No. 21-60314

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DANIEL GIRMAI NEGUSIE,
Petitioner,

v.

MERRICK GARLAND, U.S. Attorney General,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER BY
THE BOARD OF IMMIGRATION APPEALS

BRIEF OF AMICI CURIAE NON-PROFIT ORGANIZATIONS AND LAW SCHOOL CLINICS IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure Rule 26.1, each Amicus Curiae certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: August 5, 2021

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CERTIFICATE OF INTERESTED PARTIES

(1) Case No. 21-60314, *Negusie v. Garland*.

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

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae ("Amici") submit this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.[1] All parties have consented to the filing of this amicus brief. *See* Fed. R. App. P. 29(a)(2).

Amici are non-profit organizations and law school clinics that represent, advocate for, and support asylum seekers and refugees across the country, including individuals who were forced to participate in conduct that may constitute persecution under duress. Amici have a strong interest in ensuring that federal laws are interpreted to afford asylum protection as Congress intended and the United States' international obligations require. Amici regard the resolution of the issues in this case as critical to the equitable and just administration of refugee law. Attachment A lists all Amici.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Amici state that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person other than Amici, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici respectfully submit that the persecutor bar to asylum and withholding of removal under sections 208(b)(2)(A)(i) and 241(b)(3)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(2)(A)(i), 1231(b)(3)(B)(i), should not apply to individuals who participated in persecution of others under duress.

In the underlying proceedings before the Board of Immigration Appeals ("BIA" or "Board"), both parties to this case initially agreed that duress negates personal culpability for persecutory acts and thus constitutes an exception to the bar. Notwithstanding the Department of Homeland Security's ("DHS") subsequent change in position in 2017, the Board adopted a duress defense to the persecutor bar, "[g]iven the humanitarian purposes of the Refugee Act and the clear intent of Congress that it be interpreted in accord with the scope of protection offered by the [United Nations Refugee] Convention and Protocol." *Matter of Negusie*, 27 I&N Dec. 347, 362 (BIA 2018).

Shortly afterwards, Attorney General ("AG") Sessions directed the Board to refer the case for his review and invited additional briefing on the same question of the relevance of duress. *Matter of Negusie*, 27 I&N

Dec. 481 (A.G. 2018). Despite substantial briefing and evidence submitted by Petitioner's counsel and numerous amici to the AG and throughout the long procedural history of the case in support of a duress defense, AG Barr vacated the BIA's decision in 2020 and issued a sweeping opinion rejecting any consideration of duress in assessing applicability of the persecutor bar. *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020).

Amici concur with Petitioner that the AG's decision expansively applying the persecutor bar is erroneous under any reasonable construction of the statute and contrary to Congressional intent and international law. This brief does not repeat the clear and cogent arguments made by Petitioner and other amicus curiae briefs on this point. Instead, Amici bring the Court's attention to the far-reaching and damaging impact of the AG's blanket refusal to recognize a duress defense on asylum seekers we represent who, due to a range of circumstances beyond their control, should not be held responsible for assistance or participation in persecutory acts.

Indeed, commonly in these cases, the coercion itself constitutes persecution against applicants who are morally opposed to and

traumatized by their own forced acts. For example, asylum seekers from countries ranging from Syria to the Democratic Republic of the Congo ("DRC") have reported that governmental or other armed forces in their countries of origin forced them and other detainees to mutually physically harm or have sexual relations with each other—in all cases against the will of both detainees. Failure to accept a duress exception would perversely exclude both from asylum. Similarly, in some instances, the true persecutor in the situation forcibly enlisted the applicant precisely because the applicant's circumstances impaired their ability to resist threats to their own safety and magnified their susceptibility to manipulation. For instance, this is often the case for children, people with developmental or psychiatric disorders, and trauma survivors, as detailed in this brief.

These applicants are properly viewed as victims themselves, not perpetrators. Returning them to persecution for blameless acts would not further the bar's statutory objective of denying protection to those who have committed serious human rights violations. Rather, it would amount to a gross miscarriage of justice and a violation of the United States' international refugee protection obligations.

In Section I, Amici provide an overview of scientific evidence relating to child development, intellectual disability and mental illness, and trauma resulting from past abuse as examples of circumstances that illustrate why consideration of duress must inform applicability of the persecutor bar.[2] Amici also present stories of asylum seekers who could potentially face exclusion from protection in the absence of a duress exception to the persecutor bar.[3] These harrowing stories unequivocally meet universally accepted elements of duress. *See* Pet'r's Br. 46–47, July 29, 2021. If allowed to stand, the AG's erroneous decision will have unjust and severe consequences for bona fide asylum seekers in a broad range of circumstances.

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[2] The considerations discussed in this brief are non-exhaustive; many individuals who do not possess these characteristics and have sufficient mental capacity are also unable to resist coercion due to a range of other factors. Rather, age, developmental and psychiatric disorders, and past trauma starkly illuminate why culpability for participation in persecution must be evaluated in light of individual circumstances in each case.

[3] In several of the stories described in this brief, the applicant's conduct should not amount to participation in persecution under any reasonable construction of the statute, for example, where the applicant did not commit any acts and was merely unable to protect other victims. Some adjudicators have erroneously raised the persecutor bar in these types of cases, but even if the conduct constituted participation in persecution, many individuals in these situations are clearly subject to duress.

In Section II, Amici highlight prior decisions by the BIA and Immigration Judges ("IJs") granting asylum to applicants after finding they lacked personal culpability for acts they committed because of duress. These examples demonstrate that the AG's decision is an unreasonable departure from prior agency practice. Moreover, they establish that adjudicators can implement a workable duress test that takes into account the totality of the circumstances of each case, as they have done in the past.

ARGUMENT

I. Failure to Recognize a Duress Exception Unfairly Excludes and Endangers Bona Fide Asylum Seekers Who, Due to a Range of Factors Outside Their Control, Lack Culpability

The AG's refusal to accept a duress exception to the persecutor bar disregards how individual circumstances, such as those characteristics commonly shared by children, persons with developmental and psychiatric disorders, and trauma survivors, may diminish personal culpability.[4] This Section discusses scientific literature on each of these

[4] While this brief focuses on duress, factors such as lack of mental capacity due to age, intellectual disability, or serious mental illness may also prevent individuals from comprehending that their actions are furthering persecution of others on account of a protected ground. Mens

three populations below, along with relevant case examples, to bring into sharp relief the cruelty and unreasonableness of the AG's sweeping rejection of duress as a defense. In order to avoid "treat[ing] entire classes of victims as persecutors," *Negusie v. Holder*, 555 U.S. 511, 535 (2009) (Stevens, J., concurring in part and dissenting in part), this Court should reverse the AG's decision and hold that duress is relevant to determining applicability of the persecutor bar under the totality of the circumstances in each case.

A. Children Have Diminished Capacity to Resist or Escape Coercion Due to Their Lack of Cognitive Development, Dependency, and Sensitivity to Distressing Situations

A vast body of literature on child development and the real-life stories of asylum seekers persecuted as children show why duress as a defense to the persecutor bar is necessary.[5] Scientific evidence confirms

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rea is a separate requirement for the persecutor bar that is beyond the scope of this case.

[5] Use of the term "children" in this brief refers to youth broadly, as much of the research discussed extends to young people over the age of majority. Indeed, there is "scientific consensus, based on recent decades of research," that the brain does not fully mature until the early to mid-twenties, particularly with respect to capacities for decision-making and behavioral control. Ryan B. Matlow et al., *Factors Influencing the Decisions, Acts, and Behaviors of Children and Youth Seeking Refuge in the United States: A Consensus Report*, Stan. Hum. Rts. & Trauma Mental Health Program 5 & n.1, 8, 29 (2020); *see also, e.g.*, Elizabeth

that young, developing brains lack capacity for autonomous decision-making, impulse control, and risk assessment. Additional research suggests that the complex process of cognitive development is intricately linked to environment, and that children's lack of agency over their external conditions makes them dependent on others. This information, coupled with the case examples to follow, makes clear that children should not be held morally responsible for acts committed under undue pressure.

1. The structural and functional immaturities of the child brain necessitate consideration of duress

The AG's decision on a duress defense to the persecutor bar risks excluding children from asylum and fails to recognize their diminished capacity for such higher-level cognitive skills as inhibition, emotional regulation, and anticipation of consequences. *See* Matlow et al., *supra* note 5, at 8.

The vulnerability of children to coercive forces has become so visible that both international and domestic law make clear that "great care" should be taken before assigning individual culpability to children

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Scott et al., *Brain Development, Social Context, and Justice Policy*, 57 Wash. U. J. L. & Pol'y 13, 26 (2018).

for their conduct. United Nations High Commissioner for Refugees ("UNHCR"), *Guidelines on International Protection: Application of the Exclusion Clauses: Article IF of the 1951 Convention relating to the Status of Refugees*, ¶ 28 (Sept. 4, 2003) ("UNHCR Exclusion Guidelines"). For example, the Supreme Court—guided by scientific research—has emphasized that children's "vulnerability and . . . lack of control over their immediate surroundings mean [they] have a . . . claim . . . to be forgiven for failing to escape negative influences in their whole environment." *Roper v. Simmons*, 543 U.S. 551, 570 (2005); *see also Graham v. Florida*, 560 U.S. 48, 68–69 (2010).

Without a duress defense to the persecutor bar, children will be held responsible for acts that scientific evidence, recognized by courts, demonstrates they do not have the ability to control, especially when subject to coercion. Numerous studies of cognitive development confirm that the human brain perceives, processes, and responds to duress and coercion differently as it develops, citing to structural and functional changes that occur over time. *See, e.g.,* Shauna Carmichael, *The Persecutor Bar, Former Child Soldiers & Lessons from Research on Child Development,* 18 Scholar 381, 436–41

(2016) (discussing studies of brain development through childhood and adolescence).

More specifically, "[a]reas of the brain responsible for . . . emotional reactivity (i.e., the limbic system) reach maturation . . . much sooner than those brain regions (i.e., prefrontal cortex) responsible for behavioral inhibition, emotional regulation, and executive functioning," which involves "adaptive coping skills." Matlow et al., *supra* note 5, at 8–10. As a result, children experience heightened sensitivity to threatening and other "emotionally charged" situations. *Id.* at 9. This is compounded by neurological changes related to thinking about social relationships, which render children highly "susceptible to peer influence," thus placing them at greater risk of coercion and abuse. Scott et al., *supra* note 5, at 15–16, 24, 26–27, 33; *see also* Matlow et al., *supra* note 5, at 9.

As UNHCR notes, "[c]hildren are more likely to be distressed by hostile situations . . . or to be emotionally affected by unfamiliar circumstances." UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, ¶ 16

(Dec. 22, 2009). In fact, persecutors often target children for forced recruitment for this very reason, according to another high-level United Nations expert: "Children are often desired as recruits because they can be easily intimidated and indoctrinated [and] [t]hey lack the mental maturity and judgment to express consent or to fully understand the implications of their actions." United Nations Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Working Paper Number 3: The Children and Justice During and in the Aftermath of Armed Conflict*, 10 (Sept. 2011).

Trauma from abuse and exposure to violence can further stunt the cognitive development of children. *See, e.g.*, Matlow et al., *supra* note 5, at 12, 17. Other environmental factors such as lack of supportive or protective caregivers also affect children's susceptibility to coercion. *Id.* at 24; *see also* Scott et al., *supra* note 5, at 64 (noting that children lack control over their living situations). The impact of past trauma and abuse on applicants' inability to resist coercion is discussed in more detail in Section I.C, *infra*.

2. The stories of forced child recruits illustrate the unjust and dangerous impact of the Attorney General's decision

The AG's decision incorrectly characterizes asylum seekers persecuted during childhood, including child soldiers and children forcibly recruited into gangs, as perpetrators rather than victims and threatens their return to dangerous environments without any consideration of the circumstances under which they acted. The following case examples highlight the broad-reaching and adverse impact of the AG's decision.

"Jaime"[6]—Mexican Child Forced to Assist Cartel Members After Kidnapping and Exposure to Brutal Violence and Threats: Jaime entered the United States as an unaccompanied child after he was kidnapped, beaten, and threatened at gunpoint by cartel members in Mexico. Jaime lost his father at a young age and lived with his mother until he was around 16 years old, when gang members beat him for refusing to sell drugs for the gang. Fearing for his life, Jaime relocated to another city in Mexico where he lived with his aunt and

[6] Pseudonyms are used to protect the confidentiality of individuals. Documentation of the facts of the case examples are on file with Amici.

uncle. Jaime's aunt and uncle did not allow him to go to school and treated him like an indentured servant, forcing him to work both inside and outside the home. A few months after he fled his hometown, cartel members kidnapped Jaime. His kidnappers took him to a building where they beat him and, pointing a gun at him, forced him to use another firearm to shoot other captives. Jaime was able to escape and fled to the United States. The traumatic experiences Jamie was exposed to have impacted his mental health, resulting in brief hospitalization in the United States. His case is currently pending.

"Joseph"—Former Child Soldier Forced to Join the Rwandan Patriotic Front ("RPF") and Tortured for Resistance: Joseph was born to Tutsi refugees in Uganda. When he was around 14 years old, members of the RPF, a Tutsi-led rebel group, drove onto his family's compound in Uganda and forcibly transported him and his brother to separate military camps in Rwanda. The rebel forces told Joseph's father that because he fled Rwanda during the Hutu revolution, his children would need to make up for his desertion. For the next few years, the RPF forced Joseph to undergo military training and eventually serve as a child soldier on the frontlines of combat in the

Rwandan civil war, when the rebel group committed war crimes and crimes against humanity.

After the RPF took control of the country, Joseph was imprisoned and sentenced to life for "insubordination" because he was part of a group of soldiers who demanded that they be returned to Uganda. While in prison, Joseph was subjected to beatings, rape, and other torture on a regular basis, until the RPF forcibly re-conscripted him and sent him to the DRC during its campaign of violent repression against Rwandans living abroad. Joseph was eventually able to flee from the DRC and return to Uganda. Years later, however, Rwandan forces attacked Joseph's family compound in search of his whereabouts, and murdered several of his family members in retaliation for his desertion. Fearing for his life, Joseph fled to the United States, where he has been diagnosed with posttraumatic stress disorder ("PTSD"). Joseph's case remains pending.

A failure to recognize a duress defense to the persecutor bar distorts the reality of asylum seekers like Jaime and Joseph who were robbed of their childhood and whose forced recruitment is part and parcel of their own persecution. These individuals are victims, not

persecutors, and their stories highlight the need to consider factors that negate personal culpability.

B. Individuals with Intellectual Disabilities and Mental Illnesses May Be Unable to Resist or Escape Coercion Due to Lack of Control, Susceptibility to Manipulation, and Cognitive Impairments

Characteristics shared by individuals with intellectual disabilities[7] and mental illnesses[8] further illustrate the need for a duress exception to the persecutor bar. UNHCR has long recognized that, in addition to children, adult asylum seekers may lack the "mental capacity to be held responsible [for] a crime" due to various factors, including "insanity" or "mental handicap." UNHCR Exclusion

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[7] The American Psychiatric Association's ("APA") definition of "intellectual disability" for clinical diagnostic purposes—which has been adopted by the Supreme Court in its Eighth Amendment jurisprudence—denotes (1) "significantly subaverage intellectual functioning" coupled with (2) "deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances)" (3) manifested by age eighteen. *Hall v. Florida*, 572 U.S. 701, 711 (2014) (citing APA, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013) ("DSM-5")).

[8] According to the APA, mental illnesses are "health conditions involving changes in emotion, thinking or behavior (or a combination of these). . . . [and] are associated with distress and/or problems functioning in social, work or family activities." APA, *What Is Mental Illness?*, https://www.psychiatry.org/patients-families/what-is-mental-illness (last visited Aug. 5, 2021).

Guidelines, *supra*, at ¶ 21. This conclusion is grounded in an extensive body of social science research, which documents impaired cognitive ability and risk of undue pressure as common facets of intellectual disability and mental illness. The AG's rejection of a duress exception disregards these critical considerations and unjustly punishes and imperils asylum seekers whose developmental and psychiatric disorders expose them to exploitation in the first place.

1. Social science research demonstrates that many individuals with intellectual disabilities and mental illnesses may lack the culpability required for persecutory acts

Looking to the "the views of medical experts," the Supreme Court has acknowledged that individuals with intellectual disabilities have limited capacity "to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions." *Hall*, 572 U.S. at 720–21 (quoting *Atkins v. Virginia*, 536 U.S. 304, 305 (2002)) (internal quotation marks omitted). As in other legal contexts, *see id.*, these cognitive limitations—many of which are also characteristic of psychiatric disorders—may diminish an asylum applicant's culpability for purposes of the persecutor bar.

