2022

Refugees Under Duress: International Law and the Serious Nonpolitical Crime Bar

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INTRODUCTION

Kevin Euceda[1] was forcibly recruited by the MS-13 gang when he was just thirteen years old. Kevin was destitute after being abandoned by his parents in San Pedro Sula, Honduras, and the gang commandeered his house as a base of operations and compelled his participation in gang activities.[2] Over the years, Kevin was forced into minor roles in the gang's

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1. This Article is dedicated to Kevin, a warm hearted, kind soul who did not deserve his lot in life and who was taken from this world too early. Kevin authorized his counsel to use his real name while working with Hannah Dryer at the Washington Post to complete the coverage cited below. *See infra* note 2. Kevin authorized the use of his real name, in part, because he wanted to publicize the injustices he suffered in the United States immigration system. This Article lifts up his name posthumously to honor his desire to publicize his mistreatment by United States authorities.

2. Hannah Dryer, *Trust and consequences: The government required him to see a therapist. He thought his words would be confidential. Now, the traumatized migrant may be deported.*, WASH. POST (Feb. 15, 2020), https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/ [https://perma.cc/9GF6-C3WX].

criminal enterprise, and on a couple of occasions was obligated to engage in violence.[3] These violent acts haunted Kevin and left him severely traumatized.[4] Kevin endured life under the thumb of the violent gang until he was seventeen, when he seized a rare chance to escape.[5] He fled Honduras, traversing dangerous migratory channels through Guatemala and Mexico to arrive in the United States, where he believed he could find protection.[6] His trauma was evident when he arrived in the United States, leading immigration officers to medicate him, require counseling, and place him on suicide watch.[7] Unbeknownst to Kevin at that time, an arduous legal battle awaited him that he would be forced to wage from detention centers throughout the United States because of his perceived dangerousness.[8] While his legal case was strong in many respects, he ended up being unable to endure the cost of the fight, jailed like a criminal in immigration detention for the three years that his lawyers worked to secure protection in the United States.[9] Over this period, a judge's decision to award him asylum was reversed, and her orders to release Kevin from detention were twice blocked by the Department of Homeland Security ("DHS").[10] Kevin accepted deportation to Honduras as his only escape from detention while his case continued to languish in a seemingly endless process.[11] He met an untimely death in an accident just months later.[12]

Kevin faced many impediments to refugee protection in the United States.[13] This Article focuses on the government's insistence that Kevin should be barred from refugee protection because he committed "serious nonpolitical crimes" as a member of MS-13. The serious nonpolitical crime bar originates from the 1951 Convention Relating to the Status of Refugees ("Refugee Convention") and it excludes from protection any person who

3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. Hannah Dryer, *To stay or to go? Amid coronavirus outbreaks, migrants face the starkest of choices: Risking their lives in U.S. detention or returning home to the dangers they fled*, WASH. POST (Dec. 26, 2020), https://www.washingtonpost.com/nation/2020/12/26/immigration-detention-covid-deportation/ [https://perma.cc/8M29-3JZ7].
12. *Id.*
13. Other than the serious nonpolitical crime bar, Kevin faced challenges establishing a well-founded fear on account of a protected characteristic. More specifically, Kevin alleged that he was the member of a particular social group of "former MS-13 members," which the BIA has found does not constitute a basis for refugee protection. W-G-R-, 26 I. & N. Dec. 208 (B.I.A. 2014). While Kevin was able to distinguish his case from that precedent before the Immigration Judge, who awarded Kevin asylum, the BIA reversed that decision and remanded to the IJ.

had committed a serious crime outside the country of asylum.[14] The United States incorporated this exclusion into United States law with the 1980 Refugee Act,[15] legislation ostensibly intended to bring the country into compliance with its international obligations under the Refugee Convention.[16] Under case law, the application of the bar requires "balanc[ing] the seriousness of the criminal acts against the political aspect of the conduct to determine whether the criminal nature of the applicant's acts outweighs their political character."[17] In Kevin's case, where the crimes MS-13 compelled him to commit were relatively serious and not at all political in nature, the application of the serious nonpolitical crime bar might have been appropriate. But the fact that Kevin committed those crimes in fear for his life suggests that a different outcome should be possible. However, no duress exception to the serious nonpolitical crime bar has been established under United States law.

The United States has an international legal obligation to permit Kevin and other asylum seekers like him to present a duress defense against the imposition of the serious nonpolitical crime bar. This obligation is derived from the Refugee Convention itself, which has been interpreted by the UN High Commissioner for Refugees ("UNHCR"),[18] international refugee law scholars,[19] and states party to the Refugee Convention to include an implicit duress exception.[20] It is well documented that the objective of the Refugee Convention, promulgated to manage the humanitarian disaster in the wake of World War II, was to extend international protection to refugees who could not find safe harbor in their home countries.[21] The exceptions to refugee protection were intended to

14. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

15. Immigration and Nationality Act §§ 208(b)(2)(A)(iii), 241(b)(3)(B)(iii) bar an individual from obtaining asylum and withholding of removal, respectively, if "there are serious reasons for believing that the alien committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States."

16. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 438–39 (1987); *see also* INS v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999) (citing *Cardoza-Fonseca* in finding that "one of Congress' primary purposes in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968 . . . ").

17. E-A-, 26 I. & N. Dec. 1, 3 (B.I.A. 2012) (citing *Aguirre-Aguirre*, 526 U.S. at 415).

18. U.N. High Comm'r for Refugees, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees ¶ 22, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003).

19. *See* Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses*, UNHCR 33 (2001), https://www.refworld.org/pdfid/3b3702152.pdf [https://perma.cc/X2BM-833B]; *see also* JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 218–20 (Anne Lynas Shah ed., 1991).

20. *See infra* notes 166–70.

21. *See* U.N. High Comm'r for Refugees, Convention and Protocol Relating to the Status of Refugees (Dec. 2010), https://www.unhcr.org/en-us/3b66c2aa10 [https://perma.cc/9K5N-X436].

exclude those who perpetrated harmful acts that contravened the humanitarian purpose of the treaty.[22]

Considering the humanitarian objective of refugee protection, and the human rights context in which it was developed, it goes to reason that criminal exclusion from the protection framework should be tethered to actual criminal culpability.[23] Indeed, where a refugee was compelled by his persecutors to act criminally, it is necessary to examine the refugee's culpability in that context and determine whether protection is appropriate to truly achieve the humanitarian purpose of the protection framework.[24] Any other interpretation would be unfaithful to the goals of the Refugee Convention and the intent of the United States Congress when it implemented the 1980 Refugee Act in furtherance of those goals.[25]

Kevin's case provides an excellent example of why such an exception must exist. Indeed, anyone who spent any time with Kevin instantly understood that he was a victim of MS-13, that he had been forcibly recruited in fear, and that any actions he took on the gang's behalf were to save himself from torture or death. This was evident to every counselor that met with Kevin, his many lawyers, a journalist that worked closely with him, and perhaps most importantly, the Immigration Judge ("IJ") that heard Kevin's testimony under oath.[26] However, the DHS never accepted that Kevin could be anything but a dangerous criminal, notwithstanding all the evidence to the contrary, and the Board of Immigration Appeals ("BIA") found that characterization to be conclusive when it excluded him from refugee protection without a serious examination of his actual criminal culpability.[27] This refusal to consider Kevin's duress defense to the application of the serious nonpolitical crime bar and examine his actual criminal culpability in a manner consistent with the humanitarian goals that United States asylum law was intended to serve resulted in Kevin's death.[28] This is far too common, and it must change.

