UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 06-60629

MA SAN KYWE,
Petitioner,

v.

ALBERTO R. GONZALES, Attorney General of the United States
Respondent

On Appeal from the Board of Immigration Appeals

BRIEF FOR THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the second sentence of Fifth Circuit Rule 29.2 have an interest in this amicus brief. 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

The Office of the United Nations High Commissioner for Refugees (UNHCR) has been charged by the United Nations General Assembly with responsibility for providing international protection to refugees and other persons within its mandate and for seeking durable solutions to the problems of refugees by assisting governments and private organizations. See Statute of UNHCR, U.N. Doc. A/RES/428(V), Annex, PP1, 6 (1950). As set forth in its Statute, UNHCR fulfills its protection mandate by, *inter alia*, "promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." *Id.* at P8(a). UNHCR's supervisory responsibility is formally recognized in the 1951 Convention relating to the Status of Refugees, art. 35, July 28, 1951, 19 U.S.T. 6259 ("1951 Convention") and its 1967 Protocol relating to the Status of Refugees, art. II, Jan. 31, 1967, 606 U.N.T.S. 267 ("1967 Protocol").[1]

The views of UNHCR are informed by more than 50 years of experience supervising the Protocol and the Convention. UNHCR is represented in 116 countries and provides guidance in connection with the establishment and implementation of national procedures for refugee status determinations, and also

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[1] In analyzing refugee protection issues, the most relevant international treaties are the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. The United States signed the 1967 Protocol, which incorporates by reference the substantive provisions of the 1951 Convention, in 1968. Implementing legislation was passed in 1980.

conducts such determinations under its mandate. UNHCR's interpretation of the provisions of the Convention and Protocol are, therefore, integral to the global regime for the protection of refugees.

The present case involves the legal grounds under the Immigration and Nationality Act ("INA") upon which an asylum-seeker may be deemed inadmissible to the United States and denied refugee protection based on assistance provided to a "terrorist organization" as defined by the INA. This case raises fundamental issues regarding the proper interpretation of the 1951 Convention and its 1967 Protocol and their application in the United States. UNHCR is expressly mandated to supervise these multilateral treaties, which serve as the foundation of United States asylum law. Specifically, this case involves the proper interpretation of Article 1F of the 1951 Convention, which provides for the exclusion from refugee status of individuals under certain circumstances and, as applied in the United States, Article 33(2) of the 1951 Convention, which allows for limited exceptions to State Parties' *non-refoulement* (non-return) obligations. Given the potentially serious consequences of the denial of refugee protection, *i.e.*, possible return to persecution, this case implicates the core mandate of UNHCR.[2]

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[2] UNHCR submits this amicus curiae brief in order to explain the analytic framework for resolving issues related to exclusion from international refugee protection and exceptions to the principle of *non-refoulement* as provided for under the Convention and not to offer an opinion on the merits of the applicant's claim.

SUMMARY OF ARGUMENT

In denying Petitioner asylum on the grounds that she provided "material support" to a terrorist organization, the Board of Immigration Appeals (the Board) failed to construe the "material support" bar consistently with United States obligations under the 1967 Protocol. The Board assumed that if its approach violated international law, these violations would be cured by the Executive Branch through its exercise of a discretionary waiver. *In re S-K-*, 23 I. & N. Dec. 936, 942-43 n.7 (BIA 2006). That decision was erroneous in two respects.

First, every indication of congressional intent demonstrates that courts are meant to construe those provisions of the INA affecting refugee protection, including the "material support" bar, in a manner consistent with United States obligations under the 1967 Protocol. For more than two hundred years, it has been the law that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 81 (1804) (Marshall, C.J.). The "law of nations" unquestionably includes the 1951 Convention and 1967 Protocol, as well as the customary international law principle of *non-refoulement*. This principle prohibits the expulsion of a refugee unless he is a threat to the security of the country of refuge or, having been convicted of a particularly serious crime, constitutes a danger to the community of that country.

The *Charming Betsy* doctrine has evolved into a clear statement rule: when a statute can be read in conformity with international obligations, it should be so construed absent a clear indication from Congress that it intended otherwise. There is no such clear statement in the INA. As the Supreme Court recognized in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the legislative history of the 1980 Refugee Act, which created the current framework of asylum law in the United States, makes clear that a primary purpose of the Act's amendments to the INA was to bring the United States into compliance with its obligations under the 1967 Protocol. Since those amendments, including those amendments which implemented the "material support" bar, Congress has never indicated any intent to depart from those obligations.