First, individuals with intellectual disabilities "act on impulse rather than pursuant to a premeditated plan," and "in group settings they are followers rather than leaders." *Atkins*, 536 U.S. at 318. Neurological evidence may explain a lack of impulse control in some cases or a tendency to be overly trusting more generally. *See, e.g.*, Elizabeth Nevins-Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C. Davis L. Rev. 1419, 1446–48 (2012). Furthermore, given their dependency on others, intellectually disabled people are often conditioned to comply with the wishes of "perceived authority figures," including those with "malicious or criminal intent," leaving them "highly manipulable" and exposed to even "subtle and nonphysical intimidation and coercion." *Id.* at 1445–49; Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. Chi. L. Rev. 495, 511–13 (2002).

Second, because of deficits in logical and moral reasoning and independent thinking, individuals with intellectual disabilities generally lack decision-making and problem-solving skills. Nevins-Saunders, *supra*, at 1444. Accordingly, in the face of coercion, they may

be unable to assess the imminence of the threatened harm and identify any safe and reasonable alternatives to complying with the persecutor's demands. *See, e.g.*, Kate Evans, *Drawing Lines Among the Persecuted*, 101 Minn. L. Rev. 453, 528, 530–31 (2016) (discussing how the duress defense has been applied to war crimes and crimes against humanity when an individual lacked an adequate means of escaping the perceived threat). Relatedly, intellectually disabled people face difficulties understanding "cause and effect" and thus the full nature and impact of their actions. Nevins-Saunders, *supra*, at 1443–44.

With respect to mental illness, experts have increasingly recognized that cognitive dysfunction is "just as prominent, persistent and disabling" as the "motivational, affective and emotional symptoms" that have traditionally been the focus of treatment. Mark J. Millan et al., *Cognitive Dysfunction in Psychiatric Disorders: Characteristics, Causes and the Quest for Improved Therapy*, 11 Nature Revs. Drug Discovery 141, 164 (2012). In fact, cognitive deficits are a "highly relevant dimension" of a range of psychiatric disorders, including schizophrenia, bipolar disorder, and PTSD (the last discussed further in Section I.C, *infra*). *Id.* at 141, 144. As with intellectual disabilities,

mental illnesses often implicate impaired executive functions, such as planning, problem solving, reasoning, and judgment. *See id.* Therefore, in response to undue pressure, individuals with mental illnesses may lack the ability to think of alternatives to acceding to their coercer or to comprehend the consequences of their actions on others.

2. The Attorney General's decision penalizes and endangers individuals with intellectual disabilities and mental illnesses

The AG's failure to recognize a duress exception will result in the denial of asylum to individuals with developmental and psychiatric disorders, many of whom are unable to resist their persecutors' demands and face further abuse based on these exact medical conditions upon removal to their home countries.

"Luis"—Mexican Man with Psychosis Forcibly Recruited by Cartel: Luis is a Mexican asylum seeker who has a psychiatric disorder with psychotic features, a condition that can severely limit one's cognition and day-to-day functioning.[9] Because of his mental illness,

[9] Psychosis, which refers to symptoms of hallucinations and/or delusions, arises from "neural systems subserving perception and information processing." David B. Arciniegas, *Psychosis*, 21 Continuum 715, 733 (2015).

Luis' family abandoned him at a young age, and he lived on the streets much of his life. Without family support or access to treatment, Luis self-medicated with drugs. Eventually, members of a violent cartel approached Luis and threatened to kill him if he did not assist them. Fearing for his life, Luis felt he had no other choice but to comply and served as a "watchman" while the cartel carried out its illicit activities.

One day, Mexican police officers kidnapped Luis and forced him to reveal the location of a drug house belonging to the cartel. Luis fled to the United States, fearing that the cartel would harm him for divulging information to the police and that others would continue to single him out for abuse because of his mental illness. In a competency hearing, the IJ concluded that Luis lacked sufficient competency to proceed with his immigration proceedings without procedural safeguards under *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). Subsequently, and notably before the AG's decision in *Negusie*, DHS stipulated to Luis' eligibility for withholding of removal.

Similar to Luis, Amici are aware of other asylum seekers who face removal to countries where they have no hope for adequate medical and mental health treatment and face further exploitation at the hands of a

myriad of state and non-state actors. In lieu of ensuring the refugee protections contemplated under domestic and international law, the AG's decision will punish asylum seekers like Luis for the very medical conditions that have made them a prime target for persecution and that diminished their culpability for any excludable acts they were forced to commit.

C. Survivors of Past Trauma, Including Gender-Based Violence, May Be Unable to Resist or Escape Coercion Based on Psychosocial Consequences of Their Persecution

The AG's rejection of a duress exception also threatens the safety of trauma survivors, whose psychological impairments stemming from past abuse may diminish their culpability for alleged persecutory acts. Studies consistently show higher rates of PTSD among refugees than non-refugee populations, in large part because the persecution central to their status encompasses exposure to violence and severe human rights violations. *See, e.g.*, Brandon R. White, *Using Learned Helplessness to Understand the Effects of Posttraumatic Stress Disorder and Major Depressive Disorder on Refugees and Explain Why These Disorders Should Qualify as Extraordinary Circumstances Excusing Untimely Asylum Applications*, 64 Buff. L. Rev. 413, 439–41 (2016)

(noting that over 30% of refugees have PTSD, compared to 3.5% of the general U.S. population). Recent research also confirms that a refugee's ability to function daily declines with each accumulated trauma they have experienced in the past. *See, e.g.*, Martin Begemann et al., *Accumulated Environmental Risk in Young Refugees – A Prospective Evaluation*, 22 EClinicalMedicine 1, 2, 5 (2020). Yet, the AG's decision effectively penalizes asylum seekers who are often unable to refuse coercive demands (a form of persecution in itself) precisely because they continue to suffer the ongoing effects of their past persecution.

1. Social science research confirms that the impact of trauma on survivors may negate their culpability

According to the APA, PTSD is triggered by direct or indirect "exposure to actual or threatened death, serious injury or sexual violation," resulting in "clinically significant distress or impairment in the individual's . . . functioning." APA, *DSM-5 Fact Sheets: Posttraumatic Stress Disorder* (2013).[10] Psychological experts concur that, "[a]t the core, trauma alters the brain's development by prioritizing tasks of survival," such as "detect[ing] potential risk and

[10] Available at https://www.psychiatry.org/psychiatrists/practice/dsm/educational-resources/dsm-5-fact-sheets.

threat [and] prioritiz[ing] emotional responsivity," over "long-term decision-making and impulse control skills." Matlow et al., *supra* note 5, at 11–12.

As mentioned, many asylum seekers either have been formally diagnosed with PTSD or otherwise manifest symptoms of PTSD, all which may bear on the individual's ability to resist coercion. The DSM-5 classifies PTSD symptoms in four clusters: (1) re-experiencing, which in serious cases may lead to an inability to distinguish memories of the original traumatic incident with present circumstances; (2) avoidance, which involves taking steps to avoid reminders of the past trauma; (3) negative changes in cognition and mood, which may result in "the development of a foreshortened sense of future, anticipation of a short life, and a difficulty planning for the future"; and (4) hyperarousal, including "hypervigilance" (i.e., "a constant state of alert") and "reckless or self-destructive behavior." White, *supra*, at 433–35; *see also* UNHCR, *Guidelines on the Protection of Refugee Women*, ¶ 99 (July 1991) (trauma may manifest in "violent or disruptive behavior").

In order to assess alleged criminal acts by survivors of gender-based violence in particular, a number of courts and psychological

experts have looked to the related theory of battered women's syndrome ("BWS"), which describes "a pattern of cyclical violence against women that leads to 'measurable psychological changes.'" Michaela Dunn, *Subjective Vulnerabilities or Individualized Realities: The Merits of Including Evidence of Past Abuse to Support a Duress Defense*, 54 Suffolk U. L. Rev. 347, 347–48 (2021); *see, e.g.*, *United States v. Nwoye*, 824 F.3d 1129, 1138 (D.C. Cir. 2016) (noting that evidence regarding BWS is generally admissible in criminal proceedings); *United States v. Homick*, 964 F.2d 899, 905 (9th Cir. 1992) (describing BWS as a "species" of the duress defense). An individual with BWS will expect a repetition of violence, which need not be by the same person as her initial abuser; rather, "[f]rom the perspective of an abuse victim, danger is always imminent." Dunn, *supra*, at 354–55, 366.

Many experts consider BWS to be a "sub-category" of PTSD, with abuse victims commonly experiencing multiple symptoms. *Id.* at 354, 356 n.55. For example, victims may confuse prior and current threats through flashbacks, seek to avoid further trauma by complying with others' demands, and become hypervigilant to signs of potential danger. *Id.* at 354–55, 368. A central aspect of BWS is "learned helplessness,"

which means that, due to an inability to leave abusive situations in the past, the victim can no longer recognize opportunities to escape or seek protection and perceives any attempts to change their current circumstances as futile. *See id.* at 347–48, 367–68; White, *supra*, at 455–56.

While common among victims of gender-based violence, studies have also found high rates of learned helplessness in a diverse range of other groups. White, *supra*, at 455. Generally, learned helplessness stems from "exposure to uncontrollable events," and results in "the perception of [ongoing] uncontrollability." *Id.* at 455–56. Because a "lack of control over one's circumstances is a key characteristic of . . . of the refugee experience," there is a "pervasive sense of helplessness" among traumatized refugees. Angela Nickerson et al., *A Critical Review of Psychological Treatments of Posttraumatic Stress Disorder in Refugees*, 31 Clinical Psych. Rev. 399, 413 (2011); *see also* Evans, *supra*, at 530–31. As a result, asylum seekers who are trauma survivors may be unable to conceive of any choice other than to meet their persecutors' demands in order to avoid further harm.

2. Stories of trauma survivors demonstrate that the Attorney General's decision will unfairly punish victims for their own trauma and place them in further harm's way

Amici are aware of a number of applicants who have sought asylum based on brutal violence they suffered at the hands of family and community members, but are now at risk of denial due to the AG's refusal to accept a duress defense to the persecutor bar. The example below shows that, by refusing to consider duress, the agency will effectively blame survivors of trauma for their subordinate status in society and complex history of abuse—factors outside their control—which heightened their susceptibility to coercion.

"Sara"—Survivor of Female Genital Cutting ("FGC") Whose Daughters Were Cut Against Their Will: Sara's story, described below, is common among FGC survivors who were unable to prevent their family and community members from performing the same procedure on their daughters, despite the survivors' opposition to the practice.[11]

[11] Assuming arguendo that a parent's mere inability to prevent harm to their child by others amounts to "participation" in persecutory acts, even if they did not directly participate in the child's cutting, the parent

Sara is an Eritrean woman who suffered FGC at a very young age. When she was older, she married a man who abused her physically and controlled every aspect of her life; he was the sole financial provider and made all decisions regarding their family and household. Each time Sara gave birth to one of her daughters, she experienced prolonged bleeding and incapacitation—a common consequence of FGC. In Sara's community, girls are usually subjected to FGC several weeks after their birth. During each of these periods, while Sara was confined at home due to both her health complications and local custom, a member of the community came into her home and took away her newborn daughter to be cut.

Sara's abusive and controlling husband paid for her daughters' FGC procedures. Even though Sara personally opposes FGC, particularly in light of her own traumatic experience with the procedure, she was afraid that her husband would further harm her or she would be cast out of her community if she voiced her opinion. Given her subordinate status as a wife in Eritrean society, Sara also knew she

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should be exempt from the bar if they were subject to duress. *See supra* note 3.

lacked the power to override her family's or community's wishes. Eventually, Sara managed to escape with her children to the United States, where she has since been diagnosed with PTSD. Her case remains pending.

Stories like Sara's are not unusual among survivors of trauma, particularly gender-based violence. Women face significant impediments to leaving abusive family relationships due to entrenched patriarchal structures in society, as well as psychological impairments beyond their control due to multiple traumas. As such, abuse victims and other trauma survivors may lack personal culpability for acts (or omissions) committed under duress. Refusing to acknowledge the relevance of duress risks returning asylum seekers to the very cycle of violence and learned helplessness that they attempted to break by seeking haven in the United States.

II. The Agency Has Previously Granted Asylum and Withholding Notwithstanding the Persecutor Bar Based on an Assessment of Duress Under the Totality of the Circumstances

Prior to the AG's decision, the BIA and IJs considered duress in analyzing applicability of the persecutor bar and granted asylum to applicants under the totality of the circumstances in their cases. Agency

decisions on file with Amici have examined several of the factors highlighted in Section I, including but not limited to age, disability, and trauma, to determine that the applicant lacked culpability.

For example, an unpublished BIA decision affirmed the IJ's grant of asylum to a former child soldier in the Lord's Resistance Army in Uganda. *Matter of E-O-*, AXXX XXX XXX (BIA July 12, 2006) (Attachment B). Because the applicant was only "a boy between the ages of 11 and 13 during the relevant period," the BIA concluded that the applicant lacked the "requisite personal culpability" for participation in persecution of others and thus was not subject to the bar. *Id.* at A-6. In support of its conclusion, the BIA cited the Eighth Circuit's decision in *Hernandez v. Reno*, 258 F.3d 806 (8th Cir. 2001). In *Hernandez*, the Eighth Circuit held that the agency erred by ignoring the petitioner's "uncontroverted testimony that his involvement with [a guerrilla group] was at all times involuntary and compelled by threats of death" and remanded to the agency to "evaluate the entire record in order to determine whether the individual should be held personally culpable" under the persecutor bar. 258 F.3d at 814.

A decision from the New York Immigration Court similarly

granted asylum to an applicant from Côte d'Ivoire who was formerly a child soldier in the Patriotic Movement of Ivory Coast ("MPCI"), a rebel group. *Matter of X*, AXXX XXX XXX (New York Immigr. Ct. Jan. 7, 2011) (Attachment C). The IJ similarly relied on *Hernandez*, 258 F.3d at 814 to conclude that "duress and intent may be taken into account, as part of the 'totality of the relevant conduct'"—which "has always been and still remains appropriate for the court to assess"—in determining whether the persecutor bar applies. Attachment C, at A-14 (citing also *Matter of A-H-*, 23 I&N Dec. 774, 785 (A.G. 2005), overruled by *Negusie*, 28 I&N Dec. 120 (A.G. 2020) on other grounds).

Looking to the facts of the case, the IJ reasoned that the applicant "did not have control over the situation" due to various factors—including his age, traumatic experiences such as witnessing brutal violence against family members and other child soldiers, and the "constant threat of severe injury or death." Attachment C, at A-16–A-17. Thus, the IJ concluded that the applicant could not be found culpable for any persecutory acts he may have participated in. *Id.* Notably, the IJ pointed out that other courts have found that child soldiers, despite forced participation in persecutory acts, are "victims of

persecution themselves" and eligible for asylum. *Id.* at A-17–A-18 (citing, *e.g.*, *Lukwago v. Ashcroft*, 329 F.3d 157, 169–70 (3d Cir. 2003)).

In another case, an IJ at the Phoenix Immigration Court likened the situation of a Honduran asylum seeker who was forcibly recruited by gangs as a minor to that of child soldiers. *Matter of H-G-D-F-*, AXXX XXX XXX (Phoenix Immigr. Ct. Feb. 16, 2007), at A-46 (Attachment D). The applicant's stepfather physically abused him as a child and beat his mother on a regular basis. *Id.* at A-30. "To get away from home," the applicant spent time with a friend who eventually began taking orders from a gang leader. *Id.* When the gang told the applicant to act as a lookout, he felt compelled to comply with their orders because he feared they would hurt him or his family, as they had attacked or murdered many other people. *Id.*

The IJ concluded that the applicant's actions were not essential to the gang's persecutory acts, but even if they were, any "participation was out of fear of harm to himself or his family" and therefore did not trigger the persecutor bar. *Id.* at A-45. Specifically, the IJ cited to a UNHCR advisory opinion regarding international standards for exclusion from refugee status as applied to child soldiers, which

emphasized consideration of factors such as "age, mental and emotional maturity, [and] voluntariness of service" in determining whether exclusion is proper. *Id.* at A-46 (citing UNHCR, Advisory Opinion, transmitted by letter dated Sept. 12, 2005 from the UNHCR Deputy Regional Representative addressed to J. Wells Dixon, Esq., Kramer, Levin, Naftalis & Frankel, at 1 (Sept. 12, 2005)[12] ("Given the possible consequences of exclusion, *i.e.*, return to persecution, a holistic examination of all relevant facts is critical.")).

As illustrated by the examples above, the AG's blanket refusal to recognize a duress exception to the persecutor bar is an unreasoned departure from past agency practice of considering the totality of circumstances in evaluating personal culpability.