This Article will argue for the incorporation of a duress exception to the serious nonpolitical crime bar in four parts. First, this Article illustrates the original intent of United States asylum law to implement Refugee Convention obligations, and the divergence of United States practice from that original intent through a discussion of two seminal

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22. U.N. High Comm'r for Refugees, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees ¶ 20, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003).

23. *See* U.N. High Comm'r for Refugees, The Exclusion Clauses: Guidelines on Their Application ¶ 75 (Dec. 1996).

24. *Id.*

25. *See, e.g.*, Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections From Human Rights Norms*, 15 MICH. J. INT'L L. 1179 (1994).

26. Dryer, *supra* note 2.

27. *Id.*

28. *Id.*

asylum law cases, *INS v. Cardoza-Fonseca*[29] and *INS v. Aguirre-Aguirre*.[30] Next, this Article summarizes the current state of the law surrounding the serious nonpolitical crime bar, which the United States Supreme Court interpreted in a restrictive manner in *Aguirre-Aguirre*, setting up the current challenge to pleading a duress defense to that bar.[31] Third, this Article examines the controversy around the existence of a duress exception to the persecutor bar, arguing that the BIA has appropriately interpreted that bar to include a duress exception that should extend to the serious nonpolitical crime bar by analogy. Finally, this Article argues that United States law must be read in a manner consistent with international law and incorporate a duress defense into the serious nonpolitical crime bar, and that a failure to do so degrades the rule of law by permitting the executive to undermine the will of Congress. The conclusion will emphasize the need for a duress defense to the serious nonpolitical crime bar so that refugees like Kevin can receive the protection guaranteed under United States law.

I. INTERNATIONAL REFUGEE LAW IN THE UNITED STATES

In 1968, the United States ratified the 1967 Protocol to the 1951 Convention on the Status of Refugees, which bound the United States to the obligations set forth in the Refugee Convention.[32] When the United States Congress passed the Refugee Act in 1980, it was unequivocal in its intent to bring the United States into compliance with the international obligations it had taken on with its ratification of the 1967 Protocol.[33] In this regard, the Refugee Act created a unique legislative mandate requiring both the agency charged with its implementation and courts that review those efforts to read that statute in a manner consistent with international law.[34] However, United States agencies and courts are unaccustomed to applying international law domestically and have been increasingly less inclined to do so since the passage of the Refugee Act. This section illustrates this shift with a discussion of two United States Supreme Court cases, *INS v. Cardoza-Fonseca*[35] and *INS v. Aguirre-Aguirre*,[36] and highlights the consequences for refugees seeking protection in the United States.

29. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).
30. INS v. Aguirre-Aguirre, 526 U.S. 415 (1999).
31. *Id.*
32. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.
33. *See* Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980); *see also* Caitlin B. Munley, *The Refugee Act of 1980 and INS v. Cardora-Fonseca*, 27 GEO IMMIGR. L. J. 809, 810 (2013) (citing S. REP. NO. 96-256).
34. *See* Munley, *supra* note 33, at 810; *see also Cardoza-Fonseca*, 480 U.S. at 424.
35. *Cardoza-Fonseca*, 480 U.S. at 421.
36. *Aguirre-Aguirre*, 526 U.S. at 415.

In *INS v. Cardoza-Fonseca*,[37] the United States Supreme Court interpreted the statutory language "well-founded fear of persecution" that is central to the refugee definition, incorporated directly into United States law from the Refugee Convention.[38] The case arose from Luz Marina Cardoza-Fonseca's application for asylum, in which she alleged that Nicaraguan *Sandinistas* would imprison and torture her in order to gain information about her brother, who was a political dissident in Nicaragua.[39] In considering her claim for refugee protection, first the IJ and then the BIA applied a standard that required her to demonstrate that she would "more likely than not" suffer the persecution she alleged.[40] The United States Supreme Court disagreed with this standard, finding that a one-in-ten chance of persecution could qualify as the "well-founded fear" required to establish eligibility for asylum pursuant to the 1980 Refugee Act.[41]

There were several very compelling reasons for the Court to decide *Cardoza-Fonseca* the way it did.[42] This discussion will focus on the Court's consideration of "the abundant evidence of an intent to conform the definition of 'refugee' and our asylum law to the United Nations's Protocol to which the United States has been bound since 1968."[43] This evidence included both the statutory language, much of which was imported directly from the Refugee Convention, as well as congressional statements made during the legislative debate. For example, the Court highlighted the Conference Committee Report stating that the refugee definition was accepted "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol."[44] With the link between the statutory language of the 1980 Refugee Act and the 1951 Refugee Convention firmly established, the Court proceeded to consider sources that would provide content for the otherwise ambiguous "well-founded fear" language.[45] Those sources included the history of the 1951 Convention, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook"), and the writings of international refugee law scholars.[46]

Regarding the history of the 1951 Convention, the Court highlighted the roots of the Refugee Convention definition in the International Refugee Organization (IRO) Constitution. Specifically, the Court illustrated how the drafters of the IRO Constitution intended the well-

37. *Cardoza-Fonseca*, 480 U.S. at 421.
38. *Id.* at 439–40.
39. *Id.* at 424–25.
40. *Id.* at 425.
41. *Id.* at 449.
42. *Id.* at 432–33.
43. *Id.*
44. *Id.* at 437 (citing S. REP. NO. 96-590, at 20 (1980); *see also* H.R. REP. NO. 96-608, at 9 (1979)).
45. *Id.* at 436–41.
46. *Id.* at 431, 436–41.

founded fear inquiry to include persons who can "show good reason why he fears persecution," and that the 1951 Convention drafters intended to incorporate this same standard.[47] The Court found additional support for this lower burden in the UNHCR Handbook, which urged protection for a person "if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition . . . ."[48] Finally, the Court noted that its examination of the refugee definition history, corroborated by the UNHCR Handbook, was further supported by the work of refugee law scholars.[49] In fact, the Court specifically concluded that a ten percent chance of persecution could qualify as a "well-founded fear" based on the writing of A. Grahl-Madsen in his 1966 treatise, The Status of Refugees in International Law.[50]

While none of these international law sources were dispositive, it is evident that the Court understood its role to identify the applicable rule of international refugee law, because that was the rule that Congress intended to govern. Accordingly, the Court examined the history of the Refugee Convention, the UNHCR Handbook, and the writings of refugee law scholars to answer the question of what standard of proof international refugee law required. Once it settled on a one in ten chance, it concluded that must be the standard in the United States as well.[51]

Just over a decade after the Supreme Court issued its decision in *Cardoza-Fonseca*, it considered the proper interpretation of the serious nonpolitical crime bar in *INS v. Aguirre-Aguirre*.[52] The High Court's view of international law had dimmed, as evidenced by the very different approach it took to interpret the meaning of that provision of United States law, clearly derived directly from the Refugee Convention.[53] In that case, Aguirre sought refugee protection based on his fears that he would be persecuted for his political activity in Guatemala, which included participation in strikes over rising bus fares and the failure of the government to investigate student disappearances.[54] The IJ granted asylum, but the BIA reversed, concluding that Aguirre's conduct during protests, which included burning buses, breaking store windows, and attacking store customers, bus passengers, and police officers, constituted serious nonpolitical crimes.[55]

