two centuries ago and has since reiterated, "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)*; see also Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

As discussed in Part I above, a reasonable alternative construction of the statute at issue in this case is not only possible, but urged by other canons of construction and precedents applicable under U.S. law. The Board must therefore avoid placing the statute in conflict with the international legal obligations of the United States, by recognizing that refugees who give money or other goods or services to terrorist organizations under duress are not barred from refugee protection on that basis.

A. The IJ's Refusal to Recognize Duress as a Defense to Material Support Violates the Refugee Convention and the 1967 Protocol

The law of asylum in the United States derives very directly from international law, principally from the 1951 United Nations Convention Relating to the Status of Refugees (the "Refugee Convention") and the 1967 United Nations Protocol Relating to the Status of Refugees ("Refugee Protocol"), which incorporates the key elements of the Refugee Convention by reference. The United States acceded to the Refugee Protocol in 1968 and incorporated its provisions into domestic law through the Refugee Act of 1980. Pub. L. No. 96-212, 94 Stat 102 (1980). As the Supreme Court has confirmed, a primary purpose of Congress in passing the

Refugee Act "was to bring United States refugee law into conformance with the 1967 United Nations Protocol." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).[6]

The principles of refugee protection that underlie the Refugee Convention and Protocol are subject to limited exceptions. Those relevant to this case are contained in Article 1F and Article 33(2) of the Convention. The "exclusion clauses" of Article 1F apply to persons being considered for refugee status, and aim to exclude from refugee protection those who have committed offenses so grave that they can be seen as undeserving of international refugee protection. Article 33(2) applies to persons already recognized as refugees and allows for an exception to the obligation of *non-refoulement* if a refugee poses a danger to the safety of the host country. Neither of these exceptions applies to individuals who, like R-K-, were forced to give money or services to armed groups under duress.

1) The Exception to Refugee Protection Contained in Article 1F Targets Serious Criminal Conduct And Recognizes Defenses Including Duress

a) Article 1F targets serious criminal conduct

Article 1F provides:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has committed a crime against peace, a war crime, or a crime against humanity . . .;
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Refugee Convention, July 28, 1951, 1989 U.N.T.S. 150, Art. 1F.

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[6] In addition to its treaty-based obligations under the Refugee Protocol, the U.S. is also bound by customary international law. Like the prohibition against torture, the prohibition against *refoulement* to persecution or torture is an accepted principle of customary international law, which nations accept as a binding legal norm in the absence of a treaty or other source of legal obligation. U.S. courts are bound to apply customary international law where there is no treaty and no controlling executive or legislative act or judicial decision. *The Paquete Habana,* 175 U.S. 677, 700 (1890); *Matter of Medina,* 19 I.&N. Dec. 734, 743 (BIA 1988).

The bars to asylum and withholding of removal under U.S. law track the broad categories of the exclusion clauses (and of Article 33(2), discussed below) and derive from the same underlying principles. The grounds for exclusion enumerated in Article 1F are exhaustive, meaning that they cannot be augmented by additional grounds for exclusion in the absence of an international convention to that effect. *Background Note* at ¶ 7. In keeping with U.S. rules of statutory interpretation, the scope of the corresponding bars to refugee protection under U.S. law should therefore be interpreted consistently with Article 1F.

The development of the concept of exclusion rested on three main concerns: (1) to ensure that the Refugee Convention did not clash with a State's existing obligations under extradition law; (2) to safeguard the integrity of the asylum system in the eyes of the public, and thus strengthen the protections available to victims of human rights violations; 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. As the UNHCR has explained, the rationale for the exclusion clauses is that "certain acts are 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 ("*Exclusion Guidelines*"). The exclusion clauses are exceptions to human rights protections, and as such must be interpreted restrictively. *See Background Note* ¶ 4. Careful application of the exclusion clauses is also justified because exclusion can result in such serious consequences to the applicant. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1992) ("*UNHCR Handbook*").

While there is as yet no universally accepted definition of "terrorism," specific acts considered to be "terrorist" acts that are broadly condemned by the international community fall under the rubric of Article 1F. *See Background Note* ¶ 79-84; Walter Kälin & Jörg Künzli, *Article 1F(b): Serious Non-Political Crimes*, 12 Int'l J. of Refugee Law, Special Supplementary Issue on Exclusion (2000) 46, 74-76. Certain terrorist acts may constitute crimes against humanity and thus fall within the scope of Article 1F(a). And leaders of terrorist organizations who carry out acts of international terrorism of such magnitude as to pose a serious threat to international peace and security may be considered to fall under Article 1F(c). *See Background Note* ¶83. But neither of these clauses could possibly apply to the facts of Mr. K-'s case, so that as with the majority of refugees facing exclusion on terrorism-related grounds, if any exclusion clause is relevant here, it is Article 1F(b). Terrorist acts falling within the scope of Article 1F(b) are considered "serious non-political crimes" because they are disproportionate to any political objective or lack a clear link to such a political objective. *See Aguirre-Aguirre v. INS,* 526 U.S. 415 (1999); *UNHCR Handbook* ¶ 152.

b) Exclusion must be based on individual responsibility for serious wrongdoing, and cannot be based on acts committed under duress

All of the exclusion clauses involve crimes—very grave crimes—that make a person who has committed them "unworthy of international protection," and the focus in determining whether or not a person's actions have made him undeserving of refugee protection under Article 1F is on the person's individual culpability in the commission of criminal acts. *UNHCR Handbook* ¶ 147-148. This does not mean that asylum applicants must be given all the procedural protections guaranteed to criminal defendants under U.S. law or that guilt must be determined "beyond a reasonable doubt." *See Background Note* ¶ 98, 107. But it does mean that

on the facts established under the "serious reasons for considering" standard applicable to the exclusion clauses, the asylum applicant must bear individual responsibility for wrongdoing.