CONCLUSION

The experiences of children, individuals with intellectual disabilities and mental illnesses, and survivors of past trauma demonstrate why a duress defense must prevail. Consideration of duress is necessary to ensure a fair application of asylum law and provide critical protection from persecution to bona fide asylum seekers,

[12] Available at https://www.refworld.org/pdfid/440eda694.pdf.

while also making sure that the United States does not permit those who commit human rights violations to benefit from the protections intended for their victims. Moreover, adjudicators' prior decisions implementing a duress exception reinforce the workability of a test that takes into consideration the totality of the circumstances.

For the foregoing reasons, Amici urge the Court to reverse the AG's decision, hold that an applicant who participated in persecution under duress is not barred from asylum or withholding of removal under the statute, and remand for further proceedings consistent with Congressional intent and international refugee protection obligations.

Dated: August 5, 2021

Respectfully submitted,

/s/ Karen Musalo

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(b) as it contains 6,393 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f). Additionally, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Microsoft Word, using Century Schoolbook in 14-point font.

Dated: August 5, 2021

/s/ Karen Musalo
Karen Musalo
Attorney of Record for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2021, I electronically filed the foregoing, **Brief of Amici Curiae Non-Profit Organizations and Law School Clinics in Support of Petitioner**, with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that the counsel of record for Petitioner and Respondent in this case are registered CM/ECF users and will therefore be served by the appellate CM/ECF system.

Dated: August 5, 2021

/s/ Karen Musalo
Karen Musalo
Attorney of Record for *Amici Curiae*

ATTACHMENTS

ATTACHMENT A

List of Amici

1. Al Otro Lado, San Ysidro, CA
2. American University, Washington College of Law, International Human Rights Law Clinic, Washington, DC
3. Bellevue Program for Survivors of Torture, New York, NY
4. Capital Area Immigrants' Rights Coalition, Washington, DC
5. Catholic Legal Immigration Network, Inc. (CLINIC), Silver Spring, MD
6. Central American Legal Assistance, Brooklyn, NY
7. Community Legal Services in East Palo Alto, East Palo Alto, CA
8. Dolores Street Community Services, San Francisco, CA
9. Education and Leadership Foundation, Fresno, CA
10. Florence Immigrant and Refugee Rights Project, Tuscon, AZ
11. HIAS Pennsylvania, Philadelphia, PA
12. Human Rights Initiative of North Texas, Dallas, TX
13. International Refugee Assistance Project, New York, NY
14. Kids in Need of Defense (KIND), Washington, DC
15. Las Americas Immigrant Advocacy Center, El Paso, TX
16. Legal Services for Children, San Francisco, CA

17. Mississippi Center for Justice, Jackson, MS

18. Oxfam America, Boston, MA

19. Pangea Legal Services, San Francisco, CA

20. Project Blueprint, Marshfield, MA

21. RAICES, San Antonio, TX

22. Safe Passage Project, New York, NY

23. San Joaquin College of Law – New American Legal Clinic, Clovis, CA

24. Tahirih Justice Center, Falls Church, VA

25. The Right to Immigration Institute, Waltham, MA

26. UCSF Human Rights Collaborative, San Francisco, CA

27. University of Arizona Community Immigration Law Placement Clinic, Tucson, AZ

28. University of Baltimore Immigrant Rights Clinic, Baltimore, MD

29. University of San Francisco Immigration & Deportation Defense Clinic, San Francisco, CA

30. VECINA, Austin, TX

Attachment B

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Morgan, Julia M, Esquire
330 S. 12th St. Suite 3700
Minneapolis, MN 55404-0000

Office of the District Counsel/BLM
P.O. Box 11898
St. Paul, MN 55111-0898

Name: O[redacted] E[redacted] **A[redacted]**

Date of this notice: 07/12/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Acting Chief Clerk

Enclosure

Panel Members:
OSUNA, JUAN P.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A[redacted] Date: JUL 12 2006

In re: E[redacted] O[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Julia M. Morgan, Esquire

ON BEHALF OF DHS: Darrin Hetfield
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

ORDER:

PER CURIAM. The Department of Homeland Security (DHS) has appealed from the Immigration Judge's decision dated April 8, 2005. We affirm the Immigration Judge's decision granting the respondent, a native and citizen of Uganda, asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158. The Immigration Judge properly determined that the respondent was an unaccompanied minor during the 1-year period after his arrival in the United States on July 23, 2000, and therefore, established extraordinary circumstances excusing the untimely filing of his asylum application (I.J. at 16). *See* 8 C.F.R. § 1208.4(a)(5)(iii). Turning to the merits of the claim, we affirm the Immigration Judge's conclusion that the respondent established past persecution in Uganda on account of his membership in the Acholi tribe (I.J. at 18-19). Similarly, we affirm the Immigration Judge's conclusion that the respondent established a well-founded fear of future persecution from the government based on his Acholi tribal membership, as well as the possibility that he could be identified as a former member of the Lord's Resistance Army (LRA) (I.J. at 19). Finally, because the respondent was a boy between the ages of 11 and 13 during the relevant period, we are not persuaded that he had the requisite personal culpability for ordering, inciting, assisting, or otherwise participating in the persecution of others on account of a protected ground as a former child soldier in the LRA (I.J. at 16-18). *See Hernandez v. Reno*, 258 F.3d 806 (8th Cir. 2001). Nor are we persuaded, again based on the respondent's age, that he can be charged with having committed serious nonpolitical crimes outside the United States prior to his arrival. *See* section 208(b)(2)(A)(iii) of the Act. Accordingly, the appeal is dismissed.

A[redacted]

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h). *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005).

FOR THE BOARD

Attachment C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEW YORK, NEW YORK

File No.: A	
In the Matter of	
	IN REMOVAL PROCEEDINGS
RESPONDENT.	

CHARGE: No Charge

APPLICATIONS: Section 208 – Asylum; Section 241(b)(3) – Withholding of Removal to the Ivory Coast; Article 3, United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment – Witholding of Removal to the Ivory Coast

ON BEHALF OF RESPONDENT
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ON BEHALF OF DHS
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POST REMAND DECISION AND ORDER OF THE IMMIGRATION JUDGE

This supplemental opinion addresses only those issues raised by the Board of Immigration Appeals' ("BIA") remand opinion dated June 2, 2009. As such, the underlying factual and procedural history and legal analysis contained in the Immigration Judge's ("IJ") oral decision dated April 23, 2007 are incorporated into this decision and adopted in their entirety and not reiterated herein.

I. Factual and Procedural History Since Initial Decision on April 23, 2007

On April 23, 2007, the undersigned granted ("Respondent") application for asylum under the Immigration and Nationality Act ("INA") § 208 (2010)[1] (See IJ at 24, April 23, 2007). On May 15, 2007, the Department of Homeland Security ("DHS") timely filed its appeal to the BIA, which in turn remanded the record for further proceedings. Specifically, the BIA remanded the record for further fact-finding concerning the Movement of Cote d'Ivoire, which is also known as the Mouvement

[1] Because the undersigned granted asylum, a ruling was not made concerning the applicant's requests for withholding of removal or protection under the Convention Against Torture.

Patriotique de Cote d' Ivoire ("MPCI"), and its goals and activities. The MPCI was a rebel group in the Ivory Coast that forced the Respondent to join its ranks when he was 15 years old in 2004.[2] The BIA indicated that, in light of the factual findings regarding the goals and activities of the MPCI, an analysis should then be made as to whether the Respondent's actions while he was under the control of the MPCI were undertaken on account of a protected basis. If not, the Respondent would not be deemed a persecutor of others on account of a protected ground and would be eligible for asylum. See INA § 101(a)(42); INA § 208(b)(2)(A)(i); INA § 241(b)(3)(B)(i). Additionally, the BIA remanded to allow the parties to submit additional evidence, particularly regarding current country conditions in Cote d' Ivoire ("the Ivory Coast"). It should be noted that DHS did not challenge the Court's credibility finding, factual findings, or holding that the Respondent suffered past persecution and had a well-founded fear of future persecution when it appealed the case to the BIA. Thus, these findings and conclusions remain undisturbed in this opinion and are in fact, reaffirmed. The Court has reviewed the entire record of proceedings and carefully considered the additional evidence submitted by both parties, which has been entered into evidence.

II. Additional Exhibits Considered

The following additional evidence was considered in coming to a decision in the case:

Exhibit R1: BIA remand decision, dated June 2, 2009 and the entire record below

Exhibit R2: DHS's submission regarding the activities the MPCI engaged in during the relevant time period; includes a Human Rights Watch article and an Amnesty International Article

Exhibit R3: Respondent's submission, including the 2008 Human Rights Report for the Ivory Coast, a New York Times article concerning Ivory Coast elections, and a report from the office of the United Nations High Commissioner for Refugees ("UNHCR") regarding the Ivory Coast

Exhibit R4: The 2009 Human Rights Report: The Ivory Coast

Exhibit RA: Respondent's brief, filed on February 8, 2010

Exhibit RB: DHS's closing arguments in opposition to relief applications, filed on March 24, 2010

Exhibit RC: Letter from Respondent in response to DHS's closing arguments in opposition to relief applications (Exh. RB)

[2] The MPCI has been incorporated into the political coalition that is currently known as the New Forces ("FN"). See the 2009 U.S. Department of State Human Rights Report: Cote d'Ivoire.

III. The Goals and Activities of the MPCI

The MPCI was an armed government opposition group that controlled the northern portion of the Ivory Coast; it continues to control this area under a new name and coalition: the New Forces ("FN"). The government of the Ivory Coast controls the southern portion. This de facto partition occurred around 2002 following an armed uprising and failed coup attempt.

Beginning in 2000, the rebel forces that comprised the MPCI had principally engaged in looting, beating, raping, and killing in regions under its control. In the earlier part of the decade, members of the MPCI raped and sexually assaulted women, often because of their ethnicity or political affiliations. (Exh. R2, "Targeting Women: the Forgotten Victims of the Conflict" page 17 of 44). Women were also forced to join the MPCI and were sometimes sexually enslaved. (Exh. R2, "Targeting Women: the Forgotten Victims of the Conflict" page 7 of 44). In addition to targeting women on account of their ethnic or political associations, women were often specifically targeted if they were somehow associated with government officials. (Exh. R2, "Targeting Women: the Forgotten Victims of the Conflict" page 17 of 44). In 2002, there were reports that government figures such as mayors, security force members, and other government workers were unlawfully detained and some disappeared, all at the hands of the MPCI. (Exh. R2, "Amnesty International 19 December 2002 page 2). Members of the armed forces were killed by the MPCI as well. (Exh. R2, "Targeting Women: the Forgotten Victims of the Conflict" page 12 of 44). The MPCI mainly operated in the regions they controlled. (Exh. R2, "Targeting Women: the Forgotten Victims of the Conflict" page 11 of 44).

In 2003, the MPCI also targeted and killed Liberian and Sierra Leonean mercenaries who were also members of the MPCI[3], partly as a response to reports that Liberians and Sierra Leoneans were the most violent members of group, which was seen as a political liability for the MPCI. (Exh. R2, "My Heart is Cut" page 16 of 74). The MPCI also began to kill the girlfriends of Liberian and Sierra Leonean rebel groups, as well as other women who were associated with them. (Exh. R2, "My Heart is Cut" page 27 of 74).

In 2004, which was around the time that the Respondent was forcibly conscripted by the MPCI into its ranks, there was a general decrease in the number of sexual attacks by the MPCI reported. (Exh. R2, "My Heart is Cut" page 31 of 74). However, the evidence in the record indicates that rebel forces, which at this point may or may not have included the MPCI[4], continued to sexually assault women based on their ethnicity and government affiliations. (Exh. R2, "My Heart is Cut" page 4 of 74). The 2006 United States Department of State Country Report on Human Rights Practices for the Ivory

[3] It is possible that the Liberian and Sierra Leonean mercenaries were also members of the Mouvement Populaire Ivoirien du Grand Ouest ("MPIGO") or the Mouvement Pour La Justice Et La Paix ("MJP"), which joined the MPCI ranks in 2003.

[4] Around 2002, other rebel groups, such as the MPIGO and the MJP, had formed against the government and engaged in the same kind of activities as the MPCI against pro-government supporters.

Coast (Exh. 12) indicates that rebel groups, which may or may not have included the MPCI, continued to target members of the government.

IV. Analysis of Respondent's Actions as a Member of the MPCI and the Persecutor Bar

DHS contends that the Respondent is barred from asylum because he allegedly persecuted others on account of a protected basis as a member of the MPCI. The Respondent contends that he did not persecute others on account of a protected basis and that the evidence in the record supports his assertion.

i. Legal Standard

a. *Persecutor Bar*

The issue of whether an alien's asylum petition is excluded by the "persecutor bar" is an evolving area of law. See generally Matter of Fedorenko, 19 I&N Dec. 57 (BIA 1984); Fedorenko v. U.S., 449 U.S. 490 (1981); Negusie v. Holder, 129 S.Ct. 1159 (2009). However, it is clear that the INA specifically excludes from the refugee definition "any person who ordered, incited, assisted or otherwise participated in the persecution of any person on account of" a protected ground; this limitation is known as the "persecutor bar." See INA § 101(a)(42); INA § 208(b)(2)(A)(i); Weng v. Holder, 562 F.3d 510, 513-14 (2d Cir. 2009); Balachova v. Mukasey, 547 F.3d 374, 384 (2d Cir. 2008). The government has the initial burden to prove that the persecutor bar applies in a given case. See 8 C.F.R. § 1240.8(d)(2010); Gao v. Att'y Gen., 500 F.3d 93, 103 (2d Cir. 2007). If the government satisfies its burden, then the burden shifts to the applicant to prove that the persecutor bar does not apply. 8 C.F.R. § 1240.8(d).

The Second Circuit has established a four-step inquiry to analyze whether an applicant falls within the purview of the persecutor bar: 1) the applicant must have ordered, incited, or actively carried out the persecution; 2) if factor 1 has not been met, then the applicant must have "assisted" the persecution in that his or her actions must have been active and must have had a direct consequence for the person who was persecuted; 3) there is nexus between the persecution and the race, religion, nationality, membership in a particular social group, or political opinion of the person who was persecuted; and 4) the applicant must have had "'sufficient knowledge that...[his or her] actions [might] assist in persecution [in order] to make those actions culpable.'" Weng, 562 F.3d at 514 (citing Balachova v. Mukasey, 547 F.3d 374, 384 (2d Cir. 2008)); Xie v. INS, 434 F.3d 136, 143 (2d Cir. 2006); see also Gao, 500 F .3d at 102 (holding that a persecutor must have some knowledge that his or her actions assisted in the persecution of another).

At times, a court is faced with "difficult line-drawing problems" when assessing whether the persecutor bar applies to a given case. Fedorenko, 449 U.S. at 512-13, n. 34. In those circumstances, some circuit courts have taken the view that a court should engage in a "particularized evaluation" of the applicant's case in order to determine whether the persecutor bar applies. Hernandez v. Reno, 258 F.3d 806, 813 (8th Cir. 2001). An applicant's "personal culpability" should be evaluated when assessing that

person's actions in relation to allegations that the applicant engaged in persecution. Id. An individual's responsibility for his actions "must be assessed along a continuum of conduct." Id. Consequently, all pertinent evidence related to an applicant's conduct, including how easy it was for the alleged persecutor to flee if acting under duress, whether an alleged persecutor received any payment or rewards for his or her actions, and how candid the alleged persecutor was with the court, must be assessed. Id. at 814.

b. The Role of Scienter and the Persecutor Bar

The four-factor inquiry that underpins the persecutor bar analysis that was articulated in Weng v. Holder and Balachova v. Mukasey included the element of scienter as a necessary part of the persecutor bar analysis. Weng, 562 F.3d at 514; Balachova, 547 F.3d at 385. The Second Circuit case Gao v. Att'y Gen. also confirms that there is a scienter element present in the persecutor bar:

> While the evidence need not show that the alleged persecutor had specific actual knowledge that his actions assisted in a particular act of persecution...the persecutor bar requires some level of culpable knowledge that the consequences of one's actions would assist in acts of persecution.