On review, the Ninth Circuit found that the BIA had applied an incorrect standard, citing an additional consideration from the UNHCR Handbook requiring the BIA to balance the seriousness of the criminal

47. *Id.* at 438.
48. *Id.* at 439.
49. *Id.* at 439, 440 n. 24.
50. *Id.* at 431, 449.
51. *Id.*
52. INS v. Aguirre-Aguirre, 526 U.S. 415 (1999).
53. *Id.* at 427.
54. *Id.* at 421–22.
55. *Id.* at 422–23.

conduct against the severity of the persecution feared.[56] This additional consideration suggested that proportionality was a relevant factor in deciding whether to apply the bar to protection, such that more serious crimes may be permitted if the persecution feared was more severe.[57] However, on review, the Supreme Court held that the BIA was not required to follow UNHCR Handbook interpretations when deciding the scope of United States asylum protection.[58]

In *Aguirre-Aguirre*, no one disputed that it was appropriate for the court to "weigh the political nature of an act against its common-law or criminal character" in deciding whether to apply the serious nonpolitical crime bar.[59] Rather, the Supreme Court focused on the Ninth Circuit's conclusion that the BIA was also required to follow additional guidance in the UNHCR Handbook. The Court first concluded that it owed *Chevron*[60] deference to the BIA's interpretation of the scope of the serious nonpolitical crime bar.[61] The Court then found error in the Ninth Circuit's conclusion that the BIA was required to balance the crimes against the threat of persecution by simply referencing a previous BIA case in which the Board concluded that there was no support in the text of the statute for that balancing.[62] While the UNHCR Handbook provided that this balancing was appropriate, the Supreme Court found that the Handbook was "not binding on the Attorney General, the BIA, or United States courts."[63] Notably, the BIA had never considered the intent of Congress to comply with international refugee law obligations, and the Supreme Court did not require compliance with this legislative mandate.[64]

Professor Bassina Farbenblum observed the Court's shift regarding its application of international law in these two seminal cases in her challenge to the Court's utilization of the *Chevron* doctrine in cases interpreting United States refugee law obligations.[65] Professor Farbenblum found *Cardoza-Fonseca* significant both because the Court clearly understood its role in interpreting United States asylum law in a manner consistent with the Refugee Convention and because it did not defer to the

56. *Id.* at 423.
57. *Id.*
58. *Id.* at 427.
59. *Id.* at 423.
60. Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
61. *Aguirre-Aguirre,* 526 U.S. at 424–25.
62. *Id.* at 425 (citing *Rodriguez–Coto,* 19 I. & N. Dec. 208, 209–210 (B.I.A. 1985), which "reject[ed] any interpretation of the phras[e] . . . 'serious nonpolitical crime' in [§ 1253(h)(2)(C)] which would vary with the nature of evidence of persecution").
63. *Id.* at 427 (citing INS v. Cardoza–Fonseca*,* 480 U.S. 421, 439, n. 22, when the Supreme Court wrote that "[w]e do not suggest, of course, that the explanation of the U.N. Handbook has the force of law or in any way binds the INS . . . ").
64. *Id.* at 422–23; 427.
65. *See* Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1078–91 (2011).

agency's interpretation of the statute.[66] As to the latter point, she emphasized that Justice Stevens authored *Cardoza-Fonseca* and *Chevron* three years earlier, and clearly distinguished the two cases. Specifically, the Court in *Cardoza-Fonseca* found the interpretation of a "well-founded fear" to be "a pure question of statutory construction," which is distinguished from the "complex policy judgment about how to fill a statutory gap" at issue in *Chevron*.[67] Professor Farbenblum then critiqued the Supreme Court's failure to retain this distinction in *Aguirre-Aguirre*.[68]

In *Aguirre-Aguirre*, the Supreme Court utilized a *Chevron* framework to analyze an apparent pure question of statutory construction because "the agency was 'giv[ing] ambiguous statutory terms concrete meaning through a process of case-by-case adjudication.'"[69] Professor Farbenblum astutely observed both the malleability of the Court's previously articulated *Chevron* distinction and, most important for the present discussion, that "[t]he Court made no attempt to determine the meaning of 'serious [non]political crime' in Article 1F(b) under international law."[70] Indeed, the Court in *Aguirre-Aguirre* addressed the narrow question of whether the UNHCR Handbook is binding on the agency and ended its analysis once it answered that question in the negative. The Court did not inquire whether the UNHCR Handbook guidance was expressive of international refugee law, and had it asked and answered that question in the affirmative, it would have likely changed the outcome of the case under the reasoning of *Cardoza-Fonseca*.

Nothing in *Aguirre-Aguirre* forecloses a renewed effort to urge courts to read the serious nonpolitical crime bar in conformity with international refugee law. That case stands for the rule that the BIA is not required to follow the UNHCR Handbook, but it does not undermine the *Cardoza-Fonseca* Court's conclusion that Congress intended United States asylum law to conform to international refugee law obligations. However, the stark contrast between the Supreme Court's approach in these two cases provides compelling evidence that it is less inclined to read United States asylum law in conformity with international law, Congressional intent notwithstanding. The following section provides a more fulsome account of the current state of law on the serious nonpolitical crime bar, confirming that a return to an interpretive canon that prioritizes the original intent of Congress in passing the Refugee Act is still possible.

66. *Id.* at 1086–87.
67. *Id.* at 1087.
68. *Id.* at 1089–92.
69. *Id.* at 1089 (citing *Aguirre-Aguirre*, 526 U.S. at 425) (internal quotations omitted).
70. *Id.*

II. THE SERIOUS NONPOLITICAL CRIME BAR

As noted previously, an individual is barred from obtaining refugee protection in the United States if "there are serious reasons for believing that the [noncitizen] committed a serious nonpolitical crime outside the United States prior to the arrival of the [noncitizen] in the United States."[71] This bar to protection was directly incorporated from Article 1F of the Refugee Convention, which excludes from the ambit of convention protection any person for whom there are serious reason to believe has committed: (a) a crime against peace, war crime, or crime against humanity;[72] (b) a serious nonpolitical crime;[73] or (c) acts contrary to the purposes and principle of the United Nations.[74] These exclusion clauses were incorporated into United States law after the United States subjected itself to the convention framework with its ratification of the 1967 Protocol.[75] This section examines the current scope of the serious nonpolitical crime bar and highlights some key challenges to interpreting the bar in a manner consistent with the Refugee Convention, as intended by Congress.

The BIA first considered the applicability of the serious nonpolitical crime bar in Matter of Rodriguez-Palma, which involved an asylum seeker from Cuba who admitted to committing a robbery in Cuba before his arrival in the United States.[76] This case was decided the same year that the Refugee Act was enacted. Accordingly, the Board's consideration of the serious nonpolitical crime bar was an issue of first impression.[77] Noting both the intent of Congress to implement United States obligations under the 1967 Protocol to the Refugee Convention and the lack of any clarification of the scope of the bar in the Convention or the Protocol, the Board looked first to the UNHCR Handbook.[78] The BIA cited the Handbook, which provided that "a serious crime must be a capital crime or a very grave punishable act" and that the gravity of the crime should be weighed against the persecution feared.[79] The BIA decided to apply the bar

71. 8 U.S.C. § 1158(b)(2)(A)(iii) (1980).

72. Refugee Convention, *supra* note 14, art. 1(F)(a). The full text of exclusion 1F(a) is "He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes."

73. *Id.* The full text of exclusion 1F(b) is "He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."