A construction of the "material support" bar that is consistent with the 1951 Convention and its 1967 Protocol is clearly possible but, despite the clear statement rule, was not applied by the Board in this case. Article 1F and Article 33 of the 1951 Convention are directly relevant to the proper interpretation of the "material support" bar. Article 1F indicates the types of criminal acts which may give rise to exclusion of a person from international refugee protection if it is established that he or she incurred individual responsibility for these acts. Article 33 codifies the principle of *non-refoulement* and prohibits a State from returning a refugee to a risk of persecution except in very limited circumstances. In

interpreting the "material support" bar, the Board should have looked to these sources of international law for guidance.

Second, the Board's view that it was not obligated to apply international law because Congress gave certain Executive Branch officials the unreviewable discretion to waive the "material support" bar was incorrect. Neither the text nor the legislative history of the waiver provision provides any indication that Congress intended for the waiver to exempt the Board or federal courts from their obligation to interpret the "material support" bar in conformity with the 1951 Convention and the 1967 Protocol. Moreover, there is no support in United States domestic law for interpreting a discretionary waiver as exempting federal agencies and courts from their obligation to interpret all applicable laws in a manner consistent with United States obligations under international law. Finally, the Board's assertion that the waiver operates to ensure compliance with international obligations is misplaced: in more than four years since the waiver's enactment, the Executive Branch has never granted a waiver in an asylum case.

The Board's decision to interpret the "material support" bar without regard to the 1951 Convention and the 1967 Protocol cannot be squared with Congress' intent that those provisions of the INA that affect refugee protection be interpreted and applied in a manner consistent with these international obligations. In

reviewing the Board's decision and interpreting the "material support" bar, this Court should remedy the Board's error.

ARGUMENT

I. THE "MATERIAL SUPPORT" BAR MUST BE CONSTRUED CONSISTENTLY WITH UNITED STATES OBLIGATIONS UNDER THE 1967 PROTOCOL

A. Congress Clearly Intended, and Supreme Court Jurisprudence Requires, that the "Material Support" Bar Be Interpreted Consistently With United States Obligations Under The 1967 Protocol

Under INA § 212(a)(3)(B)(iv)(VI),[3] an individual who is found to have provided "material support" to a "terrorist organization," as those terms are defined under the statute, is statutorily ineligible for asylum[4] and withholding of removal.[5] In applying the "material support" bar, this Court's interpretation must be guided by the proper interpretation of the 1967 Protocol Relating to the Status of Refugees.

When Congress enacted the "material support" bar, it legislated against the backdrop of the long-established rule that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *The Charming Betsy*, 6 U.S. at 81. Since Justice Marshall's frequently-cited

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[3] Under this section, "the term 'engage in terrorist activity' means, in an individual capacity or as a member of an organization ... to commit an act that the actor knows, or reasonably should know, affords material support" to a terrorist organization.

[4] INA § 208(b)(2)(A)(v).

[5] INA § 241(b)(3)(B)(iv).

decision, the Supreme Court and lower federal courts have reaffirmed the "*Charming Betsy*" presumption on numerous occasions. *See, e.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641, 646-47 (5th Cir. 2004) (*rev'd on other grounds by Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005)); *United States v. Suerte*, 291 F.3d 366, 373-74 (5th Cir. 2002); *Ali v. Ashcroft,* 213 F.R.D. 390, 405 (W.D. Wash. 2003) ("Because Respondents' proposed interpretation of the statute may result in persecution or deprivation of life in violation of international law, Petitioners' proposed construction is preferred as it reconciles the statute with the law of nations"), *aff'd on other grounds,* 346 F.3d 873 (9th Cir. 2003).

The *Charming Betsy* requirement that statutes be read to comply with the "law of nations" where possible encompasses international law in its entirety, including both treaties and customary international law. *See Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 157-58 (2d Cir. 2003) (*citing* Article 38 of the Statute of the International Court of Justice (ICJ), 59 Stat. 1031, 1060 (1945), to identify sources of international law); *cf. The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction"). Thus, Charming Betsy not only requires that the "material support" provision be read, where possible, to comply with United States treaty obligations under the 1967 Protocol, it also demands that

courts interpreting the provision conform to the customary international law requirement of *non-refoulement*. *The Paquete Habana*, 175 U.S. at 700.