Gao, 500 F .3d at 102 (finding that the petitioner, a Chinese local cultural management bureau responsible for inspecting local book sellers for compliance with Chinese laws, was not a persecutor because he lacked the requisite level of knowledge that his acts assisted in persecution). The Second Circuit in Gao v. Att'y Gen. adopted the analysis reflected in the First Circuit case of Castañeda- Castillo v. Gonzales, whereby the court held that in order for the persecutor bar to apply, the applicant for asylum had to have prior or contemporaneous knowledge about the persecution. See Castañeda- Castillo v. Gonzales, 488 F.3d 17, 22 (1st Cir. 2007). Similarly, the Sixth Circuit requires an analysis of scienter when determining whether an applicant falls within the purview of the persecutor bar. See Diaz-Zanatta v. Holder, 558 F .3d 450, 455 (6th Cir. 2009).

c. The Role of Duress and the Persecutor Bar

Nearly thirty years ago, the United States Supreme Court ("Supreme Court") determined that an individual's service as an armed Nazi concentration camp guard, "whether voluntary or involuntary," made him ineligible for relief. Fedorenko, 449 U.S. at 490. At that time, the Supreme Court concluded that the objective effect of an alien's actions, and not personal motivation and intent, controlled a determination of whether the "persecutor bar" applied. Id.

In 2009, in Negusie v. Holder, the Supreme Court refrained from establishing a new statutory interpretation of the "persecutor bar" and remanded the case to the BIA to determine whether the bar included a coercion or duress exception. 129 S.Ct. 1159 (2009). The matter before the Negusie court involved an asylum application by an Eritrean and Ethiopian dual national who claimed he was forced to engage in persecution as an armed prison guard. While the BIA held that the alien was inadmissible under the "persecutor bar," the Supreme Court concluded that the BIA misapplied the Fedorenko v.

U.S holding as mandating that whether an alien is compelled to assist in persecution is immaterial for "persecutor bar" purposes, and found that motive and intent may in fact be relevant. Negusie, 129 S.Ct. at 1165-67. The BIA has not yet issued a decision on the remanded case. However, Negusie suggests that it is possible that an applicant's intent may be a relevant inquiry when assessing whether the applicant assisted in persecution. Id. at 1163. In any event, it has always been and still remains appropriate for a court to assess the "totality of the relevant conduct" of the alleged persecutor to determine whether the persecutor bar applies. Matter of A-H, 23 I&N Dec. 774, 785 (AG 2005); Hernandez, 258 F.3d at 814. Thus, duress and intent may be taken into account, as part of the "totality of the relevant conduct" when assessing whether a person engaged in acts of persecution on account of a protected ground. See Hernandez, 258 F.3d at 814.

ii. Legal Analysis

Under the four-factor test articulated in Weng v. Holder and Balachova v. Mukasey, the evidence in the record establishes that the MPCI sometimes engaged in persecutory acts based on a protected ground. Around 2004 to 2006, the years that the Respondent was forced to serve under the MPCI, the MPCI often targeted civilians because of their affiliations with the government. Members of the MPCI would, with intent and knowledge of what they were doing, assault, rape, and sometimes kill pro-government supporters or their relatives. Some of the actions that the MPCI engaged in against pro-government supporters or their relatives have been deemed persecutory. See Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985); Balachova, 547 F.3d at 387. Additionally, the MPCI engaged in violence against civilians specifically because of their affiliations with the government. Thus, there is a nexus between the persecution that the MPCI engaged in and a protected ground. Consequently, the MPCI has engaged in persecution. See Weng, 562 F.3d at 514; Balachova, 547 F.3d at 384-85.

Notwithstanding the above, the Respondent's forced membership in the MPCI during the pertinent period of persecution is not enough to trigger the persecutor bar in his case. See Singh v. Gonzales, 417 F .3d 736, 739-40 (7th Cir. 2005) (stating that the petitioner's membership in a local Punjabi police department, which at times engaged in persecution, was not enough to trigger the persecutor bar). In fact, under the same four-factor test, the evidence in the record shows that the Respondent did not engage in persecution on account of a protected ground. First, most of the Respondent's actions were not persecutory. Second, even if some of the Respondent's actions could arguably be persecutory, there was no nexus between those actions and a protected ground in the mind of the Respondent. See Castaneda-Castillo, 488 F.3d at 22 ("We hold that presumptively the persecutor bar should be read not to apply to Castañeda if his version of his state of mind is accepted"). Lastly, the Respondent did not have sufficient knowledge that any of his actions might have assisted in persecution on account of a protected ground. Thus, the Respondent cannot be held culpable as a persecutor and is not exempt from relief because of the persecutor bar.

Although the MPCI sometimes engaged in persecutory acts against civilians, the Respondent, a 15-year old boy who was one day suddenly abducted by the MPCI against his will and forced to join its ranks, did not know that the MPCI sometimes engaged in persecution of civilians. When the Respondent was abducted by the MPCI, the group

took him to an area to be trained. The Respondent testified that the rebels told him and the other trainees that "the government wasn't any good and well that they had to try and change it." (Hearing Transcript, April 23, 2007, p. 62). The MPCI did not tell the Respondent or the others that they intended to harm civilians who were affiliated with the government; rather all the Respondent knew was that the MPCI intended to try and change the government.

The Respondent testified that the MPCI forced him to raid villages. The Respondent felt forced to participate in the raids because he understood that if he did not, the MPCI would hurt or kill him. The Respondent's thoughts were not far fetched, as the MPCI did not hesitate to cut off the Respondent's brother's hand when his mother attempted to stop them from taking him; the Respondent had also witnessed the MPCI kill another child soldier because of his disobedience. As far as the Respondent knew, the purpose of these raids was to "take objects of value, to take anything, everything that needed to be taken." (Hearing Transcript, April 23, 2007, p. 62). It did not matter what the religion or ethnicity or anything else the villagers were. The Respondent never knew the identity of the victims or anything about them. In fact, the Respondent was forced to raid the village that his own family was staying at and the one he once lived at. It is clear from the record that the Respondent did not have any knowledge that the MPCI could have been targeting villagers because of their associations with the government. As far as the Respondent knew, the MPCI was just targeting people at random.

Most of the actions that the Respondent engaged in do not constitute persecution. During the raids the Respondent, under the MPCI's threats, would shoot his gun into the air to frighten the villagers and move them to a certain place so that the MPCI could loot their homes. The Respondent would also proceed to loot the village homes so that he could avoid being hurt or killed by the MPCI. Looting is not a form of persecution. Balachova, 547 F.3d at 386. The Respondent never raped or maimed any of the victims, although he watched others do it. It would have been difficult for the Respondent, a young boy surrounded by a rebel militia, to stop such actions all by himself when he knew that he would be killed for trying. Moreover, merely witnessing others persecuting is not persecution itself. Balachova, 547 F.3d at 387. Thus, the Respondent's looting and witnessing of atrocities going on around him did not constitute active persecution nor did it assist in persecution.

There were times that the Respondent, under threat of the MPCI, would hit people with his hands and weapons, possibly making them bleed but not being sure of it. There were also times that the Respondent forced other children to join the MPCI. Lastly, there was one time that the Respondent, after having been shot at, shot into a crowd of villagers. According to the Respondent, he does not know if anyone died but he never intended to kill anyone. Assuming *arguendo* that beatings, forcibly recruiting child soldiers, and shooting into a crowd of civilians could be persecutory actions, those actions cannot be persecutory without the person who is committing the actions knowing that it is being done on account of a protected ground. See 8 C.F.R. § 208.13(b)(1); INS v. Elias-Zacarias, 502 U.S. 478, 481-83 (applicant must show some evidence that persecution is due to one of the enumerated grounds). The record demonstrates that the Respondent did not have sufficient knowledge that his actions could have assisted in the

persecution of others because he did not know they were being persecuted on account of a protected ground.

Moreover, it is not entirely clear whether the villagers were actually being targeted for their affiliations with the government or any other protected ground when the Respondent went out on these raids. Although the MPCI were sometimes known to engage in persecution, this information does not prove they engaged in persecution during these raids. Consequently, it has not been established that there is a nexus between the alleged persecution and the race, religion, nationality, membership in a particular social group, or political opinion of the person or persons being persecuted during the raids that the Respondent went on.

In evaluating the totality of the circumstances, it should also be noted that the Respondent was very young when his forced recruitment occurred, which has implications on his ability to fully comprehend what was going on around him and what the MPCI was actually doing. The Respondent had also just suffered traumatic experiences, some at the hands of the MPCI. His father and sister were killed, his mother was assaulted, he and his family were displaced from their home, his younger brother was brutally maimed by the MPCI, and he himself was literally kidnapped and forced to join this violent group under threat of serious injury or death. Additionally, the MPCI also drugged the Respondent before each and every raid he went on. The Respondent testified that the drugs initially made him feel dizzy and afterwards, he felt strong. Sometimes, the Respondent would hear voices during the time he was a member of the MPCI, possibly due to the drugs. The drugs the Respondent was given most likely affected his comprehension of what was happening during the raids even more. Thus the Respondent's youth, traumatic experiences, and the drugs he was forced to take did not allow for him to fully understand what was happening during the raids. Because the Respondent did not know that the MPCI could have been attacking villagers based on a protected ground and because the Respondent was too young, traumatized, and drugged to form the requisite intent necessary to persecute, the Respondent cannot be held culpable as a persecutor.

Additionally, it should be emphasized that the Respondent was *forced* at a very young age to join the MPCI and partake in the raids; he acted under duress. After seeing what the MPCI was capable of when they maimed his younger brother, killed another child solider for his disobedience, and physically abused another child soldier for reasons unknown, the Respondent knew he had no choice but to do what the MPCI wanted him to do and would have suffered serious consequences for any form of disobedience. This case is similar to Hernandez v. Reno, where the petitioner was forced under threat of death to join the Organization for People in Arms (ORPA), a rebel group opposed to the Guatemalan government. Hernandez, 258 F.3d at 809. At one point, the petitioner was forced to shoot into a group of suspected informants; the petitioner was not the only one shooting at them. Id. The petitioner, who had indicated several times before the incident that he did not really want to partake in this kind of violence and suggested he wanted out of the group, tried not to aim directly at the group of informants when he was shooting; however, after the incident all the informants had been killed. Id. The petitioner wanted to shoot at the ORPA members instead of the informants but knew that he would have been overpowered by them. Id. After the shooting incident, the petitioner voiced his disagreement with the ORPA's tactics to the commander and asked to be released. Id.

His request was denied and he was placed under surveillance. Id. When the ORPA later engaged in a battle with government forces near the Mexican border, the petitioner took the opportunity to escape. Id. at 810. The petitioner had been with the ORPA for approximately 20 days. Id. Ultimately, the Eighth Circuit did not rule on the issue of the persecutor bar in the petitioner's case. However, the court did remand the case for an analysis of all the facts in the petitioner's case, particularly the fact that the petitioner's participation in the aforementioned events was involuntary and under threat of death and the petitioner did all he could to protest the ORPAs practice and escape from their control. Id. at 813-15.

In the case at bar, the Respondent was also forced to join a violent group against his will. He was directed by the MPCI to loot and assault people. The Respondent also shot at a group of villagers without knowing whether any of them were hurt under the direction of the MPCI. Yet Respondent did not willingly do any of these actions; in fact, he was under constant threat of severe injury or death if he did not partake in these actions. It would have been difficult to protest these actions and even more difficult to flee from the MPCI any earlier than he did because the Respondent was very young and had no one to help him. Eventually, his mother and a friend of his father's were able to help the Respondent flee from the deadly situation. All of these factors, particularly the fact that the Respondent acted under extreme duress, are significant in assessing his personal culpability in the raids and any persecutory acts that might have been engaged in. The Respondent did not have control over the situation because of his age, because of the traumas he had experienced, because of the drugs the MPCI forced him to take, and because of the MPCI's threatening presence. As a result, this Court cannot find that the Respondent was culpable in any persecutory acts that might have occurred on the part of the MPCI.

Although the Second Circuit has not spoken on the issue, other courts have recognized that child soldiers who have been forcibly conscripted to fight for rouge or rebel groups, forced to watch those groups commit atrocities, and forced to commit atrocities themselves, all under threat of death, are victims of persecution themselves. Lukwago v. Ashcroft, 329 F.3d 157, 169-70 (3d Cir. 2003) (holding that petitioner's forced conscription as a child, forced participation in violent acts against others, and forced witnessing of violent acts against others was a form of persecution). Thus, the Respondent was a victim not a victimizer.

The Respondent is not the first former child solider to not be deemed a persecutor and to be eligble for asylum, despite having been forced to commit violent acts when he was conscripted into the MPCI. There is sparse case law concerning child soldiers who were forcibly conscripted to fight in rebel armies and how the persecutor bar affected them. However, there have been cases that involved child soldiers who were forcibly conscripted into rebel armies, who committed actions that might have been persecutory in nature, but who were nonetheless deemed potentially eligible for relief or who were not found to have committed persecution. See Sackie v. Ashcroft, 270 F.Supp.2d 596, 600 (E.D. Pa. 2003) (discussing IJ's holding and BIA affirmation that petitioner was not a "persecutor" when he was forcibly recruited as a child soldier by a rebel group in Liberia, forced to take drugs, and killed others under orders and direct threat to his own life; asylum was denied for other reasons); Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003)

(petitioner trained to shoot, forced to fight against government soldiers, and forced to kill another child soldier for disobedience was not deemed a persecutor and still potentially qualified for asylum on remand).

For the foregoing reasons, this Court affirms its finding, which was articulated and is incorporated by reference in the decision of April 23, 2007, that the Respondent did not engage in the persecution of others on account of a protected ground while he was a member of the MPCI. Thus, the persecutor bar does not exclude the Respondent from obtaining asylum relief.

V. Country Conditions in the Ivory Coast

The June 2, 2009 BIA remand requested this Court to consider additional documentation concerning country conditions in the Ivory Coast submitted by both parties and to assess whether the Respondent is still eligible for asylum in light of the newly submitted evidence.

On April 23, 2007, this Court found that the Respondent was credible and that he was eligible for asylum based on past persecution and a well-founded fear of future persecution by either the government, which controls the Southern part of the Ivory Coast or the FN (formerly the MPCI) who controls the northern part of the Ivory Coast. The next issue that this decision on remand considers is whether or not country conditions in the Ivory Coast have changed, rendering the Respondent ineligible for asylum relief because of a lack of well-founded fear of future persecution.

An applicant for asylum who has established past persecution is presumed to have a well-founded fear of future persecution based on the same claim.[5] 8 C.F.R. § 1208.13(b)(1)(i)(A). That presumption may be rebutted if DHS demonstrates by a preponderance of the evidence that the applicant no longer has a well-founded fear of persecution in his or her country of nationality. Id.

The U.S. Department of State 2009 Human Rights Report for the Ivory Coast ("DOS Report") suggests in a very general way that the various ruling forces in the country have strived to improve the conditions in the Ivory Coast and that, to a certain extent, some conditions have improved.[6] For example, the Ouagadougou Political Agreement between the government-controlled South and the rebel-controlled North in 2007 is a symbol of the efforts being made on both sides to hold elections, disarm various factions, and to reunify the country. (DOS Report, p.1). However, the DOS Report does not necessarily reflect the tangible benefits the agreement has had on the Ivory Coast.

[5] In this decision, the IJ found that the Respondent suffered past persecution and had a well-founded fear of future persecution instead of relying on the presumption.

[6] The Court notes that although the DOS Report is the most recent country report, as it is dated March 11, 2010, it does not necessarily reflect the most current conditions in the Ivory Coast, which may have changed since the time the DOS Report was generated and might call into question the political stability that exists in the Ivory Coast at this time. However, as the DOS Report is the only evidence the Court has on record to evaluate the latest country conditions in the Ivory Coast, the Court limits its analysis to what is contained in the report and anything else in the record before it.

Nonetheless, the DOS Report does state that there have not been any reports of the following: politically motivated disappearances, political prisoners or detainees, security forces killing demonstrators, or recruiting of child soldiers. (DOS Report, pgs. 2, 3, 8, 21). The DOS Report also indicates that the government made advances towards assisting the return of internally displaced persons to their homes. (DOS Report, p.13). Improvements have also been attempted in the election process and voter registration since 2000. (DOS Report, pgs. 1, 15).

While the various governing parties in the Ivory Coast have tried to improve conditions there over the last few years, there remains an undercurrent of civil unrest, political instability, and continued human rights abuses. The DOS Report has not indicated that disarmament has actually occurred. Security forces use students as informants to monitor political activities at universities. (DOS Report, p.12). Extrajudicial killings are committed by both pro-government and rebel forces. (DOS Report, pgs.2, 3). The FN has tortured suspected pro-government supporters in regions under its control. (DOS Report, p. 4). Human rights abuses are still committed by both sides against various individuals. (DOS Report, p. 4). The elections have been delayed. (DOS Report, p.1). There is also some indication that members of the Rally for Republicans (RDR) have been targeted by the government, which is significant as the Respondent's father belonged to the RDR and was murdered because of his association with the group; this may directly place the Respondent in danger of being targeted if he is discovered (DOS Report, p. 4).