74. *Id.* The full text of exclusion 1F(c) is "He has been guilty of acts contrary to the purposes and principles of the United Nations."

75. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

76. 17 I. & N. Dec. 465, 466 (B.I.A. 1980).

77. *Id.*

78. *Id.* at 468.

79. *Id.* (citing U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, ¶¶ 155–56 (Sept. 1979)).

and stated that it would reach the same result whether based on the nature of the crime alone or balanced against the persecution feared.[80] The BIA emphasized that robbery was a crime involving moral turpitude, criminalized under common law and statute, and "characterized as a grave, serious, aggravated, infamous, and heinous crime."[81] The BIA also concluded that there was insufficient evidence that Rodriguez-Palma would suffer persecution in Cuba, so "assuming arguendo" that a balancing test was appropriate, it was still appropriate to apply the bar.[82]

It is notable that the Board never approached the UNHCR Handbook as a binding interpretive source, but rather a useful one. Worth highlighting is the BIA's failure to appreciate its mandate to interpret United States asylum law in a manner consistent with the Refugee Convention.[83] Indeed, it decided not to require the proportionality test advanced in the UNHCR Handbook, not because it did not believe that test was expressive of a Convention obligation, but because it questioned whether such a proportionality test was advisable.[84] Of course, this is the same Board that applied a heightened burden of proof in *Cardoza-Fonseca*, which was ultimately reversed by the Supreme Court due, in part, to its failure to comply with international law.[85]

Where the BIA expressed uncertainty about the applicability of the UNHCR Handbook in *Matter of Rodriguez-Palma*, it ignored that guidance altogether in Matter of McMullen when it applied the bar to a former member of the Provisional Irish Republican Army ("PIRA").[86] McMullen had provided military training and conducted special operations, including arms purchases and shipments as a feature of his membership in the PIRA, a group widely recognized for its use of violent terrorist tactics in furtherance of its political objectives.[87] The BIA found that McMullen did not fear persecution on account of his political opinion and then went on to find that the serious nonpolitical crime bar applied.[88] Specifically, the BIA invoked the balancing test previously set forth in *Rodriguez-Palma*, considering whether "the political aspect of the offense outweigh[s] its common-law character."[89] The BIA stated that conduct would trigger the bar if it was atrocious in nature or if "the crime is grossly out of proportion to the political objective," and ultimately found that McMullen's criminal

80. *Id.* at 469.
81. *Id.*
82. *Id.* 469–70.
83. *See id.* 468–70.
84. *Id.* 468–69.
85. INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).
86. *See* McMullen, 19 I. & N. Dec. 90, 92–94 (B.I.A. 1984).
87. *Id.* at 92–93.
88. *Id.* at 94–99.
89. *Id.* at 97–98.

conduct was both atrocious in nature and disproportionate to his political objectives.[90]

The BIA's reference to the UNHCR Handbook in *Rodriguez-Palma* and its subsequent failure to specifically analyze its obligations under international refugee law in *McMullen* set up the Supreme Court battle over the scope of the serious nonpolitical crime bar in *Aguirre-Aguirre*. As was noted above, the Supreme Court overturned the Ninth Circuit's decision to require the BIA to apply the proportionality test mentioned in *Rodriguez-Palma*.[91] Since *Aguirre-Aguirre*, there have been few efforts to reassert international refugee law as the appropriate framework for interpreting the serious nonpolitical crime bar under United States law.

The BIA's current approach to the serious nonpolitical crime bar is to first examine whether the crime is "serious" and then "balance the seriousness of the criminal acts against the political aspect of the conduct to determine whether the criminal nature of the applicant's acts outweighs their political character."[92] This approach is set forth in the BIA's 2012 case Matter of E-A-,[93] which concerned the asylum claim of a man from Côte d'Ivoire who had perpetrated certain abuses as a member of the youth group of the Democratic Party of Côte d'Ivoire ("PDCI").[94] He testified that he was instructed by party leaders to "make trouble" at opposition party events, and that he "burned passenger buses and cars, threw stones, pushed baskets of food off the heads of merchants as they walked on the streets, and threw merchandise off of merchants' tables in the market."[95]

In analyzing whether this constituted a serious nonpolitical crime, the BIA emphasized that the first step is to ask "whether the criminal conduct is of an atrocious nature," inasmuch as a finding that the conduct is atrocious would trigger the application of the bar without further analysis.[96] The BIA found that the conduct was not atrocious and moved on to balance the criminal nature against the political nature of the conduct.[97] In so doing, the BIA considered "whether (1) the act or acts were directed at a governmental entity or political organization, as opposed to a private or civilian entity; (2) they were directed toward modification of the political organization of the State; and (3) there is a close and direct causal link

90. *Id.* at 98. Notably, the BIA analogized case law on the applicability of the political offense exception to extradition without any clear basis for doing so, reasoning that McMullen's likely ineligibility for that exception reinforced its decision to apply the serious nonpolitical crime bar. *Id.* at 98–99.

91. INS. v. Aguirre-Aguirre, 526 U.S. 415, 416 (1999).

92. E-A-, 26 I. & N. Dec. 1, 3 (B.I.A. 2012) (citing *Aguirre-Aguirre*, 526 U.S. at 429–31).

93. *Id.*

94. *Id.* at 2.

95. *Id.*

96. *Id.* at 3.

97. *Id.* at 4–5.

between the crime and its political purpose."[98] In applying this analytical framework, the BIA noted the similarity between the conduct at issue in Matter of E-A- and *Aguirre-Aguirre*, and that the main distinction was testimony that no one was physically injured.[99] However, the BIA found that physical injury was not necessary to apply the bar, particularly where the conduct is "highly dangerous" and places "innocent people at substantial risk of death or serious bodily injury."[100] Ultimately, the BIA applied the bar in Matter of E-A-.[101]

In the context of the BIA's discussion, it addressed the applicant's contention that he had only participated in the criminal activity under duress.[102] While it ultimately rejected this argument because it was "not based on any specific, credible threat or any evidence that such actions had been carried out on others similarly situated to him,"[103] the BIA's reasoned consideration of coercion as part of its analysis is cause for cautious optimism.[104] The final section of this Article will present a complete argument that international refugee law requires a duress exception to the serious nonpolitical crime bar. Before setting forth that argument, the next section considers the analogous controversy around a duress exception to the persecutor bar.

III. THE TRAIL BLAZED IN THE PERSECUTOR BAR CONTROVERSY

The current debate about the existence of a duress exception to the 1F exclusion clauses began in earnest in the United States with *Negusie v. Holder*, decided by the United States Supreme Court in 2009.[105] United States law bars from refugee protection any noncitizen who participated in the persecution of others, and *Negusie* arose from a BIA decision to apply

98. *Id.* at 3.

99. *Id.* at 4–5.

100. *Id.* at 5.

101. *Id.* at 8.

102. *Id.* at 7 (citing Urbina-Mejia v. Holder, 597 F.3d 360, 369 (6th Cir. 2010), where the court affirmed the finding that the applicant was not coerced into committing serious nonpolitical crimes as a member of a gang while a juvenile).

103. *Id.* at 7–8.