The *Charming Betsy* presumption has evolved into a clear statement rule. *See Cook v. United States*, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."); *see also United States v. Payne*, 264 U.S. 446, 448 (1924) (same); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("There is . . . a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action."). Indeed, the Supreme Court has recognized that the "cardinal principle" of constitutional avoidance—itself the most robust of clear statement rules—originates from the *Charming Betsy* presumption. *DeBartolo Corp. v. Fla. Gulf Coast Bldg. Constr. Trades Council*, 485 U.S. 568, 574-575 (1988). In evaluating the existence of a clear statement, legislative silence alone is not sufficient to violate a treaty. *Weinberger*, 456 U.S. at 32. Rather, when Congress intends to depart from international legal obligations, it must "make an affirmative expression of congressional intent to this effect." *Trans World Airlines*, 466 U.S. at 252.[6]

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[6] This Court's decision in *Miss. Poultry Assoc., Inc. v. Madigan*, 992 F.2d 1359 (5th Cir. 1993), does not require a contrary outcome. In *Mississippi Poultry*, the Court relied on the Federal Circuit's decision in *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966

The text of the INA generally, and the "material support" provision specifically, evince no such intent. To the contrary, as the Supreme Court recognized in *INS v. Cardoza-Fonseca*, "if one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that *one of Congress' primary purposes was to bring United States refugee law into conformance with the . . . Protocol . . .* to which the United States acceded in 1968." 480 U.S. at 436-37 (emphasis added) (discussing Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) ("Refugee Act")); *see also* H.R. Rep. No. 96-608, at 9 (1979) (stating Congress' intention to "bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the . . . Convention and Protocol"). Congress' desire to conform to the Protocol was not limited to the definition of "refugee." Rather, Congress also

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F.2d 660 (Fed. Cir. 1992), to construe a statute in violation of the United States obligations under the General Agreement on Tariffs and Trade (GATT). However, *Mississippi Poultry* and *Suramerica* concerned statutory provisions that were facially incompatible with GATT. Here, as explained in *infra* part I.B., the "material support" provisions clearly *are compatible* with the 1967 Protocol. Moreover, "abrogation" under the clear statement rule does not occur merely when Congress intends to abrogate a treaty vis-à-vis other signatories, which requires Executive action to have international effect, *see* Henkin, *Foreign Affairs and the U.S. Constitution*, 213 (2d ed. 2002), but also occurs when Congress repudiates an international obligation through subsequent legislation that puts the United States in violation of that obligation. In the latter case, the effect, while not on the validity of the treaty itself, constitutes an abrogation *pro tanto* of the superseded treaty provision as *internal law* of the United States. *See Sutherland Statutory Construction* § 32:8 (6th ed. 2002). Such an abrogation, however, requires a clear statement by Congress of its intent. *See Restatement (Third) of Foreign Relations* § 115 comment (a)(1) ("It is generally assumed that Congress does not intend to repudiate an international obligation . . . by making it impossible for the United States to carry out its obligations . . . . The courts do not favor a repudiation of an international obligation by implication and require clear indication that Congress, in enacting legislation, intended to supersede the earlier agreement or other international obligations.").

specifically expressed its intent that the provisions of the Refugee Act obligating the Attorney General to withhold deportation of a refugee "conform[] to the language of Article 33" of the 1951 Convention. *INS v. Stevic*, 467 U.S. 407, 421 (1984) (discussing 8 U.S.C. § 1253(h) (1994), presently codified at 8 U.S.C. § 1231(b)(3) (2006)). This includes each of the exceptions to that withholding obligation. *See* 8 U.S.C. § 1253(h)(2)(A)-(D) (1994). Indeed, the conferees evidently included these exceptions in the Refugee Act based on their explicit "understanding that [they were] based directly upon the language of the Protocol" and would be "construed consistent with the Protocol." H.R. Conf. Rep. No. 96-781, at 20 (1980), reprinted in 1980 U.S.C.C.A.N. 160, 161.