Consequently, this Court is not convinced that DHS has met its burden of proof to establish by a preponderance of the evidence that country conditions in the Ivory Coast have changed such that the Respondent is no longer eligible for asylum. Rather, this Court concludes that the Respondent continues to have a well-founded fear of future persecution in the Ivory Coast because country conditions have largely remained the same.

VI. Humanitarian Asylum

Even if the government were able to prove that country conditions have changed, this Court could still grant the Respondent asylum as a matter of discretion based on humanitarian grounds. See 8 C.F.R. § 208.13(b)(1)(iii). An applicant may warrant a grant of asylum in the exercise of discretion, even where there is little likelihood of future persecution, if compelling, humanitarian considerations would be involved if he or she were forced to return to the country where he or she suffered persecution in the past. See Matter of H-, 21 I&N Dec. at 347 (noting that "asylum should be granted in the exercise of discretion...where the asylum applicant has suffered such severe persecution that he or she should not be expected to repatriate."); Matter of Chen, 20 I&N Dec. 16, 20-21 (BIA 1989) (granting asylum to a respondent who suffered severe past persecution in China and demonstrated other compelling factors to warrant a favorable exercise of discretion). Humanitarian asylum may also be granted if the applicant has established a reasonable possibility of "other serious harm." 8 C.F.R. § 1208.13(b)(1)(iii)(B).

The Respondent is not only eligible for asylum based upon a well-founded fear of future persecution in the Ivory Coast; he is also eligible for asylum based upon having

suffered past persecution as well. The following section clarifies and expands on the basis of the Respondent's claim of past persecution, which was referenced in the original IJ decision of April 23, 2007. The Respondent's father was a member of the RDR, an opposition party that opposed the government. In August of 2001, when the Respondent was only 12 years old, his father and sister were murdered by pro-government forces near their home in Man. Soon after the Respondent's father and sister were killed, the same pro-government forces intruded into the Respondent's home, ransacked his house, took his father's belongings, assaulted his mother, and threatened that they would return in the future. The pro-government's persecutory actions against the Respondent and his family were based on the father's associations with a political party that opposed the government, for which he died. Soon after the raid on his house, the Respondent's mother took the Respondent and his siblings and relocated to a displaced person's camp. These factual circumstances are sufficient to conclude that the Respondent, then a child who depended on his family, suffered past persecution even though he was not personally harmed because he lived through the violent death of his father and sister and had to relocate because of the harm that the pro-government forces posed to him and his family. See Jorge-Tzoc v. Gonzales, 435 F.3d 146 (2d Cir. 2006) (holding that a child who had observed the violent shooting of his family and had to subsequently relocate due to fear of further harm suffered past persecution even though he was not personally harmed); see also Camara v. Att'y Gen., 580 F.3d 196 (3d Cir. 2009) (holding that it was error for the BIA to conclude that the petitioner did not suffer past persecution when she witnessed the abduction of her father whom she never saw again, experienced threats against her and her family by the same people who abducted her father, and was forced to flee her home to avoid further harm).

The Respondent's relocation to the displaced person's camp due to the murder of his father and sister by pro-government rebel forces and the threats they directed at the Respondent and his family set into motion a series of events that also had a profound and severe effect upon the Respondent that warrants a humanitarian grant of asylum. See Jiang v. Gonzales, 500 F.3d 137, 141 (2d Cir. 2007) (reflecting that harm to family members is an important factor in evaluating the severity of the persecution of applicants who have suffered direct harm themselves and citing Matter of Chen, 20 I. & N. Dec. 16 (BIA1989)); See also Matter of H-, 21 I&N Dec. at 347; Hoxhallari v. Gonzales, 468 F .3d 179, 184 (2d Cir. 2006) (holding that the past persecution suffered must be atrocious). The displaced persons camp was rampant with disease, the food there was scarce, and it was constantly being raided by the rebel forces then known as the MPCI. Then abruptly, the MPCI tried to abduct the Respondent and his younger brother. After witnessing the MPCI brutally amputate his younger brother's hand when his mother attempted to keep him from being taken by the rebel forces, the Respondent was himself abducted and forced to participate in behavior he did not want to partake in under threat of death; he was also forced to witness atrocities committed by the MPCI. The Respondent's abduction and forced participation in the activities of the MPCI could itself be a form of persecution. Lukwago, 329 F.3d at 169-70. In any event, the Respondent's experiences before his relocation, after his relocation, and during his abduction by and conscription into the MPCI had serious effects on the Respondent's mental and physical health, which he still suffers from today. Respondent continues to battle with suicidal thoughts. (Dr. Adeyinka M. Akinsulure-Smith, Psychological Assessment of Salifou Yankene, dated February 20, 2007, at 1). Respondent has suffered from hallucinations in the form of a

male voice ordering him to kill himself. Id. at 2. Respondent has difficulties with concentration and sometimes suffers severe and frequent headaches. Id. at 3. The Respondent has exhibited feelings of guilt, hopelessness, sadness, and has experienced traumatic and violent flashbacks of his time in the Ivory Coast. Id. Consequently, as a result of a psychological assessment conducted on February 20, 2007, the Respondent was diagnosed with Post Traumatic Stress Disorder, a testament to the fact that the Respondent still suffers from the effects, both physically and mentally, of the past persecution he experienced in the Ivory Coast as a child. See Jalloh v. Gonzales, 498 F .3d 148, 152 (2d Cir. 2007) (holding that humanitarian asylum requires a showing of "long lasting physical or mental effects" arising from an applicant's past persecution). As there are no negative discretionary factors in the Respondent's case, this Court finds that the Respondent merits a grant of humanitarian asylum on the basis of severe past persecution.

It should be noted that even if the Respondent's past persecution were not severe enough to merit humanitarian asylum, the Court finds that the Respondent would merit a grant of asylum because he has established a reasonable possibility of "other serious harm." 8 C.F.R. § 1208.13(b)(1)(iii)(B). Civil unrest between the rebel-governed North and the pro-government South still lurks in the Ivory Coast. The political instability and widespread violence in the Ivory Coast, as well as the Respondent's precarious position as a former rebel child soldier who escaped, establishes that the Respondent has a reasonable fear of serious harm if he returned to the Ivory Coast.

VII. Withholding of Removal under INA § 241(b)(3)

This Court has granted Respondent's application for asylum but also notes that in the alternative, it finds him eligible for withholding of removal under INA § 241(b)(3).

As with asylum, a threshold determination must be made as to the credibility of the applicant for withholding of removal. INA § 241(b)(3)(C); see also INA §§ 208(b)(1)(B)(ii) and (iii).[7] A claim for withholding of removal is factually related to an asylum claim, but the applicant bears a heavier burden of proof to merit relief. For withholding, the applicant must demonstrate that, if returned to his country, his life or freedom *would be* threatened on account of one of the protected grounds. INA § 241(b)(3); see also Zhang v. INS, 386 F.3d 66, 71 (2d Cir. 2004). To make this showing, the applicant must establish a "clear probability" of persecution, meaning that it is "more likely than not" that he will be subject to persecution on account of a protected ground if returned to the country from which he seeks withholding of removal. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). There is no discretionary element. Therefore, if the applicant establishes eligibility, withholding of removal must be granted. INA § 241(b)(3); see also INS v. Ventura, 537 U.S. 12, 13 (2002). Additionally, there is no statutory time limit for bringing a withholding of removal claim.

Because asylum and withholding claims rely on the same factual basis, but there is a heavier burden for withholding, "an applicant who fails to establish his eligibility for

[7] The requirement of a separate credibility finding for withholding of removal applies to post-REAL ID cases only.

asylum necessarily fails to establish eligibility for withholding." Zhang, 386 F.3d at 71; see also Ramsameachire v. Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004); Abankwah v. INS,185 F.3d 18, 22 (2d Cir. 1999). However, an applicant who establishes statutory eligibility for asylum, but is denied asylum in the exercise of discretion, remains eligible for withholding of removal. Osorio v. INS, 18 F.3d 1017, 1032 (2d Cir. 1994).

The Court is satisfied that the Respondent meets the heavier burden of proof to merit relief under withholding of removal under INA § 241(b)(3) and relies on the credibility and factual findings contained in the IJ's April 23, 2007 oral decision, as well as the sections discussed above.

VIII. Conclusion

For the foregoing reasons, the Court will affirm its decision of April 23, 2007 after the remand. In doing so, Respondent's application for asylum is granted. The Respondent's application for withholding of removal under INA § 241(b)(3) is also granted. As Respondent's application for asylum and withholding of removal under INA § 241(b)(3) have been granted, this Court need not further consider Respondent's applications for withholding of removal under Article 3 of the Convention Against Torture in light of his grant of asylum. The following orders shall be entered:

ORDERS

IT IS ORDERED that Respondent's application for asylum under section 208 of the Act be GRANTED;

IT IS FURTHER ORDERED that Respondent's application for withholding of removal under section 241(b)(3) of the Act to the Ivory Coast be GRANTED;

Date: 1/7/11

Alan Page
Immigration Judge

Attachment D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
200 EAST MITCHELL DRIVE, SUITE 200
PHOENIX, ARIZONA 85012

IN THE MATTER OF:	**IN REMOVAL PROCEEDINGS**
H[redacted]-G[redacted] D[redacted]F[redacted]	**FILE NO.:** A[redacted]
	DATE: February 16, 2007
Respondent	

CHARGES: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "the Act"), as amended, an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATIONS: Section 208 of the Act, Asylum

Section 241(b)(3) of the Act, Withholding of Removal

8 C.F.R. § 1208.16(c), Withholding or Deferral of Removal pursuant to Article III of the Convention Against Torture[1]

On Behalf of the Respondent:

[redacted]
Immigration Law & Policy Clinic
P.O. Box 877906
Tempe, Arizona 85287-7906

On Behalf of the Government:
Marguerite Mills, Esq.
Assistant Chief Counsel
Department of Homeland Security
2035 North Central Avenue
Phoenix, Arizona 85004

[1] The United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708, (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) (available on the U.N. website at http://www.un.org/).

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DECISION AND ORDER OF THE IMMIGRATION COURT

I. Procedural History

The respondent is a male, native and citizen of Honduras. He arrived in the United States at or near San Luis, Arizona on or about March 29, 2006. He was not then admitted or paroled after inspection by an Immigration Officer.

On April 6, 2006, based on the foregoing allegations, the Department of Homeland Security ("DHS") issued a Notice to Appear ("NTA"), charging the respondent as removable from the United States pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "the Act"), as amended, in that he is an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. (Ex. 1, NTA.)

At a continued Master Calendar Hearing on June 26, 2006, the respondent, through counsel, acknowledged receipt of the NTA, admitted all of the factual allegations, conceded the charge of removability, and declined to designate a country of removal. The Court designated Honduras. The respondent then expressed his desire to apply for relief from removal in the form of Asylum pursuant to section 208 of the Act, Withholding of Removal pursuant to section 241(b)(3) of the Act, and Withholding or Deferral of Removal pursuant to Article III of the Convention Against Torture ("CAT"). An Individual Hearing was held on November 28, 2006.

II. Testimonial Claims

A. Testimony of Dr. Thomas Boerman

Dr. Thomas Boerman ("Dr. Boerman"), admitted as an expert on the gang situation in Honduras, testified that, in some respects, the gang problem in Honduras is more significant than any other part of Central America. While there are no verifiable statistics as to the number of gangs or gang members, it is commonly agreed that there are more criminally active gang-members than would be found in El Salvador or southern Mexico. According to Dr. Boerman, none of the countries in the region has dedicated what would be considered an appropriate amount of resources to prevention, rehabilitation, and the social reinsertion of gang members. Honduras has provided substantially less. It can easily be argued that, as a government, Honduras has provided no resources to addressing the issue in a comprehensive manner.

Unlike other countries in the region that have established comprehensive response programs to

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gangs, Honduras is dedicated almost exclusively to a law enforcement approach, which has proven to be ineffectual and actually contributing to the deterioration of the situation. The policy is known as "*Mano Dura*," meaning "firm hand." Under section 332 of the Honduran Penal Code, gang membership, independent of the commission of other crimes, is punishable by up to twelve (12) years in prison. Following the enactment of the *Mano Dura* policy, there was a noticeable decline in certain types of criminal activities such as extortion. However, these results have proven to be short-lived and have resulted in several unintended consequences. While many of the gang members fear the anti-gang laws, because of the absence of government support and rehabilitation programs, the young people say that the law deepens their commitment to the gang, not out of choice, but out of desperation. The anti-gang laws have also increased public antipathy towards gang members. Moreover, the anti-gang laws have had the effect of driving the activities of gangs underground--increasing their level of sophistication and reducing their visibility. According to Dr. Boerman, relying solely on a law enforcement policy serves only to make the gang problem worse.

Dr. Boerman stated that the *Mano Dura* policy is a law enforcement/military-based approach that is focused exclusively on the repression of gangs, with strategies that are organized around mass arrests of known and suspected gang-members and long term incarcerations independent of convictions relating to the crime of gang membership. Identifying who is and who is not a gang member commonly involves police officers patrolling areas frequented by gang members and arresting individuals who are caught clustering in groups of more than two or three individuals with tattoos, and those who, based on their clothing or haircuts, have the appearance of being gang members. Thus, there is no well-established mechanism in Honduras for determining who is and is not a gang member.

There are two major gangs in Honduras--Mara Salvatrucha ("MS-13") and 18th Street. There are also a small number of gangs with a relative degree of independence from MS-13 and 18th Street. These smaller gangs, nonetheless, have affiliations with one of the two larger gangs. The presence of the smaller gangs are essentially sanctioned by the major gang controlling the area, either MS-13 or 18th Street. If their presence were not permitted by the larger the gang, the smaller gang would be eradicated. There is, therefore, a relationship between the smaller and larger gangs. Relatedly, Nueva Suyapa, a large but poor district of Tegucigalpa, the capital city of Honduras, is under the control of 18th Street. Los Puchos is a smaller gang that operates in Nueva Suyapa. While Los Puchos' association with 18th Street is speculative, it is commonly agreed that, because Los Puchos is present in 18th Street territory, there is an acceptance of Los Puchos' presence. It is, therefore, apparent that there is a relationship between 18th Street and Los Puchos, although the level of collaboration on a day-to-day level is less clear. The relationship with 18th Street enables Los Puchos to freely move about Nueva Suyapa.

Dr. Boerman then explained his notion of the "gang mentality" in Honduras. "Gang mentality" is

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the means by which gang culture is defined. It has six (6) components. The first component is the importance of being respected. There is nothing more essential in gang culture than being respected by members of one's own gang, rivals, residents in the neighborhood, and non-gang youth. Respect is synonymous with being feared. The second component of "gang mentality" is disrespect for one's rivals. To acquiesce to the presence of a rival gang is considered ruinous to the gang's respect and reputation. As a result, there is significant animosity between gangs. To show disrespect, you, as gang member, purposely engage in activities that will show your disdain for rival gangs such as throwing up hand signs at rival gang members, putting graffiti in the neighborhoods controlled by other gangs or committing crimes in those neighborhoods, talking derogatorily about other gangs, and acting out violently against rival gangs. The purpose is to show your disrespect and lack of fear of your rivals. The third component is that no insult against you or your gang should ever go unanswered. This involves a tit-for-tat exchange of indicators of disrespect that go back and forth between the gangs. The fourth component of the "gang mentality" is the process relating to the right of passage or initiation into the gang, which usually involve something that risks the person's well-being as a demonstration of loyalty and bravado. The fifth component is that all problems are handled within and between the gangs. The final component of the "gang mentality" is to disregard the rights of those who are not members of the same gang. To show regard takes away from your reputation.

Individuals, moreover, who serve as "lookouts" for the gangs are usually recognized members or peripheral associates--people who have a relationship with the gang but are not recognized as members of the gang. The purpose of the lookout is to prevent apprehension. Nevertheless, the crime would not be deterred even in the absence a lookout. A common scenario would be where the gang kidnaps a person they perceive as having money, takes him to an automated teller machine ("ATM"), and forces him to withdraw his daily maximum. In a case like that, a lookout would be standing on the periphery of the crime scene and keeping a watch for any police or security officer who might interfere with the crime. While the lookout plays an important role in the crime, it would be unrealistic to expect that anyone serving as a lookout would also be in a position to exert influence over the leadership, membership, or activities of a gang. Lookouts are usually the youngest or newest gang members or only peripherally associated to the gang. The capacity to exert influence within a gang comes with time and demonstration of a number of personality attributes that are held to be of primary importance within gang culture. Those called upon to be lookouts generally have not had the time or opportunity to establish that kind of status within the gang. Rather, lookouts are there to serve the needs of the gang and to do what they are told.