104. *See* Fatma Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*, 66 UCLA L. REV. 142, 189–90 (2019) (observing that "the BIA's decision [in *Matter of E-A-*] is promising insofar as it acknowledges that duress and self-defense are relevant to the serious nonpolitical crime analysis . . . [but] the BIA's decision does not explicitly describe duress or self-defense as affirmative common law defenses or explain their elements). Contrastingly, in *Berhane v. Holder*, the criminal conduct in question—throwing rocks during a protest—was found by the Sixth Circuit to be insufficient justification for the bar, especially considering the justifications offered by the applicant: political motive and self-defense. 606 F.3d 819, 825 (6th Cir. 2010) ("That Berhane's acts were comparatively less violent than [the cases described above] does not inoculate him from the serious-nonpolitical-crime bar, but it does suggest that the Board ought to explain why he falls on the wrong side of the line—if indeed he does.").

105. Negusie v. Holder, 555 U.S. 511 (2009).

the so-called persecutor bar to Daniel Negusie, an Eritrean man who had served as a guard in a prison camp against his will.[106] On review at the Fifth Circuit, that court upheld the BIA's application of a longstanding rule derived from *Fedorenko v. United States* that voluntariness was not a consideration in applying the persecutor bar.[107] The Supreme Court reviewed the history of the persecutor bar and determined that the BIA improperly relied on *Fedorenko* in finding that there was no duress exception.[108] Specifically, the Court found that *Fedorenko* arose from a prior version of refugee protection established by the 1948 Displaced Persons Act ("DPA"), where Negusie's application for protection arose under the modern asylum regime promulgated with the 1980 Refugee Act.[109] Accordingly, the Court concluded that it was improper to apply the statutory prohibition on a duress exception from *Fedorenko* in Negusie's case.[110] The Supreme Court remanded the question to the BIA for consideration under the appropriate statutory framework.[111]

It took nine years for the BIA to address the issue in the first instance, and the duress exception became the subject of scholarly examination in the interim.[112] Professor Kate Evans explored the international and domestic origins of the persecutor bar and concluded that a duress exception under United States law was appropriate.[113] Professor Evans argued that the International Refugee Organization (IRO) Constitution, international refugee agreements, and decisions of military tribunals informed the work of Congress in formulating the persecutor bar, and those sources supported a duress exception.[114] Professor Evans's insights were not limited to answering the question posed by the *Negusie* Court; rather, her examination of IRO documents preserved in the French National Archive revealed that voluntariness was clearly a consideration in early persecutor bar adjudications.[115] Because the IRO Constitution included a duress exception to the persecutor bar and the DPA incorporated that provision from the IRO Constitution, Professor Evans argued that the DPA should have included such an exception and the *Fedorenko* Court erred in concluding otherwise.[116] Professor Evans demonstrated that the 1951 Refugee Convention was intended to incorporate both the persecutor

106. *Id.* at 515.

107. Negusie v. Gonzales, 231 F. App'x 325, 326 (5th Cir. 2007) (citing Fedorenko v. United States, 499 U.S. 490 (1981)).

108. *Negusie*, 555 U.S. at 522–23.

109. *Id.* at 524 (explaining that the DPA and INA had "different textual structures . . . . and [are] different statute[s] enacted for a different purpose").

110. *Id.*

111. *Id.* at 524–25.

112. Kate Evans, *Drawing Lines Among the Persecuted*, 101 MINN. L. REV. 453 (2016).

113. *Id.* at 457–59.

114. *Id.* at 460.

115. *Id.* at 487–510.

116. *Id.* at 511–15.

bar and its duress exception from the IRO Convention, and that the United States Congress intended to include those international obligations in the 1980 Refugee Act.[117] In this manner, Professor Evans provided valuable guidance to the BIA, which was set to resolve the question posed by the Supreme Court in *Negusie*.

When the BIA ultimately decided *Matter of Negusie*[118] on remand, it concluded that the 1951 Refugee Convention and the 1967 Protocol implicitly included a duress defense, "limited in nature," and that it was therefore appropriate to read a duress defense into United States law. [119] The BIA first reasoned that Congress had intended to bring United States law into alignment with its international refugee law obligations when it passed the Refugee Act, and more specifically that it had intended to implement the Article 1F(a) exclusion clause in the form of the persecutor bar.[120] The BIA then examined Article 1F(a), and found that the persecutor bar was intended to remove from the ambit of protection persons who had perpetrated crimes against humanity or war crimes, and examined that body of international criminal law for guidance.[121] The BIA quickly concluded that international criminal tribunals in the post-war era understood "that persons could not be held individually responsible for executing an order unless they had the ability to make a moral choice."[122] A duress defense was consistent with that spirit and was specifically accepted by tribunals at that time.[123] Ultimately, the BIA concluded that a narrow duress defense was consistent with the international refugee documents, and was therefore the best permissible approach inasmuch as it fulfilled the purposes of the Refugee Act.[124]

The Board then adopted a five-element test, which required an individual seeking to establish eligibility for refugee protection notwithstanding the persecutor bar to show that he or she:

> (1) acted under an imminent threat of death or serious bodily injury to himself or others; (2) reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) had no reasonable opportunity to escape or otherwise frustrate the threat; (4) did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and (5) knew or reasonably should have known that the harm he inflicted

117. *Id.* at 517–23.
118. Negusie, 28 I. & N. Dec. 120 (A.G. 2020).
119. Negusie, 27 I. & N. Dec. 347 (B.I.A. 2018).
120. *Id.* at 353–57.
121. *Id.* at 357–58.
122. *Id.* at 357.
123. *Id.* at 358–59.
124. *Id.* at 360.

> was not greater than the threatened harm to himself or others.[125]

After articulating this "limited" defense, the BIA found that Negusie himself did not qualify for a duress exception to the persecutor bar, both because he had overstated the actual threat of death he faced and because he likely had an opportunity to escape before he did.[126] It appeared that the BIA had allowed a duress defense with an extremely high standard.

Two years later, Attorney General Sessions certified *Negusie* to himself for review and vacated the Board's decision.[127] Sessions, "seeking to avoid collateral consequences that would be detrimental to the administration of immigration law, and weighing the diplomatic implications of this decision," concluded that the persecutor bar does not include a duress exception.[128] He focused on the history of the statutory provision, and reasoned that it made much more sense to read the persecutor bar in the Refugee Act in the same manner that it had been interpreted previously in the DPA.[129] Notably, Sessions latched on to the precise problem that Professor Evans highlighted. Indeed, convincingly argued that the DPA was intended to incorporate the provisions of the IRO Convention in the same manner that the Refugee Act was intended to incorporate the provisions of the Refugee Convention, and that *Fedorenko* was wrongly decided. However, Sessions took the opposite approach and used *Fedorenko* to suggest that the DPA had no duress exception to the persecutor bar, and that the best interpretation was to find that Congress intended the same when it enacted the Refugee Act.[130] This approach ignores the international law origins of refugee protection.

Sessions further reasoned that because Congress had legislated against the backdrop of *Fedorenko* and reenacted the persecutor bar as part of 1996 legislation after the BIA had clearly held no duress exception existed, that Congress's intention was to enact a persecutor bar with no duress defense.[131] He went on to observe that other provisions in the INA made explicit exceptions for involuntary acts, and that the absence of one in the persecutor bar was conclusive regarding congressional intent.[132] In this sense, he rejected the notion that Congress intended to legislate in conformity with international agreements in favor of a view that a duress

125. *Id.* at 363. The BIA recognized that this is a more limited exception than the United States Supreme Court "presumed" to be accurate in United States v. Dixon, which included only the first four elements. *Id.* at 363–64. The fifth element, which requires a proportionality analysis, was derived from international law. *Id.*

126. *Id.* at 368.