Legislation following the Refugee Act confirms Congress' continued commitment that provisions in the INA relating to refugee protection be construed so as to comply with the 1967 Protocol. *See, e.g., In re L-S-*, 22 I. & N. Dec. 645, 653 (BIA 1999) (noting that the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) "further clarified [Congress'] understanding of our nation's obligations under the Protocol"). Neither the legislative history nor the text of any major amendment to the INA since 1980—including the Immigration Act of 1990, which added the "material support" provision—contains any statement suggesting Congress intended to depart from the purposes of the Refugee

Act.[7] Indeed, even the Board in the case at bar stated that it was "not convinced that it was the intent of Congress" that the "material support" bar should conflict with international law. *In re S-K-*, 23 I. & N. Dec. at 942-43 n.7. In interpreting the "material support" bar, "it is thus appropriate to consider what ["material support"] means with relation to the Protocol." *Cardoza-Fonseca*, 480 U.S. at 437.

In sum, Congress plainly intended for courts to construe the "material support" bar consistently with United States obligations under international law. The absence of a clear statement to the contrary, coupled with the legislative history, compels the conclusion that any interpretation of the bar that fails to honor United States obligations under international law is incorrect.[8]

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[7] REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005); H.R. Conf. Rep. 109-72 (2005); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002); H.R. Rep. No. 107-609 (2002); USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); 147 Cong. Rec. H7159, 130 (2001); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); H.R. Conf. Rep. 104-863 (1996); Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996); H.R. Conf. Rep. 104-518 (1996); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); H.R. Conf. Rep. No. 101-955 (1990); Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986); H.R. Cong. Rep. 99-1000 (1986).

[8] For the foregoing reasons, because Congress' intent to conform to the 1951 Convention and 1967 Protocol is clear, the Board's decision is not entitled to deference under *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837-843 and n.9 (1984) ([W]here Congress' intent "is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). However, even if this Court concludes that the "material support" provision is ambiguous, the Supreme Court has held that where, as here, interpretation of a statute implicates a clear statement rule, the agency's interpretation (even if the statute is ambiguous) should not receive *Chevron* deference if the agency's interpretation conflicts with the result required by that rule of construction. *See, e.g.*, *DeBartolo*, 485 U.S. at 574-575 (refusing to apply *Chevron* deference to the National Labor Relations Board's interpretation of the National Labor Relations Act where, although the NLRA was ambiguous, the NLRB's interpretation necessarily implicated the constitutional avoidance

B. This Court Can Apply the "Material Support" Bar In A Manner Consistent With United States Obligations Under the 1967 Protocol and Customary International Law

The 1951 Convention and the 1967 Protocol are the key international legal instruments defining who is a refugee and setting forth the legal obligations of State Parties with regard to refugees. Under these treaties, denial of international refugee protection to individuals who otherwise satisfy the refugee definition is foreseen in two sets of circumstances.

First, within the eligibility criteria for international refugee protection, an individual is excluded from such protection if he or she falls within the "exclusion clauses" of the 1951 Convention. Article 1F of the 1951 Convention, in particular, provides for exclusion from international refugee protection on the grounds that an individual is responsible for certain heinous acts or serious crimes.[9] Thus, Article

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cannon which "*has its roots in Chief Justice Marshall's opinion for the Court in . . . Charming Betsy*") (emphasis added); *INS v. St. Cyr*, 533 U.S. 289 (2001) (declining to give *Chevron* deference to the BIA's interpretation of the Antiterrorism and Effective Death Penalty Act of 1996 and IIRIRA because the statutes' ambiguity implicated the long-standing presumption that statutes should not apply retroactively); *Equal Employment Opportunity Comm'n v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (declining to give *Chevron* deference to the EEOC's "plausible interpretation" in light of the rule of statutory construction requiring that Congress clearly express its intent that a statute apply extraterritorially). Thus, because Congress has not provided a clear statement of its intent to construe the INA inconsistently with international law, even if this Court concludes the statute is ambiguous, *Chevron* deference to the Board's decision is not required because such deference would require an outcome at odds with the clear statement rule. *DeBartolo*, 485 U.S. at 574-575.

[9] Such persons are considered not to be deserving of international protection as refugees. UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees para. 140 (UNHCR Handbook). The UNHCR Handbook and UNHCR's Guidelines on International Protection are intended to provide guidance for governments, legal practitioners, decision-makers and the

1F directly relates to how the "material support" bar to asylum should be interpreted.