Dr. Boerman also testified that it can be particularly difficult for a lookout to distance himself from the gang. If the lookout has observed members of the gang committing serious crimes, that person, in departing from the gang, represents a real and viable threat to the gang and to the perpetrators of the crimes. Furthermore, in Honduras, there is a practice that once a person is

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recognized by the police as having cut his ties from gang activities, that person is very often targeted by the police for arrest and interrogation in order for them to obtain information about gang activities and individuals in the person's former gang. Former gang members in Honduras told Dr. Boerman that, as much fear as they had from their former gangs and gang rivals, they had equal fear of the police because it was common for the police to arrest and interrogate them. These interrogations often involved physical duress and low-level torture. Hence, gangs tend not to allow young persons who have witnessed their crimes and who will be subject to manipulation and coercion by the police, to slip away from the gang. Dr. Boerman stated that "you might find yourself in quite a dire situation should you try to uncouple from the gang you've become involved with." Additionally, Dr. Boerman asserted, Honduran gangs operate through coercion and violence. If a gang has become invested in bringing a person into the gang, and the young person has ambivalence towards making the "jump" in to the gang, the gang may engaged in coercion to force the decision by threatening the person with of death and making threats against the person's family.

In Honduras, Dr. Boerman further testified, the people who established gangs in Central America were young people growing up in a society defined by civil conflict, where the levels of brutality and violence were such that they were desensitized to violence. When these youths moved into gang culture, they brought with them the desensitization to violence and the willingness to use violence and terror as a tactic. The other group that provided the foundation for gangs were demobilized combatants that were active during the civil wars–both guerillas and military personnel who, at the end of the civil war, were unable to reintegrate back into society as noncombatants. Thus, there is "an extraordinary culture of violence" within the gangs. As a result, the level of tolerance towards people trying to exit the gang is almost nonexistent, and the willingness to behave violently towards those who make those attempts is the norm. For a person to simply drift away from the gang without consequence, then, is "very unrealistic." Some, nevertheless, have been able to leave a gang by claiming religious conversion. In order to prove this, a former gang-member would have to show a deeply internalized commitment to a spiritually-oriented life.

Dr. Boerman added that where a child, who had previously served as lookout and witnessed crimes committed by the gang, left the area and subsequently returned, that child would be at immediate risk of harm or death at the hands of the gang, especially if the crimes he witnessed were by higher profile gang-members. His family would also be in danger. While Dr. Boerman was with an organization named "Save the Children," at a location approximately three hours from Tegucigalpa, he worked with youths attempting to extricate themselves from gangs. The gangs have a tremendous investment in not allowing people with information that can be used against them by the police to freely roam the neighborhood. According to Dr. Boerman, over a period of four years, twenty-three of the youths in the program were killed. The majority were killed by members of their own gangs for attempting to leave the gang. Among these was a sixteen year-old boy who was machine-gunned

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outside of the organization's building. Moreover, once a person makes the decision to leave the gang, he is no longer free to walk on the streets or take public busses. The only places he can go are sheltered environments like churches, gang-intervention programs, and shelter workshops. The person cannot be on the streets on his own because of the threat posed by his former gang and the police. Many of those who have returned are in hiding because of the fear they are experiencing.

There is, furthermore, no one who can protect a child from gang-retaliation. It is unlikely that the child's family could protect him from the gang. Instead, the family would find itself in danger of being harmed. The police are also unable to protect to a person from gang retaliation. The Honduran police, according to Dr. Boerman, are an understaffed, undertrained, underpaid, and outgunned institution. There are 5,500 officers for a population of approximately seven million. The police thus lack the resources to protect anyone. As a result, witness intimidation and murder are rampant in Honduras. If a witness actually testifies, he or she often "has a contract put out on them." While the police can protect the person during proceedings, that protection does not continue after the trial. The Honduran police do not perceive providing protection as their role. To the contrary, providing protection to a person who was once involved with a gang would run contrary to the *Mano Dura* policy. The youths also do not have the freedom to hide in their homes because gang members usually live in the same community. Consequently, the witness/youths have no choice but to try to survive on the streets.

Dr. Boerman added that it takes profound courage to leave a gang in Honduras. In choosing to leave, a person is violating the central tenet of gang culture and mentality, which revolves around respect and loyalty. Therefore, the person knows he will likely be subject to violence because of his decision to leave. The person is essentially making the commitment to leave the gang in spite of the risks.

Dr. Boerman also testified that although gangs have not yet taken root in rural areas, relocation to these rural areas is not a viable solution. It is often impossible to survive in rural areas, which is why there is such major rural to urban migration within Honduras. The swelling population in the urban areas and the chaos and disorder of those areas is a direct result of the lack of viable opportunities to survive in smaller communities or rural areas. Over the last several decades, there is a clear pattern of mass migration from rural areas to the cities by people trying to survive. Hence, there is nothing to suggest that a person moving from the city to a rural area would be able to survive, especially in the absence of family that could, at least, take him in and provide him with the support system necessary to live a marginal life. Therefore, the person would forced to return to an urban area, where he would again find himself "in the crosshairs."

Dr. Boerman stated that, although he has never spoken with the respondent, based on what he

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knows of the respondent's situation, he believes that the respondent faces two threats. The first is that the respondent was peripherally associated with Los Puchos and was affiliated with an individual known as "Chelito" at a personal level. Chelito is a member of Los Puchos and "a very high profile player in Honduran gang-culture." Chelito was responsible for the murder of a United States Drug Enforcement Agency agent and has become a household name. Chelito developed a more intimate relationship between Los Puchos and 18th Street. As a result, the respondent is in a position where he is trying to extricate himself from both Los Puchos and 18th Street. The second threat comes because the respondent acted as a lookout for Los Puchos. If, in this capacity, the respondent was a witness to crimes and knows the identities of the perpetrators, he will be at risk because the gangs do not allow people who have information that can be used against them to roam the streets freely. Instead, the gangs threaten and kill former lookouts. Hence, if the respondent was privy to information about Chelito's activities and those directly associated with Chelito, he would be at the highest level of risk.

The second threat is that the respondent was a witness to a robbery committed by MS-13 gang-members. If the respondent is known to the suspects in that case, then it would be consistent with practices in Central America that they would target him for violence out of retaliation and attempts to silence him. Thus, the respondent is in danger both from his former gang and MS-13. It would be difficult to find a place to live where one would be free from the risk of harm by either 18th Street or MS-13. Dr. Boerman stated that he believes there is a six in ten chance that the respondent would be harmed if he were returned to Honduras.

B. Testimony of the Respondent

The respondent, testifying in the Spanish language with an English translation, stated that he is seventeen years-old and from Nueva Suyapa in Honduras. Nueva Suyapa is a poor district of the city where there are many gangs. There, respondent used to live with his mother, his step-father, and four siblings. His step-father and mother would fight regularly and often violently. His step-father would also strike the respondent using objects for minor reasons. To get away from home, the respondent would go to a store with his friends, including Chelito, and play on the game machines. They began going to the store between the ages of seven and nine.

Chelito left for a period of time. When he returned, he was different. He acted more dominant. He would order the group to go out and steal. The respondent complied out of fear that Chelito would beat him if he did not. Chelito began taking orders from Sinestro, a gang leader who had killed many people. On one occasion, when the respondent was between nine and twelve years old, Chelito took the respondent with him and some others to the "Boulevard." Once there, they told the respondent to watch for the police. Again, the respondent did as he was told out of fear that he or his family would be harmed. Chelito and the others kidnaped a man exiting a nightclub and took him to an ATM, where

they made him take out money for them. The others, at Chelito's command, thereafter took the man to the hills and beat his head with rocks. In all, the respondent acted as a lookout ten to eleven times. The respondent feels remorse for his involvement.

Chelito made the threat that if the respondent did not join Los Puchos, he would kill the respondent's family. Respondent felt that Chelito's threat was serious. Chelito had attacked his own brother with a gun and was known for committing robberies and rapes. As a result, the respondent believed that Chelito would not hesitate in harming his family. To avoid Chelito, the respondent began working for his brother-in-law. A gang-member named Chicho came looking for the respondent at his home at one point. The gang also looked for him at his school. According to the respondent, he could not go the police because the gang would have killed him or harmed his family. Once the respondent recognized that the harassment was continuing, he stopped working for his brother-in-law.

The respondent next worked with his cousins as a bus fare collector. They were frequently robbed by gangs. In one incident, they were robbed at gunpoint by MS-13 gang-members. The bus owner believed that the respondent and his cousin had stolen the money and fired both of them. When the respondent went to the bus station the next day to look for work, he saw the MS-13 gang members who had robbed him the day before and identified them as the thieves. Police officers then arrested the gang members. The gang members threatened that they would get the respondent when they got out. At the police station, the officers offered to kill the gang members, but the respondent declined. Out of fear of reprisal from the gang, the bus owner decided not to press charges. Although the police did not take a formal statement from the respondent given his young age, the respondent did give an oral statement. The police later sent him a subpoena to testify against the gang members. The respondent feared that he would be killed if he testified or that the gang members would carry out their threat. Not long after receiving the subpoena, the respondent fled to the United States because of the danger he was now in from both Chelito's gang and MS-13.

After the respondent left Honduras, gang members attempted to rape his sister. The respondent's mother and siblings, consequently, moved to Nicaragua. According to the respondent, he cannot live with them in Nicaragua because he does not have the papers to live there legally, nor does he want to live with his family because he is afraid that they would be hurt by the gangs. For the same reason, he could not live with his sister in Honduras. In addition, the respondent cannot live with his natural father, who resides legally in the United States. The cousin that lives with his natural father told the respondent that he could not live with them.

The respondent fears that the gangs will harm him because of the crimes he witnessed if he is returned to Honduras. Chelito and his gang will likely believe the respondent is a traitor to them and that he has been working with the police given his extended absence from the area. If Chelito does not

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forgive him for avoiding the gang, the respondent will be killed.

III. Credibility

Before determining whether the respondent meets the statutory criteria required for Asylum, Withholding of Removal, and CAT relief, the Court will address the credibility of the respondent in its entirety. Singh v. Ashcroft, 301 F.3d 1109, 1111 (9th Cir. 2002). In this case the Court finds that the respondent is credible. Throughout these removal proceedings, the Court had the opportunity to observe the demeanor, responsiveness, and specificity of the respondent, and based upon such observation, the Court does not doubt the overall veracity of his testimony with regard to the material elements of his claims.

The Court also had the opportunity to evaluate the responsiveness, specificity, inherent plausibility of the facts presented by the respondent's witness, the consistency between his written and oral statements, the internal consistency of such statements, and other relevant factors. Based upon these, the Court does not doubt the overall veracity of the witness' testimony with regard to the material elements of the respondent's claim. Therefore, the Court finds the respondent and his witness are credible and accordingly affords their testimonies full evidentiary weight.

IV. Legal Standard for Asylum

A. Burden of Proof

Respondent bears the evidentiary burdens of proof and persuasion in any application for asylum under section 208 of the Act or withholding of removal under section 241(b)(3)(A) of the Act. Matter of Acosta, 19 I&N Dec. 211, 214-215 (BIA 1985), modified by Matter of Mogharrabi, 19 I&N Dec. 439, 446-47 (BIA 1987); 8 C.F.R. §§ 1208.13(a), 1208.16(b) (2004). An applicant must also demonstrate that he is entitled to asylum as a matter of discretion. Kalubi v. Ashcroft, 364 F.3d 1134, 1137 (9th Cir. 2004). An applicant, however, is not eligible for asylum if he 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.[2] INA § 208(b)(2)(A)(i) Similarly, an alien

[2] In making this determination, the Court must utilize a two-part test. First, individual accountability must be established. Vukmirovic v. Ashcroft, 362 F.3d 1247, 1252 (9th Cir. 2004). In this regard, it must be shown that the alien was actively involved in the persecutorial acts. Laipenieks v. INS, 750 F.2d 1427, 1431 (9th Cir.1985). While this standard does not require actual "trigger-pulling," see In re A-H-, 23 I. & N. Dec. at 784 (stating that the persecutor bar "do[es] not require *direct* personal involvement in the acts of persecution" (emphasis added)), mere acquiescence or membership in an organization is insufficient to bar relief. Miranda-Alvarado v. Gonzales, 449 F.3d 915, 926-29 (9th Cir. 2006); Laipenieks, 750 F.2d at 1431; see also Kalubi, 364 F.3d at 1139; Matter of

is not eligible if there are serious reasons for believing that he has committed a serious nonpolitical crime outside the United States prior to his arrival in the United States. INA § 208(b)(2)(A)(iii).

B. Definition of a "Refugee"

An asylum applicant must establish that he is a "refugee." INA § 208(b)(1). An applicant may be granted asylum if he is a "refugee" within section 101(a)(42) of the Act, which states the following:

> The term "refugee" means . . . any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself to the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]

INA § 101(a)(42); 8 C.F.R. § 1208.13(b)(1). An alien may qualify as a refugee either because he has suffered past persecution or because he has a well-founded dear of future persecution. 8 C.F.R. § 1208.13(b). The source of the persecution must be the government or forces that the government is unwilling or unable to control. Lolong v. Gonzales, 400 F.3d 1215, 1218 (9th Cir. 2005); Mashiri v. Ashcroft, 383 F.3d 1112, 1119 (9th Cir.2004).

1. Persecution

There is no universally accepted definition of "persecution." However, the 1951 Convention Relating to the Status of Refugees suggests that a threat to life or freedom on account of race, religion, nationality, political opinion, or membership in a particular social group would constitute persecution. A similar approach was adopted by the Board of Immigration Appeals in Matter of Acosta, 19 I&N Dec. at 222, which explained "persecution" to mean "either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." In addition, "'persecution'

Rodriguez-Majano, 19 I&N Dec. 811, 814-15 (BIA 1988) ("[M]ere membership in an organization, even one which engages in persecution, is not sufficient to bar one from relief, but only [sic] if one's action or inaction furthers that persecution in some way."). Rather, the Court 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. Vukmirovic, 362 F.3d at 1252. Whether one's actions were material to the persecution "is measured by examining the degree of relation his acts had to the persecution itself: How instrumental to the persecutory end were those acts? Did the acts further the persecution, or were they tangential to it?" Miranda-Alvarado, 449 F.3d at 928. Second, the Court should consider the surrounding circumstances, such as whether the alien had acted in self-defense, to determine whether the applicant had assisted or otherwise participated in persecution. Vukmirovic, 362 F.3d at 1252-53.

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as used in [INA] section 101(a)(42)(A) clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome." Id. at 223. Persecution would also include other serious violations of human rights based on one of the five reasons. Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ¶ 51 (1992) (hereinafter Handbook). An asylum applicant may be subjected to acts, which individually, would not amount to persecution; however, the combination of factors may establish persecution based on a cumulative ground. Id. at ¶ 52. An alien may qualify as a refugee either because he has suffered past persecution or because he has a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b).

Various forms of physical violence, including rape, torture, assault, and beatings, amount to persecution. See Chand v. INS, 222 F.3d 1066, 1073-74 (9th Cir. 2000) ("Physical harm has consistently been treated as persecution."). Additionally, detention and confinement may constitute persecution. Kalubi, 364 F.3d at 1136 (imprisonment in over-crowded Congolese jail cell with harsh, unsanitary and life-threatening conditions established past persecution).

2. Past Persecution

An applicant may establish refugee status based on past persecution if the applicant can establish that he has previously suffered persecution in his country of nationality, on account of one of the five statutory reasons. INA § 101(a)(42)(A); 8 C.F.R. § 1208.13(b)(1). In order to establish past persecution, an applicant must show: (1) an incident, or incidents, that rise to the level of persecution; (2) that is "on account of" one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either "unable or unwilling" to control. Navas v. INS, 217 F.3d 646, 655–56 (9th Cir. 2000). Once an applicant establishes past persecution, he will be presumed to have a well-founded fear of future persecution, unless the applicant's fear of future persecution is unrelated to the past persecution. 8 C.F.R. § 1208.13(b)(1).

The presumption of a well-founded fear based on past persecution is rebuttable. Id. If the applicant establishes that he has been persecuted for one of the five statutory reasons, then the burden shifts to the Government to show that there is little likelihood of persecution in the country of nationality. Matter of Chen, 20 I&N Dec. 16 (BIA 1989); 8 C.F.R. § 1208.13(b)(1)(i). For instance, an asylum application based on past persecution may be denied if there has been a fundamental change in circumstances in the applicant's country of nationality, such that the applicant no longer has a well-founded fear of persecution based on one of five statutory reasons. 8 C.F.R. § 1208.13(b)(1)(i)(A); see also Matter of N-M-A, 22 I&N Dec. 312, 312 (BIA 1998) (Government need only prove that the applicant no longer has a well-founded fear of persecution from his original persecutors). Also, the presumption may be rebutted if the applicant could avoid future persecution by relocating to another

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part of her country of nationality and, given the circumstances, it would be reasonable to expect the applicant to do so.[3] 8 C.F.R. § 1208.13(b)(1)(i)(B).