127. Negusie, 28 I. & N. Dec. 120 (A.G. 2020).

128. *Id.* at 121.

129. *Id.* at 132.

130. *Id.* at 133.

131. *Id.* at 133–34.

132. *Id.* at 134–35.

exception could only exist if Congress translated its intent to specific statutory language. Sessions attacked the broadly held view that the 1951 Convention included an implicit duress exception for the same reason.[133] Specifically, he emphasized that the lack of an explicit duress exception in the Convention, coupled with the fact that it merely required that States have "serious reasons" for believing prohibited conduct occurred, meant that no such duress exception existed.[134] In this regard, Session misconstrued the protective purpose of the humanitarian convention framework.

There should be no doubt that the restrictionist impulse repeatedly demonstrated by Sessions in the decisions he issued as Attorney General and his public remarks is at odds with the intent of the drafters of international refugee agreements and the 1980 Refugee Act. The goal of the international community when it drafted the IRO Constitution, the 1951 Convention, and the 1967 Protocol, and the goal of the United States Congress when it passed the 1980 Refugee Act was to protect human rights and ensure protection for the persecuted. While divergent interpretations will always be possible, that historical intent is manifest and should guide the United States understanding of refugee protection. Indeed, that was evident to the United States Supreme Court when it decided *Cardoza-Fonseca*, and while the Court did not demonstrate the same level of certainty in *Aguirre-Aguirre*, the purpose of Congress in passing the 1980 Refugee Act was clear nonetheless.[135]

In a recent development that provides some hope for a return to an interpretation of the persecutor bar more in line with international obligations and Congressional intent, Attorney General Garland vacated Sessions's 2020 decision in *Negusie* in late 2021.[136] Garland referred the case to himself for reconsideration, thereby automatically staying the BIA's 2018 decision.[137] This development provides an opportunity for Garland to either restore the BIA's limited duress exception,[138] offer a different rationale for overruling the BIA, or perhaps articulate a less restrictive exception.

Most important for the argument advanced in this Article, Attorney General Garland's decision to restore a duress exception to the persecutor bar would also open the path for an important argument by analogy. Specifically, if an implicit duress exception to the persecutor bar exists, there is a high likelihood that courts would also find an implicit duress exception to the serious nonpolitical crime bar. Where the persecutor bar is roughly imported from the Exclusion Clause Article 1F(a), and arguably

133. *Id.* at 138.
134. *Id.* at 139.
135. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).
136. Negusie, 28 I. & N. Dec. 399 (A.G. 2021).
137. *Id.*
138. Negusie, 27 I. & N. Dec. 347 (B.I.A. 2018).

1F(c), the serious nonpolitical crime bar is imported verbatim from Article 1F(b),[139] and there is a compelling argument for why a duress exception should also be read into that bar. This is a necessary step if refugees like Kevin have any hope of refugee protection in the United States, and that is the focus of the final section of this Article.

IV. A DURESS DEFENSE TO THE SERIOUS NONPOLITICAL CRIME BAR

The UNHCR, refugee law scholars, and States party to the Refugee Convention have found that the Article 1F exclusions, including the serious nonpolitical crime bar, include an implicit duress exception. This is the prevailing interpretation of international refugee law, and the United States should interpret United States asylum law to align with this obligation as Congress intended. While it is uncommon for Congress to explicitly align United States law with international law obligations, when it does so unequivocally, it is the constitutional responsibility of the Executive and United States courts to respect the legislature's desire. When they fail to do so, they undermine the relationship between the three branches of government established in the United States Constitution and thereby degrade the rule of law in the United States. Moreover, Congress's intent to create a framework for United States refugee protection consistent with the international framework is important for the global protection of refugees. The Refugee Convention envisions a multilateral approach to protecting refugees and has currently been ratified by nearly 150 countries.[140] The United States is a world leader in refugee protection, and it is particularly important for the integrity of this global system of protection that the United States lives up to its international commitments.

While the serious nonpolitical crime bar is derived from the Article 1F exclusion clauses in the same manner as the persecutor bar, for purposes of this discussion, it is important to highlight two meaningful differences. First, where the persecutor bar enjoyed a pedigree that preceded the 1951 Refugee Convention,[141] the serious nonpolitical crime bar was incorporated into U.S. law for the first time with the 1980 Refugee Act to ensure compliance with Article 1F(b) of the Refugee Convention.[142] Unlike the persecutor bar, which was found not to have a duress defense in its previous iterations,[143] the serious nonpolitical crime bar has only existed in its contemporary form and Congress always intended the statutory bar to comport with the 1951 Refugee Convention. Second, while it is generally

139. Refugee Convention, *supra* note 14, art. 1(F)(b).

140. U.N. High Comm'r for Refugees, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf [https://perma.cc/P2FB-B4CG] (stating that as of April 2015 there are 148 States Parties to one or both of the 1951 Convention or the 1967 Protocol).

141. *See* Evans, *supra* note 112, at 511, 515–17.

142. Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980).

143. *See* Fedorenko v. United States, 499 U.S. 490 (1981).

accepted that the persecutor bar was derived from Article 1F(a) of the Refugee Convention, the language of the exclusion clause and the persecutor bar are quite different.[144] In the case of the serious nonpolitical crime bar, Congress used the precise language from Article 1F(b) of the Refugee Convention to codify the bar in the INA.[145] This provides compelling evidence that Congress intended the serious nonpolitical crime bar under United States law to reflect precisely the 1F(b) exclusion in the Convention.

The UNHCR Handbook provides persuasive interpretations of Refugee Convention provisions. While the Supreme Court held that the UNHCR Handbook is not binding on United States immigration authorities in *Aguirre-Aguirre*, it recognized the source as persuasive authority.[146] The Handbook notes that exclusion of criminals was a new feature of refugee law in the post-war era, and this related mainly to the desire to exclude war criminals from protection and protect States parties from other threats to public safety.[147] Specifically with regard to Article 1F(b) exclusion, the Handbook emphasizes that only serious crimes should be included, and "[m]inor offences punishable by moderate sentences are not grounds for exclusion."[148]

While it is not the goal of this Article to impugn the United States's serious nonpolitical crime bar jurisprudence as a general matter, it is clear that the United States has interpreted the bar more broadly than the UNHCR deems appropriate. Regardless of types of crimes that appropriately trigger the bar, the Handbook cautions that "[i]n evaluating the nature of the crime presumed to have been committed, all the relevant factors—including any mitigating circumstances—must be taken into account."[149] This line in the Handbook is further elaborated in the UNHCR

144. *Compare* 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i) (precluding from refugee protection any noncitizen who "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"), *with* Refugee Convention, *supra* note 14, art. 1(F)(a) (excluding from refugee protection any noncitizen who "has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes").

145. *See* 8 U.S.C. §§ 1158(b)(2)(A)(iii), 1231(b)(3)(B)(iii) (setting forth the bar for asylum and withholding or removal, respectively, for any noncitizen for whom "there are serious reasons for believing that the alien committed a serious nonpolitical crime").

146. INS v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999) ("The U.N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts.").

147. U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, ¶¶ 147–48, HCR/1P/4/ENG/REV. 4, https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html [https://perma.cc/K6X9-M8LE] [hereinafter UNHCR Handbook].

148. *Id.* at 155.

149. *Id.* at 157.