Second, under certain limited circumstances, the country of refuge may remove a refugee to a country where he or she would be at risk of persecution, notwithstanding his or her refugee status. This is permitted only when the refugee falls within the criteria of Article 33(2) of the 1951 Convention, which provides for exceptions to the principle of *non-refoulement* set forth in Article 33(1). Because Congress created withholding of removal as the form of relief meant to implement United States obligations under Article 33, any denial of withholding of removal under the material support bar must comply with the exceptions already provided for in that Article.

1. The "Material Support" Bar Should be Applied in a Manner Consistent with the Exclusion Clauses of Article 1F of the 1951 Convention

The primary purpose of Article 1F is to deprive those guilty of heinous acts and serious crimes international refugee protection and to ensure that such persons do not abuse the system of asylum in order to avoid being held legally accountable

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judiciary in interpreting the terms of the refugee treaties. Federal courts and the Board have recognized the Handbook and the Guidelines as providing guidance in construing the 1967 Protocol. *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 439 n.22; *Rodriguez-Roman v. INS*, 98 F.3d 416, 425 (9th Cir. 1996) (noting the BIA "is bound to consider the principles for implementing the Protocol established by" UNHCR); *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (citing UNHCR's Guidelines on International Protection: Religion-based Refugee Claims); *Castellano-Chacon v. INS*, 341 F.3d 533, 547-48 (6th Cir. 2003) (citing UNHCR Guidelines on International Protection: Membership of a Particular Social Group); *In re S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996) (noting that in adjudicating asylum cases the BIA must be mindful of "the fundamental humanitarian concerns of asylum law," and referencing the UNHCR Handbook).

for their acts. UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05 at para. 2 (4 Sept. 2003) (UNHCR Exclusion Guidelines). Article 1F contains three exclusion clauses which exhaustively enumerate the acts which may result in the exclusion of an individual from international refugee protection. It provides that the Convention "shall not apply to any person with respect to whom there are serious reasons for considering" that:

> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) he has been guilty of acts contrary to the purposes or principles of the United Nations.

1951 Convention, art. 1F. A person who participates in what might be classified as "terrorist activity"—but otherwise meets the refugee definition—is therefore subject to exclusion from international refugee protection if the acts committed meet the legal criteria under Article 1F and if there are serious reasons for considering that he or she incurred individual responsibility for these acts. As discussed below, this may result from the individual's own commission of the crime or from his or her participation in the commission of such crimes by others.

In determining the clause(s) of Article 1F under which "terrorist" crimes should properly be assessed, it is necessary to consider the nature of the acts in

question as well as the context in which they occurred. Such acts may fall within the scope of Article 1F(a)—"crimes against humanity"—if they involve inhumane acts committed as part of a widespread or systematic attack against civilians. UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, at paras. 33-36 (UNHCR Background Note). In a situation involving potentially excludable acts committed during an international or non-international armed conflict, the adjudicator would need to assess whether these acts constitute serious violations of applicable international humanitarian law. If such violations were found, the acts in question would be considered "war crimes" under Article 1F(a). Conversely, conduct in conformity with the laws and customs of armed conflict is lawful under international standards and does not give rise to exclusion from international refugee protection under Article 1F. UNHCR Background Note, at paras. 30-32.

In many cases, crimes considered to be "terrorist" in nature constitute "serious non-political crimes" within the meaning of Article 1F(b). To qualify as "serious," the underlying crime must either be capital or an otherwise very grave punishable act. UNHCR Handbook, at para. 155. In determining seriousness, international rather than national standards are relevant, and it is necessary to consider whether most jurisdictions would consider the acts in question a serious crime. UNHCR Guidelines on Exclusion, at para. 14. In assessing whether a

crime is "non-political" under Article 1F(b), the adjudicator should first consider the crime's nature and purpose, *i.e.*, whether it has been committed out of genuine political motives and not merely for personal reasons or gain. Additionally, the political element of the offense should outweigh its common-law character. Thus, acts that are grossly out of proportion to the political objectives sought would not satisfy this test. UNHCR Handbook, at para. 152. Egregious acts of violence, including acts commonly considered to be "terrorist" in nature, are wholly disproportionate to any political objective and will almost certainly fail this test. Furthermore, for a crime to be considered political in nature, the political objectives should be consistent with human rights principles. UNHCR, Guidelines on Exclusion, at para. 15.