3. Well-Founded Fear of Future Persecution

If an alien can not show past persecution, the alien is still eligible for asylum based on a fear of future persecution. Generally, in order to demonstrate a "well-founded fear" of persecution, an alien must demonstrate: (1) a genuine fear of returning to the country; and (2) that a reasonable person under the circumstance would fear persecution. See Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

An asylum applicant's well-founded fear of persecution must be both subjectively genuine and objectively reasonable. Sael v. Ashcroft, 386 F.3d 922, 924 (9th Cir. 2004) (citing Mgoian v. INS, 184 F.3d 1029, 1035 (9th Cir.1999)). The subjective component is satisfied by a showing that the alien's fear is genuine. Singh v. Ilchert, 63 F.3d 1501, 1506 (9th Cir. 1995); Diaz-Escobar v. INS, 782 F.2d 1488 (9th Cir. 1986); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1283 n. 11 (9th Cir. 1984); see Mgoian, 184 F.3d at 1035 (holding that an applicant may satisfy the subjective component by credibly testifying that he genuinely fears persecution). The objective component of "well-founded fear" requires a showing "by credible, direct, and specific evidence in the record" that persecution is a reasonable possibility. Singh, 63 F.3d at 1506 (quoting Diaz-Escobar, 782 F.2d at 1492); see INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (ten percent possibility sufficient); Sael v. Ashcroft, 386 F.3d 922, (9th Cir. 2004) (same); see also 8 C.F.R. § 208.13(b)(2) (2006). The objective component may be satisfied "by the production of specific documentary evidence or by the credible and persuasive testimony of the applicant." Singh, 63 F.3d at 1506 (quoting Desir v. Ilchert, 840 F.2d 732, 726 (9th

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[3] In considering the reasonableness of internal relocation, the Court should consider, but is not limited to:

> considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

8 C.F.R. § 1208.13(b)(3). In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored. Id. In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate. Id.

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Cir. 1988)).

The Board of Immigration Appeals set forth a four-prong test for identifying a "well-founded" fear of persecution in Matter of Acosta, 19 I&N Dec. at 211, with a modification presented in Matter of Mogharrabi, 19 I&N Dec. at 439. An applicant may be deemed to have a well-founded fear of persecution if the following four elements are established: (1) the applicant possesses a belief or characteristic that the persecutor seeks to overcome in others by a means of punishment; (2) the persecutor is aware, or could become aware, that the applicant possesses this belief or characteristic; (3) the persecutor has the capability of punishing the applicant; and (4) the persecutor has the inclination to punish the applicant. Matter of Mogharrabi, 19 I&N Dec. at 446 (citing Matter of Acosta, 19 I&N Dec. at 226).

An applicant, again, does not have a well-founded fear of persecution if he could avoid persecution by relocating to another part the country of nationality, and if, under all circumstances, it would be reasonable to expect the applicant to do so. 8 C.F.R. § 1208.13(b)(2)(ii).

4. "On Account of" a Protected Ground

In order to qualify as a refugee, an applicant must demonstrate past persecution or a well-founded fear of persecution for one of the five statutory reasons, which include race, religion, nationality, membership in a particular social group,[4] or political opinion.[5] INA § 101(a)(42). The

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[4] The respondent has the burden of demonstrating both that he was a member of a particular social group and that past or feared persecution satisfies the "on account of" requirement in the "refugee" definition. 8 C.F.R. § 1208.13(a) (2006). In meeting this burden, the respondent must initially identify the "group" on which the claim is based and demonstrate that such a group is a "particular social group" as that term is used in the "refugee" definition. In Re A-M-E- & J-G-U-, 24 I&N Dec. 69, 73 (BIA 2007). The group must be defined with the requisite clarity. Id. at 74; Matter of C-A-, 23 I&N Dec. 951, 956-57 (BIA 2006) (further finding the respondent's proposed group of "noncriminal informants" was "too loosely defined). The members of a particular social group must "share a common, immutable characteristic." Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985). However, the Court does not generally require a "voluntary associational relationship," "cohesiveness," or strict "homogeneity among group members." In Re A-M-E- & J-G-U-, 24 I&N Dec. at 74 (citing Matter of C-A-, supra at 956-57). The characteristic may be innate, such as "sex, color, or kinship ties," or it may be a shared past experience such as "former military leadership or land ownership." Id. In either event, the group characteristic must be one "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." Id.

Social visibility, furthermore, is an important factor in the particular social group determination. In Re A-M-E- & J-G-U-, 24 I&N Dec. at 74; see Matter of C-A-, supra at 957 (holding that "noncriminal informants working against the Cali drug cartel" in Colombia were not a particular social group). The shared characteristic of the group should generally be recognizable by others in the community. In Re A-M-E- & J-G-U-, 24 I&N Dec. at 74. Whether a

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persecution or fear of persecution may be the result of one reason or from a combination. Handbook at ¶ 66; see also Gafoor v. INS, 231 F.3d 645, 650 (9th Cir. 2000) ("[A]n applicant need only 'produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or implied protected ground.'" (quoting Borja v. INS, 175 F.3d 732, 736 (9th Cir. 1999) (en banc)). The applicant must provide some evidence, direct or circumstantial, that the persecutor was or would be motivated to persecute him because of the victim's actual or imputed status or belief. Sangha v. INS, 103 F.3d 1482, 1486-87 (9th Cir. 1997). That an applicant holds a political opinion "is not, by itself, enough to establish that any future persecution would be 'on account' of this opinion. He must establish that the political opinion would motivate his potential persecutors." Njuguna v. Ashcroft, 374 F.3d 765, 770 (9th Cir. 2004). An applicant may manifest his or her political opinion by membership or participation in an organization with political purposes or goals. See, e.g., Montoya-Ulloa v. INS, 79 F.3d 930, 931 (9th Cir. 1996) (membership in political group opposing the Sandinistas).

An imputed political opinion, additionally, is a basis for relief and arises when "[a] persecutor falsely attributes an opinion to the victim, and then persecutes the victim because of that mistaken belief about the victim's views." Canas-Segovia v. INS, 970 F.2d 599, 601-02 (9th Cir. 1992).

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proposed group has a shared characteristic with the requisite "social visibility" must be considered in the context of the country of concern and the persecution feared. Id.

[5] In a claim of persecution on account of political opinion, the applicant must allege specific facts from which it can be inferred that he holds a political opinion, which is known to his persecutor, and that the persecution was or will be on account of that political opinion. See INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992). Persecution on account of a political opinion presupposes that:

> the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant . . . . The relative importance or tenacity of the applicant's opinions—in so far as this can be established from all the circumstances of the case—will also be relevant.

Handbook, at ¶80. Testimony that the applicant wishes to remain neutral in the midst of civil conflict in his country is not sufficient to establish a well-founded fear of persecution on account of a political opinion. Matter of Vigil, 19 I&N Dec. 572 (BIA 1988).

In section 601(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Congress stated that forced abortion, involuntary sterilization, or other coercive population control measures constitute persecution on account of political opinion. INA § 101(a)(42); see also Matter of Y-T-L-, 23 I. & N. Dec. 601, 603 (BIA 2003) (finding that coerced abortion and sterilization constitute permanent and continuous acts of persecution and necessarily demonstrate a well-founded fear of persecution); Matter of X-P-T-, 21 I. & N. Dec. 634 (BIA 1996).

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V. Legal Standard for Withholding of Removal Pursuant to Section 241(b)(3) of the Act

The requirements for asylum and withholding of removal are similar, but not identical. An applicant must show that his "life or freedom would be threatened in such country on account of the alien's race, religion, nationality, membership in a particular social group, or political opinion." INA § 241(b)(3)(A). This requires the applicant to demonstrate that "it is more likely than not" he would be subject to persecution if required to return to his native land, a more stringent standard than the "well-founded fear" standard required for asylum. INS v. Stevic, 467 U.S. 407, 429-30 (1984). If the Court grants an applicant withholding of removal, he may not be returned to the country where he would suffer persecution. INA § 241(b)(3)(A).

Like asylum, there are several statutory bars to withholding of removal. Any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social or political opinion is not eligible for withholding. INA § 241(b)(3)(B). In addition, the Court must deny an application for withholding of removal if the alien has been convicted by a final judgment of a particularly serious crime; there are serious reasons for believing that the applicant has committed a serious non-political crime outside the United States prior to entering the United States; or there exist reasonable grounds for regarding the applicant as a danger to the security of the United States. Id.; 8 C.F.R. § 1208.16(d)(2). However, unlike asylum, once an alien has established that he qualifies for withholding of removal, relief is mandatory. INA § 241(b)(3)(A).

VI. Legal Standard for Relief under the Convention Against Torture (CAT)

Pursuant to Article III of CAT, the United States may not remove an applicant to a country where it is more likely than not that he would be tortured. 8 C.F.R. § 1208.16(a), (c)(2). Torture is an extreme form of cruel and inhuman treatment and is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. 8 C.F.R. § 1208.18(a). Torture must be caused by or resulting from intentional or threatened infliction of severe physical pain or suffering, threatened or actual administration or application of mind altering substances or similar procedures, or threatened imminent death. Id. Moreover, to constitute torture, the torturer must act for one of the following purposes: (1) obtaining information or a confession; (2) punishment for an act committed or suspected of having committed; (3) intimidation or coercion; or (4) any reason based on discrimination of any kind. Id.

In addition, "torture" only includes acts that occur in the context of government authority. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8483 (1999) (codified in 8 C.F.R. § 1208.18(a) (2004)); Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000). Correspondingly,

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to qualify for relief under CAT, the torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003) (quoting 8 C.F.R. § 208.18(a)(1) (2003)). A public official's "acquiescence" to torture "requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7). However, "acquiescence" by government officials does not require "actual knowledge or willful acceptance; *awareness* and willful blindness by governmental officials is also sufficient." Zheng, 332 F.3d at 1194-95 (emphasis added).

If the Court determines that the applicant has demonstrated that it is more likely than not that he would be tortured in the country of removal, the application for withholding of removal under CAT shall be granted unless the applicant is subject to mandatory denial. 8 C.F.R. §§ 1208.16(c)(4); 1208.16(d)(1) and (2); Matter of J-E, 23 I&N Dec. 291 (BIA 2002); Matter of Y-L-, A-G-, & R-S-R, 23 I&N Dec. 270 (A.G. 2002); Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000). Withholding of removal must be denied if the applicant is deportable under section 237(a)(4)(D) of the Act (assistance in Nazi persecution or genocide); if the applicant participated in persecution on a basis enumerated in the statute; if he has been convicted of a particularly serious crime; if there is reason to believe that he committed a serious, nonpolitical crime; or if there are reasonable grounds to believe that he is a danger to the security of the United States. INA § 241(b)(3)(B); 8 C.F.R. § 1208.16(d)(2).

Even if the applicant is statutorily barred from withholding of removal, the Court must grant the applicant deferral of removal under 8 C.F.R. section 1208.17 if it is more likely than not that he would be tortured upon removal. 8 C.F.R. §§ 1208.16(c)(4); 1208.17. Deferral of removal offers only limited relief. If the Court grants deferral, DHS may not remove an applicant to a country in which it is more likely than not that he would be tortured; DHS may, however, at any time, file a motion to schedule a hearing to consider whether deferral should be terminated. 8 C.F.R. § 208.17(d). The Court shall reopen the case if DHS presents relevant evidence that was not presented at the previous hearing. Id. Upon reopening, the Court shall conduct a hearing and make a determination *de novo*. Id. In addition, deferral may be terminated at any time based on diplomatic assurances forwarded by the Secretary of State. 8 C.F.R. § 208.17(f).

VII. Analysis

A. Asylum

1. Persecution on Account of Membership in a Particular Social Group

The respondent asserts that he qualifies for asylum based on persecution on account of his

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membership in two particular social groups–(1) children forced to witness crimes by Honduran gangs and subject to death threats to compel recruitment into a gang, and (2) children who come from a dysfunctional family and are targeted by gangs for recruitment because of their weak family ties. (Ex. 7, Tab 3, Respt. Brief, 25-36.) These groups, in light of the Board of Immigration Appeals' decision in In Re A-M-E- & J-G-U-, supra, likely lack the necessary social visibility required to constitute social groups within the meaning of section 208 of the Act. It is doubtful that the shared characteristics of the groups are generally recognizable by others in the relevant community. See In Re A-M-E- & J-G-U-, 24 I&N Dec. at 74; Matter of C-A-, supra at 957. The community involved would be unable to identify whether a person has been made to witness crimes or comes from a "dysfunctional family" and has "weak family ties," respectively. The first group, furthermore, is improperly defined by the persecutory conduct. Accordingly, the respondent's claim for asylum on these grounds is denied.

2. Well-Founded Fear of Future Persecution on Account of Imputed Political Opinion

The Court, nevertheless, finds that the respondent has a well-founded fear of future persecution on account of the imputed political opinion that he is "openly and actively" against domination by the Honduran gangs. (See Ex. 7, Tab 3, Respt. Brief, 40.) The respondent satisfied the subjective component of establishing a well-founded fear of future persecution through credible testimony indicating that he fears death at the hands of Los Puchos, 18th Street, and MS-13 if he is returned to Honduras. (See Ex. 7, Tab 4, Respt. Aff. ¶¶ 62-63, 113-116.) The objective reasonability of his fear is satisfied by the compelling testimonial and documentary evidence.

Honduras is "considered one of the most violent countries in Latin America," with a homicide rate that is higher than that of other countries in the region and has a similarly high rate of physical violence. (Ex. 7, Tab 30, USAID Gang Assessment, 36, 91.) Estimates place the number of gang members as high as 70,000. (Ex. 7, Tab 30, USAID Gang Assessment; see id., Freedom House Art., 1; id., Tab 37, Religious Task Force Art., 1.) Gangs compete to demonstrate the most brutality. (Id. at 37.) Most of the crime takes place in Tegucigalpa and San Pedro Sula. (Id. at 91.) 18th Street and MS-13, which are the largest and most violent of the gangs, have largely consolidated many of the smaller gangs into their structures and have influence throughout the country. (See Ex. 7, Tab 30, USAID Gang Assessment, 93; id., Tab 26, Country Rept. 2005, 1.) The two gangs account for approximately forty percent of gang membership nationwide. (Id., Tab 26, Country Rept. 2005, 10.)

The gang-related crime, together with the government instability it creates, effectively challenges the power of the Honduran government. (See Ex. 3, Dept. of State Issue Paper, 1; Ex. 7, Tab 38, "Street Gangs," iii, v.) The transnational gangs are now powerful enough to "destabilize, challenge, and destroy targeted societies and states." (Ex. 7, Tab 38, "Street Gangs," 21.) Foremost, gang activities

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create instability and insecurity within the country and undermine regional security. (Id.; Ex. 3, Dept. of State Issue Paper, 1; see id., Tab 38, "Street Gangs," 1.) The gangs utilize violence and other illicit means to exert their power in order to indirectly seize control of areas of the country. (Ex. 7, Tab 38, "Street Gangs," 7, 8.) This is exemplified by the Honduran cities of Tegucigalpa and San Pedro Sula, where gangs have "operated virtual fiefdoms in neighborhoods, demanding that transport workers and inhabitants pay . . . 'war taxes.'" (Ex. 3, Dept. of State Issue Paper, 3.) Furthermore, in order to provide for their freedom of action and to create the commercial environment they desire, the common objective of the gangs becomes to displace or control the country's government in the regions they occupy. (Id. at iii, 2.) These sophisticated gangs develop "political agendas to improve their market share and revenues." (Id. at 10.) For example, gangs responded to the implementation of *Mano Dura* laws by "leaving the bodies of tortured and decapitated victims in the streets with notes attached" warning the government to cease its actions against gang members. (Ex. 7, Tab 8, "Central American Gangs," 9.) In December of 2004, twenty-eight persons were killed on a bus in San Pedro Sula as reprisal for stricter government enforcement of anti-crime laws. (Ex. 3, Dept. of State Issue Paper, 5.) Moreover, using their extensive resources, gangs bribe government officials, intimidate those that cannot be bribed, and murder those that will not bend in the face of intimidation. (Id. at 25.) Thus, according to Dr. Max Manwaring, although gangs and insurgents differ in their original motives and modes of operation, "the gang phenomenon is a mutated form of urban insurgency." (Ex. 7, Tab 38, "Street Gangs," iii, 2.) The transnational gangs, consequently, pose three major threats to the authority of the government. First, through violence, coercion, and other illicit activities, they undermine the ability of the government to perform its functions. (Id. at 25.) Second, they interfere with the legitimate operation of government by exerting their wills over elected officials. (Id. at 25-26.) Third, by seizing portions of the state, they act as "states within a state." (Id. at 26.)