Guidelines on International Protection No. 5, which specifically examines the applicability of the Article 1F Exclusion Clauses.[150]

The UNHCR Guidelines No. 5 emphasize the importance of applying the 1F Exclusion Clauses "with great caution and only after a full assessment of the individual circumstances of the case," demanding that they should "always be interpreted in a restrictive manner."[151] The UNHCR Guidelines therefore reiterate the point made in the UNHCR Handbook that States not lose sight of the humanitarian goals of the Convention, and that they have a responsibility to protect all those who are deserving after an individualized review. In this regard, the Guidelines focus on the need to establish individual responsibility for the crimes in question,[152] and that "factors generally considered to constitute defenses to criminal responsibility *should* be considered" when applying the Article 1F exclusion clauses.[153] "As for duress," says the UNHCR Guidelines:

> This applies where the act in question results from the person concerned necessarily and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm to him- or herself or another person, and the person does not intend to cause greater harm than the one sought to be avoided.[154]

In the Guidelines, which are included as an appendix to the Handbook, the UNHCR specifically relies on its Background Note on the Application of the Exclusion Clauses.[155] The UNHCR Background Note, for its part, takes into account State practice, UNHCR's experience, the *travaux préparatoires* of relevant international instruments, and the opinions of various expert commentators.[156] The Background Note reinforces the insights in the Guidelines cited above and adds that "consideration should be given as to whether the individual could reasonably have been expected simply to renounce his or her membership, and indeed whether he or she should have done so earlier if it was clear that the situation in question would arise."[157] There are, therefore, "stringent conditions" for the

150. U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 5, Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05 (Sept. 4, 2003), https://www.unhcr.org/en-us/publications/legal/3f7d48514/guidelines-international-protection-5-application-exclusion-clauses-article.html [https://perma.cc/TPB2-NZEJ] [hereinafter Guidelines].

151. *Id.* at 2.

152. *Id.* at 18.

153. *Id.* at 22 (emphasis added).

154. *Id.*

155. *Id.* at 1 (referring to U.N. High Comm'r for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (Sept. 4, 2003) [hereinafter Background Note]).

156. Background Note, *supra* note 155, at 2.

157. *Id.* at 26 (detailed in ¶ 70).

application for the duress defense.[158] There is no question, however, that such a defense does exist under international refugee law.

As the entity charged with the interpretation and supervision of compliance with the terms of the Refugee Convention, this UNHCR authority is particularly persuasive. Moreover, renowned refugee and asylum scholars have also concluded that duress is a viable defense to the Article 1F Exclusion Clauses.[159] James Hathaway, for his part, states that duress:

> [R]ecognizes the absence of intent where an individual is motivated to perpetrate the act in question only in order to avoid grave and imminent peril. The danger must be such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong. Moreover the predicament must not be of the making or consistent with the will of the person seeking to invoke this exception. Most important, the harm inflicted must not be in excess of that which would otherwise have been directed at the person alleging coercion.[160]

Additionally, States party to the Refugee Convention recognize the existence of a duress exception to the Article 1F exclusion clauses. Courts in Australia,[161] Canada,[162] England,[163] Germany,[164] and New Zealand[165]

158. *Id.* (detailed in ¶ 69).

159. *See* Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses*, U.N. HIGH COMM'R FOR REFUGEES 33 (2001), https://www.refworld.org/pdfid/3b3702152.pdf [https://perma.cc/X2BM-833B]; *see also* JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 218–20 (Anne Lynas Shah ed., 1991).

160. HATHAWAY, *supra* note 159, at 218.

161. *SHCB v Minister for Immigr and Multicultural and Indigenous Affairs* [2003] FCA 229 (Austl.) (considering a duress defense for an officer in the Afghani government who had participated in human rights crimes); *see also YYMT and FRFJ* [2010] AATA 447 (Austl.) (finding an individual charged under Article 1F(b) will have a duress defense to the charge and the opportunity to negate criminal responsibility); *VWYJ v Minister for Immigr and Multicultural and Indigenous Affairs* [2005] FCA 658 (Austl.) (considering a duress defense for an applicant who committed war crimes and crimes against humanity).

162. *See* Cabellero v. Canada (MCI), [1996] F.C. 291 (finding applicant committed "crimes against humanity," but could avail himself of a duress defense if "he was himself in danger of imminent harm, the evil threatened him was, on balance, greater than the evil inflicted on his victims and that he was not responsible for his own predicament"); Ramirez v. Canada (MCI), [1992] 2 F.C. 306 (Can.) (finding that there must be a finding of voluntary complicity, active personal involvement, and shared common purpose in order to apply the exclusion clause on the basis of alleged participation with a terrorist organization, and that this approach was consistent with international and domestic law); *see also* Maan v. Canada (MCI), [2007] F.C. 583 (Can. Ont.) (finding that a man who had trafficked drugs under threat to himself and his family lacked the *mens rea* for the commission of the crime, thus no crime had occurred, and the exclusion ground did not apply).

have all found it appropriate to consider a duress defense to the application of the exclusion clauses. As a matter of international law, the widespread recognition among prominent States party to the Refugee Convention that apply the international framework to the adjudication of asylum application is significant for two reasons. First, it strongly suggests that it is appropriate to read an implicit duress exception into Article 1F of the Refugee Convention in a manner consistent with UNHCR guidance. Second, it suggests that a norm of customary international law has emerged that requires such a duress exception.

The Restatement (Third) of the Foreign Relations Law of the United States provides that customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation."[166] The same source provides that customary international law is the law of the United States and should be applied by federal courts in certain circumstances.[167] Moreover, a prominent line of jurisprudence urges federal courts to interpret statutory ambiguities in a manner consistent with customary international law, and the *Charming Betsy* rule of statutory interpretation is named for the first such case.[168] The fact that various jurisdictions applying the Refugee Convention to resolve protection claims in domestic courts have found that Article 1F includes an implicit duress exception suggests "a general and consistent practice of states," which is the first prong of the test for a customary international law norm.[169] The second is that states apply the norm out of "a sense of legal obligation."[170] A review of the cited cases suggests that the states in question read the

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163. *See* Regina v. Abdul-Hussain, (1999) Crim. L.R. 570 (Ct. App.) (UK) (considering a duress defense for Iraqi applicants who hijacked a plane to escape the country); *see also* AB v. Sec'y of State for the Home Dep't [2016] UKUT 00376 (IAC) (considering a duress defense for an Iranian women's prison guard found to have committed crimes against humanity).

164. *See* Case No. 72XII77, Antonin L. v. Federal Republic of Germany, 80 I.L.R. 673 (Bavarian Higher Administrative Court (BayVGH), 7 June 1979) (accepting a duress defense in the case of an applicant who had hijacked the plane to flee the then Czechoslovakia to escape persecution for his political opinions), as referenced in Gilbert, *supra* note 159.

165. Refugee Appeal No. 74646 [2003] NZRSAA 261 (finding that a man detained by the Sri Lankan Army and forced to work was excused from criminal activity because he acted under duress).

166. RESTATEMENT (THIRD) OF THE FOREIGN REL. L. OF THE U.S. § 102(2) (AM. L. INST. 1987).

167. *Id.* § 111(1), (3), reporters' notes 1, 3 (stating that "[i]nternational law . . . [is] law of the United States," and that "[c]ourts in the United States are bound to give effect to international law").

168. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); Paquete Habana, 175 U.S. 677 (1900) (finding that "[W]here there is no treaty, and no controlling executive or legislative act or judicial decisions, resort must be had to customs and usages of civilized nations."); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

169. RESTATEMENT (THIRD) OF THE FOREIGN REL. L. OF THE U.S. at § 102(2).

170. *Id.*

Article 1F criminal exclusions to include a duress defense out of a sense of legal obligation.