Although the financing of terrorism is a criminal offense under international law, *see* International Convention for the Suppression of the Financing of Terrorism, at Art. 2, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, Art. 2(1)(b), U.N. Doc. A/54/49 (Vol. I) (1999), *adopted* 9 December 1999, *entered into force* Apr. 10, 2002, not all financing offenses reach the gravity required to fall under Article 1F(b). The regularity and amount of funds provided are critical to the exclusion analysis. UNHCR, Background Note, at para. 182 ("If the amounts concerned are small and given on a sporadic basis, the offence may not meet the required level of seriousness. On the other hand, a regular contributor of

large sums to a terrorist organization may well be guilty of a serious non-political crime.").

In line with fundamental principles of criminal law, exclusion from international refugee protection under Article 1F also requires a determination of "individual responsibility." This determination is guided by international standards, as set out in the Rome Statute of the International Criminal Court. Individual responsibility can be incurred either through the individual's own commission of the crimes in question, or through participation in the commission of such crimes by others, for example by making a substantial contribution. This involves an examination of the person's conduct and state of mind (*mens rea*) in relation to the excludable crime(s) in question. UNHCR Background Note, at paras. 50-55 and 64.

To justify exclusion for a crime under Article 1F, it must be established that the individual committed the material elements with intent and knowledge regarding the conduct and its consequences, as required under the definition of the crime in question.[10] For individual responsibility to arise on the basis that the person concerned made a substantial contribution to a crime committed by another person, it must be established that the individual's conduct had a significant effect

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[10] The definitions of certain crimes which may give rise to exclusion from international refugee protection contain a specific *mens rea* requirement. This is the case, for example, for financing offenses which fall within Article 1F.

on the commission of the crime and that he or she acted in the knowledge that it would facilitate the criminal conduct of others. UNHCR, Guidelines on Exclusion, at para. 18. Thus, the provision of funds to an organization engaged in criminal acts of a terrorist nature could either constitute a "serious non-political crime" itself, or could constitute a substantial contribution to another "serious non-political crime" (for example, murder of civilians) committed by the recipient organization.

It is fairly possible to interpret the "material support" provision in the INA in a manner consistent with Article 1F of the 1951 Convention, as required under the *Charming Betsy* doctrine. As the Board recognized, "[a] common dictionary definition of the word 'material' includes such terms as substantial, noticeable, of importance, and relevant . . . ." *In re S-K-*, 23 I. & N. Dec. at 944 n.9; *see also Singh-Kaur v. Aschroft*, 385 F.3d 293, 304 (3d Cir. 2004) (Fisher J., dissenting) ("Even a cursory examination of the 'material support' provision makes it clear that both meanings of 'material'—relevance and importance—are embraced by the statute."). Thus, in determining whether the provision of financial support itself would give rise to exclusion from international refugee protection under Article 1F, the term "material" can and should be construed in a manner consistent with the requirement that the financial contribution made be sufficiently significant based on the regularity and amount involved. Where the "material support" bar is

applied to the participation in the commission of "terrorist" acts by others, the term "material" can and should be construed consistently with international standards requiring that the support have a significant effect on the commission of crimes which fall within the scope of Article 1F.

2. The "Material Support" Bar Should be Applied in a Manner Consistent with United States *Non-refoulement* Obligations Under Article 33(2)

Pursuant to Article 33(1) of the 1951 Convention, contracting States may not "expel or return … a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." As mentioned previously, Article 33 codifies the principle of *non-refoulement* of refugees and is considered the cornerstone of the 1951 Convention. The principle is a "fundamental humanitarian principle" that has achieved the status of customary international law. Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol adopted at the Ministerial Meeting of States Parties of 12–13 December 2001, HCR/MMSP/2001/09, 16 January 2002.