As in the criminal context, individual responsibility can be negated by a lack of the requisite *mens rea*, and the normal defenses that apply under general principles of criminal liability—such as duress, self-defense, or necessity--also apply here. *Background Note* ¶¶ 64-71; *Exclusion Guidelines* ¶ 22; Lawyers Committee, *Refugees, Rebels, and the Quest for Justice* (2002), 141-44. Duress is recognized as a defense under Article 31(d) of the Rome Statute to the crimes within the jurisdiction of the International Criminal Court (genocide, crimes against humanity, and war crimes). Duress applies where a person acts necessarily and reasonably to avoid a threat of imminent death, or of continuing or imminent serious bodily harm to him- or herself or to another person, and the person does not intend to cause a greater harm than the one he or she seeks to avoid. Rome Statute of the International Criminal Court, Art. 31(d), U.N. Doc. No. A/CONF.183/9, 2187 U.N.T.S. 90, *entered into force* July 1, 2002 (1998). This definition, which follows the essential elements of the common-law defense, is also applied to Article 1F. *Exclusion Guidelines* ¶ 69; *Background Note* ¶ 22.

In the case currently before the Board, the IJ recognized, and DHS does not dispute, that R-K-'s payment of 50,000 to the LTTE was made under coercion. Even assuming that such a payment would otherwise fall within the scope of Article 1F, the fact that it was made under duress clearly exempts him from exclusion.

2) The Exception to the Obligation of Non-Refoulement Contained in Article 33(2) Does Not Apply

Article 33 of the Refugee Convention codifies the principle of *non-refoulement* of refugees, prohibiting a Contracting State from expelling or returning a refugee to a country where his life or freedom would be threatened. *Refugee Convention,* Art. 33(1). This principle,

which is considered the cornerstone of international refugee protection, allows for an exception in only two situations, codified at Article 33(2) of the Convention: (1) where there are "reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he is," or (2) where the refugee "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." As with Article 1F, Article 33(2)'s exceptions to the obligation of non-refoulement must be applied restrictively and with great caution. *See* Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement,* ¶ 147, Feb. 2003.

Under international standards, Article 33(2) applies only to persons already determined to be refugees. In implementing the Refugee Protocol, however, the United States folded the exclusion clauses of Article 1F and the exceptions to *non-refoulement* of Article 33(2) into a single set of bars to asylum and withholding of removal that are applied in the initial process of adjudicating an asylum application and may also provide a basis for later revocation of protection already granted. Thus, persons who provide "material support" to "terrorist organizations" as those terms are defined under the INA are barred from withholding of removal because the statute considers, as a categorical matter, that there are "reasonable grounds to believe that [they are] a danger to the security of the United States." INA § 241(b)(3)(B); *see also* INA § 208(b)(2)(A)(v) (bar to asylum).

The INA's equation of providing material support with posing a danger to the security of the United States becomes both absurd and inconsistent with Article 33 if it is applied to payments made under duress.[7] Mr. K-, for example, gave 50,000 rupees to the LTTE under

[7] The existence of statutory authority under INA § 212(d)(3) permitting the Secretary of Homeland Security to determine, in his sole unreviewable discretion and after consultation with the Secretary of State and the Attorney General, that the material support bar shall not apply to a particular applicant, does not suffice to avoid the inconsistency with the Refugee Convention that the IJ's interpretation would produce. The Board in its recent

coercion. He later fled Sri Lanka. It is clear from the record not only that Mr. K- acted in mortal fear of the LTTE, but that his characterization of the LTTE's methods actually matches that of the U.S. government. *See* IJ Decision at 5 ("respondent testified that the LTTE mode of operation is to kill and shoot those who oppose them");
Transcript at 33 ("If I go and complain about LTTE to the army or police, they will find out and the LTTE might shoot me. . . That's what happen[s].")

The same is true of other asylum applicants who seek refuge in the United States from the extortionist demands of terrorist organizations. The result, and in many cases the purpose of their flight, is to *avoid being coerced* by these groups. Far from posing a danger to the security of the United States, these refugees seek security in the United States from the very groups the United States condemns. In addition to the principles of restrictive interpretation applicable to Article 33(2) under international law, simple logic confirms that the material support bar cannot apply to funds or other goods or services given under duress.

Through his flight to the United States, Mr. K- has now succeeded in removing himself from the LTTE's power to coerce him. The IJ did not hold, and the record provides no basis to conclude, that he poses any sort of danger to the security of this country. Application of the material support bar to exclude him from refugee protection would therefore violate Article 33 of the Refugee Convention.

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decision in *Matter of S-K-* referred to this § 212(d)(3) authority as a means of reconciling its interpretation of the definition of a "terrorist organization" under § 212(a)(3)(B)(vi)(III) with international standards. *Matter of S-K-*, 23 I.&.N. Dec. 936 (BIA 2006). Even if such waiver authority had been implemented with respect to asylum seekers, which it has not—the respondent in *S-K-* remains detained at the time of this writing and there are to our knowledge no mechanisms in place to prevent others similarly situated from being deported--the obligation of non-refoulement under the Convention is mandatory and cannot be implemented by means of an unreviewable discretionary waiver.

CONCLUSION

For the foregoing reasons, the Board should sustain R-K-'s appeal.

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