Australia provides one such example specifically in the context of the serious nonpolitical crime bar. Like the United States Supreme Court in *Cardoza-Fonseca*, The High Court of Australia has confirmed that Australian refugee law should be interpreted in a manner consistent with Australia's international obligations.[171] In *YYMT and FRFJ*, an Australian court found that Article 1F(b) required it "to refer to the law of Australia or of a particular country where the acts were committed," and "consider any defences that are available to those countries to the relevant offences under their domestic law."[172] The Court found that Article 1F(b) used the word "commit," and that notions of criminal culpability, including duress, should apply.[173] As such, Australia clearly understood that it had a legal obligation to consider a duress defense to the application of Article 1F(b) because the core question posed by the exclusion clause related to criminal culpability, and Australian law provided a duress defense to such questions.

The analysis in *YYMT and FRFJ* resonates with an argument advanced by Professor Fatma Marouf that common law defenses should be read into the INA.[174] Professor Marouf convincingly argues that a duress defense should apply to serious nonpolitical crime cases because that bar is derived from principles of culpability under international criminal law, which include common law defenses, and such defenses are part of the body of customary international law.[175] Moreover, Professor Marouf relies on the abovementioned UNHCR guidance as well as the persecutor bar jurisprudence establishing a duress exception to emphasize the propriety of establishing an exception to the serious nonpolitical crime bar under United States law.[176]

The foregoing provides an abundance of evidence that the serious nonpolitical crime bar should be interpreted to include an implicit duress exception. Congress intended that U.S. law comport with the Refugee Convention, and all authoritative interpretations of Article 1F provide that a duress exception to the exclusion clauses is implicit.[177] This is the conclusion of the UNHCR in a range of interpretive documents, including

171. *See* Minister for Immigr. and Ethnic Affairs v. Ah Hin Teoh (1995) 183 CLR 273, 287 (Austl.) (holding that "[w]here a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument").

172. *YYMT and FRFJ* [2010] AATA 447, ¶ 135 (Austl.).

173. *Id.* at ¶ 123.

174. Fatma Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*, 66 UCLA L. REV. 142, 186–90 (2019); *see also* Elizabeth Keyes, *Duress in Immigration Law*, 44 SEATTLE UNIV. L. REV. 307, 345–49 (2021).

175. Marouf, *supra* note 174, at 185.

176. *Id.* at 186–87.

177. *See supra* note 144 and accompanying text.

the Handbook,[178] Guidelines,[179] and a Background Note,[180] and this conclusion finds ample support in the writings of international refugee law scholars.[181] Finally, numerous jurisdictions that directly apply the Refugee Convention framework in the adjudication of requests for refugee protection agree that a duress exception is implicit. While those jurisdictions do not necessarily rely on UNHCR guidance, like Professor Marouf, they understand that Article 1F requires an assessment of criminal culpability and that such assessments require the consideration of a duress defense.

No precedent decision of any United States Court to date has precluded a duress defense to the serious nonpolitical crime bar, and two courts have suggested such a defense may exist. In *Matter of E-A-*, the BIA considered whether coercion could limit liability for a serious nonpolitical crime,[182] thereby suggesting a possible interpretation of the bar that would permit forced recruits into criminal gangs, like Kevin Euceda, to secure refugee protection. However, the Board did not set forth a specific analysis that should be applied to make this determination. Moreover, it cited *Urbina-Mejia v. Holder*, which stands out as the one published case by a United States Court of Appeals to seriously consider a duress defense to the serious nonpolitical crime bar.[183] There, the Sixth Circuit found former gang members were eligible for refugee protection but that the applicant was barred from such protection because he committed a serious nonpolitical crime—namely, extortion on behalf of the gang.[184] In that case, the Sixth Circuit considered and rejected a duress defense because Urbina-Mejia carried a weapon and shared the profits of his extortion, which suggested that he had a "fair amount of autonomy."[185]

The extensive UNHCR guidance cited above, the writings of refugee law scholars, and case law from other Refugee Convention jurisdictions all suggest a framework for the consideration of a duress defense. While it is true that a finding of an applicant's "fair amount of autonomy" may undermine a duress defense, a comprehensive framework must be established under United States law. As the BIA did in *Negusie*, it must elaborate a complete duress defense to the serious nonpolitical crime bar, and that defense must conform with international refugee law, as was the intention of Congress when it passed the 1980 Refugee Act. The context of Kevin's case makes clear that he acted under threat of death, his crimes were not more severe than the harm he faced at the hands of MS-13, and he seized his first reasonable opportunity to escape and seek protection in the

178. *See* UNHCR Handbook, *supra* note 147.
179. *See* Guidelines, *supra* note 150.
180. *Id.*
181. *See* Marouf, *supra* note 174, at 185–87.
182. E-A-, 26 I. & N. Dec. 1, 3 (B.I.A. 2012).
183. Urbina-Mejia v. Holder, 597 F.3d 360, 363–67 (6th Cir. 2010).
184. *Id.* at 369.
185. *Id.* at 363.

United States. Had a duress defense been clearly available to Kevin under the law, he may have won protection, and he would be with us today.

CONCLUSION

When Kevin first arrived in the United States, he was detained as an unaccompanied minor by the Office of Refugee Resettlement ("ORR"), then transferred to adult detention on his eighteenth birthday. It was clear he would meet resistance to his claim for refugee protection because of his prior gang membership and criminal activity. However, the fact that MS-13 had forcibly recruited him and compelled him to participate in its criminal enterprise under threat of death gave hope that United States authorities would view him as a refugee in need of protection. Unfortunately for Kevin, the BIA has yet to find a duress exception to the serious nonpolitical crime bar, and in the absence of clear guidance, Kevin's asylum case languished because of the government's desire to keep him out of the United States.

Congress intended that the serious nonpolitical crime bar under United States asylum law have the same meaning and scope as the 1F(b) Refugee Convention exclusion clause. The Supreme Court has repeatedly held that it was the intent of Congress to not only replicate the language of the provisions of the Refugee Convention in United States law, but to incorporate the full extent of the meaning of such language and bring the United States into compliance with its treaty obligations. Accordingly, when Congress reproduced exactly the language of the Article 1F(b) exclusion clause in the INA, it intended for that provision of United States law to have the same meaning, scope, and limitations as Article 1F(b). The UNHCR, international refugee law experts, and national jurisdictions that apply the provisions of the Refugee Convention in asylum adjudications agree that Article 1F(b) includes a duress exception, and United States authorities should find that the same exception exists under United States asylum law. The United States government's failure to abide by congressional intent in applying statutory law contravenes the balance of power envisioned by the Constitution and undermines the rule of law as a result domestically and globally.

The continued failure on the part of the BIA to recognize a duress defense to the serious nonpolitical crime bar under United States law has real life repercussions. The consequences of this failure for Kevin, specifically his protracted suffering in immigration detention and ultimate deportation and death, will certainly befall other asylum seekers until the government takes affirmative steps to correctly interpret and apply the law. Kind-hearted, compassionate people like Kevin are often manipulated by their persecutors and compelled to carry out bad acts. The criminal law, on the national and international levels, comprehends this and provides defenses such as duress so that criminal liability reflects this reality. It is

counterintuitive to suspend this well-settled understanding of criminal liability in the refugee protection context, and to continue to do so will result in more refugees returned to their death.