Article 33(2) provides for an exception to the obligation of *non-refoulement* only in two situations: (1) when there are "reasonable grounds for regarding [the refugee] as a danger to the security of the country"; and (2) when the refugee,

"having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[11]

When examining whether a refugee falls within the national security exception under Article 33(2), the authorities of the country of refuge must conduct an individualized assessment to determine whether the refugee constitutes a present or future danger to the security of that country. Their conclusion on the matter must be supported by evidence. Lauterpacht and Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, para. 61 (June 2001) *available at* http://www.unhcr.org/protect/PROTECTION/3b33574d1.pdf (last visited on Nov. 3, 2006), para. 168. Given the serious consequences of removal, the danger to the security of the country must be posed by the individual himself and must be a "very serious danger," not a danger of lesser order. Lauterpacht and Bethlehem, at para. 169. As a result, there must be a determination that the danger will be eliminated by the refugee's removal. As with any exception to a human rights guarantee, the exception to *non-refoulement* protection must be applied in a manner proportionate to its objective. *Refoulement* must be the last possible resort for eliminating the danger the individual presents to the host country, and the gravity of that danger must outweigh the possible consequences of *refoulement*,

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[11] The exceptions to the principle of *non-refoulement* provided for in Article 33(2) apply to those who have already been determined to be refugees. Thus, unlike the exclusion clauses of Article 1F, which form part of the eligibility criteria for international refugee protection, Article 33(2) is not to be considered when making an initial determination regarding refugee status.

including the degree of persecution feared. Lauterpacht and Bethlehem, at paras. 177-179.

In drafting the withholding of removal provision, including its exceptions, Congress intended to establish a legal standard consistent with the terms of Article 33. *Cardoza-Fonseca*, 480 U.S. at 441 n.25 ("The 1980 Act made withholding of deportation under § 243(h) mandatory in order to comply with Article 33.1."). If there are no reasonable grounds for regarding an individual who provided assistance to a terrorist organization as defined in the INA as a danger to the security of the United States under Article 33(2), and that individual otherwise meets the refugee definition, a denial of withholding of removal would constitute a violation of the principle of *non-refoulement*.

An individual who has provided support to an organization that has engaged in "terrorist activity" as broadly defined by the INA does not necessarily pose a danger to the security of the United States.[12] To avoid a breach of Article 33, the relevant standards for applying the *non-refoulement* exception provided for in Article 33(2) should be considered when interpreting the scope of the "material support" provision itself. Thus, the adjudicator should take into account the nature of the group and its activities as well as the nature and extent of the individual's

[12] In this regard, the concurring opinion in the case at bar concluded that "it is clear that the respondent poses no danger whatsoever to the national security of the United States." *In re S-K-*, 23 I. & N. Dec. at 950 (Osuna, concurring).

involvement with, or support to, the group, to determine whether there are reasonable grounds to consider that person a danger to the security of the United States and whether his or her return to potential persecution is the only means of eliminating that danger.

II. THE EXISTENCE OF A DISCRETIONARY WAIVER SHOULD NOT AFFECT THE COURT'S INTERPRETATION OF THE SCOPE OF THE UNDERLYING STATUTE AND ITS CONFORMITY WITH INTERNATIONAL LAW

Notwithstanding the fact that all indicia of congressional intent demonstrate that Congress intended the "material support" bar to be interpreted consistently with the 1951 Convention and the 1967 Protocol and that such an interpretation is possible here, the Board appeared to believe it was not obligated to do so. Instead, the Board reasoned, Congress left the task of comporting "with our international treaty obligations" to Executive Branch officials authorized to grant a discretionary waiver as delineated in section 212(d)(3)(B) of the REAL ID Act (8 U.S.C.A. §1182(d)(3)(B)). *See In re S-K-*, 23 I. & N. Dec. at 942-43 n.7 (noting that Congress "expressly provided a waiver that may be exercised in cases where the result reached under the terrorist bars to relief would not be consistent with our international treaties . . ."). For the reasons set out below, this interpretation is erroneous.

First, neither the text of the waiver nor its legislative history makes any mention of international law, let alone any indication that Congress intended to

absolve courts from their responsibility to construe the INA consistently with United States obligations under international treaties.[13] *See Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1278 (5th Cir. 1985) ("In construing a statute, the ultimate goal is to discern and enforce Congress' intent. The ordinary meaning of the language in a statute is the best indicator of that intent."). It is well-established that Congress is presumed to legislate with Supreme Court precedent in mind and that legislation should be interpreted as conforming to existing precedent absent "a clear indication of contrary legislative intent." *Albernaz v. United States*, 450 U.S. 333, 341-342 (1981) (explaining that Congress is presumed to legislate aware of existing precedent); *see also Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) (noting "the well-settled presumption that Congress understands the state of existing law when it legislates . . ."). Applying that principle, it cannot be inferred that Congress intended for courts interpreting the INA generally, and "material support" specifically, to depart from the *Charming Betsy* doctrine. *See Welch v. Texas Dept. of Highways & Public Transp.*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring in part and concurring the judgment) (observing that "[r]egardless of