As part of their constant efforts to expand their power and influence, gangs like 18th Street and MS-13 actively recruit or otherwise conscript youths. (See Ex. 7, Tab 8, "Central American Gangs.") Gangs routinely use neighborhood youths as lookouts during the commission of crimes and use the lookouts' knowledge of the crimes to coerce them into joining the gang. (Ex. 7, Tab 6, Boerman Aff. ¶ 22.) Respect "and loyalty are the primary traits that the gangs inculcate . . . and violation of these norms and expectations are met with severe retribution, including physical harm and death." (Ex. 7, Tab 6, Boerman Aff. ¶ 22.) Accordingly, gangs or *maras*, as they are known in Honduras, do not readily allow people with such knowledge of their crimes to sever ties out of fear that those individuals will be coerced by the police to testify against them, since police officers often target those with former ties to a gang for potentially violent interrogation and incarceration in order to obtain information about the gang and its activities. (Ex. 7, Tab 6, Boerman Aff. ¶ 27; id., Tab 8, "Central American Gangs," 5.) Moreover, giving information about the gang to the police "is tantamount to a death sentence" by members of their former gang. (Ex. 7, Tab 8, "Central American Gangs," 5.)

Gangs employ intimidation tactics to prevent people from leaving the gang. (Ex. 7, Tab 6, Boerman Aff. ¶¶ 24, 25, 27; id., Tab 37, Religious Task Force Art., 5.) They engage in beatings, assassinations, and threaten the former lookouts with death if they do not join the gang or later attempt to leave. (Ex. 7, Tab 6, Boerman Aff. ¶¶ 24, 25, 27; id., Tab 37, Religious Task Force Art., 5.) In October of 2003, for example, a gang killed the mother and eighty-four year-old grandmother of a boy who refused to join the gang. (Ex. 7, Tab 37, Religious Task Force Art., 1.) In addition, youths are regularly injured or killed by their former gangs for attempting to leave the gang or for participating in intervention programs. (Ex. 7, Tab 8, "Central American Gangs," 5.) Since its start, twenty-three youths involved in Save the Children's program to reintegrate former gang-members into society have been killed. (Ex. 7, Tab 30, USAID Gang Assessment, 100.) The individuals also remain at risk from rival gangs. (Ex. 7, Tab 8, "Central American Gangs," 5.) Hence "[i]f a boy leaves his *mara* to lead a normal life, the *mara* kills him" and, regardless of whether he chooses to leave or to stay in the gang, he is at risk of being killed by another *mara*. (Ex. 7, Tab 37, Religious Task Force Art., 5.)

In the present case, the respondent was subjected to threats of violence for refusing to join the gang after witnessing crimes by Chelito, Los Puchos, and, indirectly, 18th Street. The respondent witnessed or knew of the robberies, rapes, and beatings committed by Chelito's gang. (Ex. 7, Tab 4, Respt. Aff. ¶ 59.) Among the crimes he witnessed, the respondent saw Chelito robbing and subsequently beating a man with a rock. (Ex. 7, Tab 4, Respt. Aff. ¶ 55.) Chelito threatened that the respondent's family would be killed if Respondent did not join Los Puchos. (See Ex. 7, Tab 4, Respt. Aff. ¶ 77.) The respondent, however, opposed the subversive activities of the gang and did not want to associate with its members. (See Ex. 7, Tab 4, Respt. Aff. ¶¶ 42, 56-58, 60, 70.) He attempted to distance himself and was forced to leave school when Chelito and 18th Street gang-members began coming there to get him to join their gang. (Ex. 7, Tab 4, Respt. Aff. ¶ 42.) Once the gang members began actively searching for him, the respondent fled the country, but was caught and returned to Honduras by the police in Mexico. (Ex. 7, Tab 4, Respt. Aff. ¶¶ 70-71.) Thereafter, the respondent attempted to hide at home until an 18th Street gang-member finally came looking for him there.(Ex. 7, Tab 4, Respt. Aff. ¶¶ 79-80.) Later, after being robbed by members of MS-13, the respondent identified the individuals that were responsible and made an oral statement to the police about the incident. (See Ex. 7, Tab 4, Respt. Aff. ¶¶ 91-93.) The police later sent him a subpoena to have him testify against the MS-13 members. (See Ex 9, Subpoena.) After the respondent's second flight from Honduras, 18th Street gang-members attempted to rape his sister, although it is unclear whether or not they were aware of her relation to the respondent. (See Ex. 7, Tab 16, Herrera Aff. ¶¶ 37-41.) Thus, it is evident that the respondent's fear of future persecution is reasonable.

In light of the long and violent history of Honduran gangs viewing refusal to join as betrayal and imputing on these individuals the political opinion of opposition to gang domination, the Court finds that it is probable that the respondent will be subject to persecution by the gangs if he is returned to

Honduras. (See Ex. 7, Tab 4, Respt. Aff. ¶ 63; id., Tab 16, Herrera Aff. ¶¶ 3, 55.) Despite the involvement of MS-13 gang-members in the incident, Los Puchos and 18th Street are likely to view the respondent's cooperation with the police after he was robbed as affirmation of the political opinion they have imputed on him. MS-13 will also be searching for the respondent due to his role in the arrest of its members. From the perspective of the gangs, then, the respondent is seeking to challenge their dominance through his refusal to join the gang and by allying himself with the police. Given this, the information the respondent possesses about the gangs makes him a threat to them. As a result, he will be targeted for persecution or death. (See Ex. 7, Tab 16, Herrera Aff. ¶¶ 3, 73.) Hence, the respondent has established the subjective and objective components necessary to establish a well-founded fear of future persecution on account of an imputed political opinion.

3. Government Unable to Control Persecutors

The Honduran government is unable to control the gangs. (Ex. 7, Tab 32, U.N. Rept., 2.) Honduras is largely committed to the *Mano Dura* approach. (Ex. 7, Tab 30, USAID Gang Assessment, 6.) However, the police are under-funded and lack the adequate training, equipment, and other resources necessary to combat the gang problem. (Ex. 3, Dept. of State Issue Paper, 3; Ex. 7, Tab 30, USAID Gang Assessment, 94, 97; id., Tab 27, Country Rept. 2004, 5; id., Tab 27, Country Rept. 2003, 7; see id., Tab 29, Caza Alianza Analysis, 5.) Intelligence sharing on gangs is uncoordinated and often does not occur. (Ex. 7, Tab 30, USAID Gang Assessment, 97.) Furthermore, of the 7,500 total police officers, only 2,500 are on duty at any given time to watch over a population of approximately seven million. (See Ex. 7, Tab 30, USAID Gang Assessment, 97; Ex. 3, Dept. of State Issue Paper, 1.) Again, some estimates place the number of gang members as high as 70,000. (Ex. 7, Tab 30, USAID Gang Assessment; see id., Freedom House Art., 1; id., Tab 37, Religious Task Force Art., 1; Ex. 3, Dept. of State Issue Paper, 2.) Consequently, because of the police force's inadequate resources and the disparity in manpower, the number of homicides are increasing despite the anti-gang legislation. (Ex. 7, Tab 30, USAID Gang Assessment, 27.)

Even the police are not safe from the gangs. Officers are regularly targeted as part of gang initiation strategies. (Ex. 3, Dept. of State Issue Paper, 5.) Some gangs identify police officers who live in neighborhoods under their control and "eliminate those law enforcement personnel." (Id.) In 2002, Honduras' Ministry of Public Security reported that gang-members were responsible for the deaths of at least eleven police officers during that year. (Ex. 7, Tab 27, Country Rept. 2003, 5.)

The police also do not offer any protection to witnesses of gang crimes. (Ex. 7, Tab 6, Boerman Aff. ¶ 27; id., Tab 16, Herrera Aff. ¶ 36.) As a result, the gangs freely and routinely engage in witness intimidation and murder. (Ex. 7, Tab 6, Boerman Aff. ¶ 24; see id., Tab 26, Country Rept. 2005, 5.) In August 2003, for example, members of a gang killed human rights activist Jose Santos

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Callejas after he identified them to the police as having committed a murder. (Ex. 3, Tab 27, Country Rept. 2003, 4.) Similarly, in May of 2001, Miguel Matute and Juan Isaias Cruz were taken from their homes and killed for having witnessed a crime by the gang. (Ex. 3, Tab 31, Amnesty Int'l Rept., 9.) At least one public official has also fallen victim to harassment and death threats for having witnessed a crime. (Ex. 7, Tab 31, Amnesty Int'l. Rept., 13.) Hence, the government's inability to protect its citizenry and failure to prosecute those who harm them has allowed gangs to "literally get away with murder." (Ex. 7, Tab 32, U.N. Rept., 3.)

There is evidence that, rather than protecting youths who may have knowledge of gang activities, the police are, themselves, engaged in persecution of these individuals. There are reports of extrajudicial killings or "social cleansing" of suspected gang-members and affiliates by the police and security forces acting in concert with civilian vigilante groups. (See Ex. 7, Tab 30, USAID Gang Assessment, 36, 91-92; id., Tab 8, "Central American Gangs," 5; id., Tab 26, Country Rept. 2005, 1; id., Tab 27, Country Rept. 2004, 3, 12; id., Tab 28, Country Rept. 2003, 1, 3; id., Tab 33, Jones Article, 2; id., Tab 36, U.N. Mission Rept., 10 (noting that the police were responsible for 5-9 % of the killings between the years 1998 and 2000), 24; id., Tab39, Human Rights Update, 18-19.) Approximately 2,825 youths have been killed in the last five years and nearly thirty-five more are killed every month. (Ex. 7, Tab 30, USAID Gang Assessment, 92, 94.) The police were suspected of being involved in five percent of the killings of youths under age twenty-three in 2002 alone. (Ex. 7, Tab 27, Country Rept. 2003, 2.) Altogether, between January 1998 and August 2002, the police were found to be responsible for the killing of "approximately 500 children." (Ex. 7, Tab 27, Country Rept. 2003, 16.) Such violence against children suspected of being or having ties to gang-members has grown dramatically over the past few years. (Ex. 7, Tab 33, Jones Article, 1.) Thus, it is apparent that the police are unable to control the gangs and are averse to helping anyone with potential gang affiliations.

4. Internal Relocation is Not Reasonable

The Court finds, considering all the circumstances, that it is not reasonable to expect the respondent to attempt to avoid future persecution by relocating to another part of Honduras. MS-13 and 18th Street have become transnational organizations with criminal activities extending across international boundaries. (Ex. 7, Tab 30, USAID Gang Assessment, 6; id., Tab 37, Religious Task Force Art., 3.) These gangs "pervade[] urban enclaves in every country" in the Central American and Mexican regions. (Id. at 9.) Gang members move freely between the Central American and Mexican borders. (Ex. 7, Tab 8, "Central American Gangs," 4-5.) Where a person has significantly offended a gang, reports suggest that the gang will seek out the person in other countries as well as in Honduras. (Ex. 3, Dept. of State Issue Paper, 6.) It is unrealistic, given these facts, to expect the respondent to be safe from the gangs within Honduras.

Credible testimony by Dr. Boerman also established that, although gangs have not yet taken root in rural areas, relocation to these rural areas is not a viable solution. It is nearly impossible to survive in rural areas of Honduras, particularly in the absence of a family to provide support. This ultimately forces migration back to urban areas. Once he is back in the urban areas, the respondent will again be in danger of persecution or death at the hands of the gangs.

It is also telling that, after the rape attempt on the respondent's sister, the district attorney told the respondent's mother to go as far away as possible if she "wanted to live in peace." (See Ex. 7, Tab 16, Herrera Aff. ¶¶ 45-46.) The respondent's mother believed that her family could only find "a little peace" if they left Honduras and moved to Nicaragua. (Id. at ¶ 64.) Consequently, the Court does not believe that it would be reasonable to expect the respondent to relocate within Honduras.

5. Respondent is Not a Persecutor and Did Not Commit a Serious Nonpolitical Crime Outside of the United States

The respondent did not order, incite, assist or otherwise participate in the persecution of any person on account of race, religion nationality, membership in a particular social group, or political opinion. The respondent was not a member of the gang, but did serve as a lookout for Chelito and Los Puchos while they engaged in their criminal activities. In this capacity, according to Dr. Boerman's expert testimony, the respondent's duty was to stand on the periphery of the crime scene and keep a watch for any police or security officers. At times, he did not see the offense being committed. (See Ex. 7, Tab 4, Respt. Aff. ¶ 59.) Although the respondent's role was important, he was not directly involved in the persecutorial acts. More importantly, Dr. Boerman testified that the crime would not be deterred even in the absence of a lookout. This indicates that the respondent's role was not instrumental to the persecution.

The circumstances surrounding the respondent's participation are also compelling. The respondent served as a lookout because, as previously discussed, he reasonably believed that he would be killed or that his family would be harmed if he disobeyed. (See Ex. 7, Tab 4, Respt. Aff. ¶ 63.) He sought to escape from having to serve as a lookout by working from 4:00 a.m. to 9:00 p.m. (Id. at ¶¶ 69, 85; see Ex. 7, Tab 16, Herrera Aff. ¶¶ 32-35.) He also attempted to flee the country, and was finally successful on his second attempt. (Ex. 7, Tab 4, Respt. Aff. ¶¶ 70, 103.)

As a lookout, furthermore, the respondent was not in a position to exert influence over the leadership, membership, or activities of the gang. Rather, according to Dr. Boerman, lookouts are there to serve the needs of the gang and to do what they are told. Consequently, because his participation was out of fear of harm to himself or his family and was non-essential to the commission of the gang's criminal acts, the Court finds that the respondent is not barred under section 208(b)(2)(A)(i)

of the Act.

The Court, furthermore, likens the respondent's circumstances to those of forcibly-conscripted, child soldiers, considering the extreme duress involved in securing his participation as a lookout. See INS v. Cardoza-Fonseca, 480 U.S. 421, 429 n. 22 (1987) (stating that the Handbook provides "significant guidance" in construing the United States' obligations under the Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 (1967)); Ex. 7, Tab 40, UNHCR Advisory Opinion (emphasizing that in cases of child soldiers, issues such as "age, mental and emotional maturity, *voluntariness of service*, and treatment by other military personnel all factor heavily in determining whether exclusion from refugee status are appropriate.") It is well established that youths who refuse to comply with the demands of the gang are killed and that, resultingly, the respondent's service was not voluntary. (See e.g. Ex. 7, Tab 8, "Central American Gangs.") Moreover, under Article 40 of the 1989 Convention on the Rights of the Child ("CRC"), each state must establish a minimum age for criminal liability below which the child may not be considered to have committed an excludable offense. (Ex. 7, Tab 40, UNHCR Advisory Opinion.) Although the United States has only signaled its intent to ratify this provision as a signing party to the CRC,[6] a person is generally considered a "juvenile," for purposes of criminal liability in this country, until he reaches the age of eighteen. See 18 U.S.C. § 5031. The respondent was well below this age at the time of the offenses. (See Ex. 7, Tab 4, Respt. Aff.) Again, the respondent was not actively involved in the offenses and only served as a lookout. Additionally, the respondent does not have a criminal record in Honduras. (Ex. 7, Tab 11, Crim. Rec.) Hence, the Court concludes that the respondent did not commit a serious nonpolitical crime outside the United States prior to his arrival in this country.

The respondent, therefore, has established that he has a well-founded fear of future persecution on account of an imputed political opinion and that he is not statutorily barred under section 208 of the Act. Consequently, his application for asylum will be granted.

B. Withholding of Removal and Relief Under CAT

Because the Court determines that the respondent is eligible for asylum, it need not reach a decision regarding withholding of removal and relief under CAT.

Accordingly, the following orders shall be entered:

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[6] CRC at http://www.unicef.org/crc (last visited February 13, 2007).

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ORDERS: **IT IS ORDERED THAT** the respondent's application for Asylum pursuant to section 208 of the Act is **GRANTED.**

IT IS FURTHER ORDERED THAT the respondent's application for Withholding of Removal pursuant to Section 241(b)(3) of the Act is **NOT REACHED.**

IT IS FURTHER ORDERED THAT the respondent's application for Withholding or Deferral of Removal pursuant to Article III of the Convention Against Torture pursuant to 8 C.F.R. § 1208.16(c) is **NOT REACHED.**

2/16/2007
Date

LaMonte Freerks
U.S. Immigration Judge

CERTIFICATE OF SERVICE

SERVICE BY: Mail (M) Personal Service (P)
TO: [X] DHS [ ] Alien [X] Alien's Attorney
Date: 2-16-07 By: [redacted] (Court Staff)