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[13] In considering the function of the executive waiver, it may be instructive to look to other contexts where such a waiver exists. In the criminal context, for example, both the President and states have the discretionary authority to grant clemency or a pardon to an individual convicted of a criminal offense. The availability of such an executive waiver, however, has never been thought to absolve courts of their responsibility to decide the constitutionality of a given statute, nor alter a court's determination as to whether a statute is constitutional or unconstitutional. The same should hold true here: simply because Congress provided the Executive Branch with means to grant discretionary relief does not mean that Congress intended for courts to avoid engaging in the substantive application of international legal principles.

what one may think of [one of the Court's 19th Century decisions], it has been assumed to be the law for nearly a century"). Instead, more likely, the waiver's text suggests only that Congress intended to provide the Executive Branch with a means to grant discretionary relief, in addition to what is required by domestic and international law, which can be granted as a matter of policy where the relevant Executive officials see fit.

Second, the Board's reliance on the waiver is misplaced given that, once the application of domestic law denies a *bona fide* refugee the legal status and rights to which he is entitled under the 1951 Convention and 1967 Protocol, a breach of those agreements has already occurred.[14] The impact of such a denial is not ephemeral; it is real and tangible. In the United States, a *bona fide* refugee denied asylum and withholding of removal has no legal status in the United States, faces the possibility of *refoulement* (in breach of Article 33 of the 1951 Convention), has no right to a travel document (in breach of Article 28), has no right to work (in

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[14] According to the International Law Commission, "[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character." International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, Annex to General Assembly Resolution A/RES/56/83, 12 December 2001, article 12. The "act" (or omission) at issue "may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision." *Id.*, Commentary on article 12. The Articles of Responsibility were adopted without a vote and with consensus on virtually all points. The articles and their commentaries have been referred to the General Assembly, possibly with the view to drafting a convention on State responsibility. *See* J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary.* Cambridge University Press, UK: 2002.

breach of Article 17), may be detained indefinitely in a prison or jail (in breach of Article 26), and may remain separated from family members who still reside outside of the United States (contrary to the principle of family unity). *See* UNHCR Handbook, at paras. 181-188. The mere possibility of the application of an executive waiver at an indeterminate future time fails to cure these ongoing violations.

Finally, there can be no assurance that, even where required to ensure compliance with international law, the Executive Branch will grant a waiver. Despite its existence for over four years now, the Executive Branch has not granted a waiver in a single asylum case, nor has it issued any guidelines regarding how they will be granted in the future. The Court should not permit the ongoing violation of United States obligations under the 1951 Convention and 1967 Protocol based on the hope that the Executive Branch will, at some indeterminate time, issue waivers in appropriate circumstances.

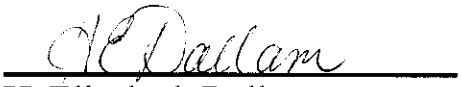
In sum, the INA's text and legislative history coupled with *Charming Betsy* demonstrate that Congress intended for the "material support" bar to be construed consistently with United States international obligations. The BIA's assumption that it was not required to interpret "material support" consistently with such obligations was therefore error because, as shown above, such an interpretation was plainly possible here.

CONCLUSION

For the foregoing reasons, UNHCR, as *amicus curiae*, respectfully urges that the decision of the Board of Immigration Appeals be reversed.

Dated: January 9, 2007

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), this brief for the United Nations High Commissioner for Refugees As Amicus Curiae In Support of Petitioner Ma San Kywe submitted herewith complies with the type volume limitation for Briefs of Amicus Curiae as set forth in Rules 7.1(B)(4) and 7.1(D)(5). The Argument section of the brief contains 6,779 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. R. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point, Times Roman.

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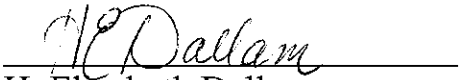

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I, H. Elizabeth Dallam, hereby certify that I served two copies of the foregoing Brief, and one copy of the digital version of the Brief on cd via Federal Express this 9th Day of January, 2007 on the following:

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