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

In the Matter of:	
Bikram THAPA	**File No.: A 98 415 637**
In removal proceedings	

BRIEF OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT BIKRAM THAPA

INTEREST OF *AMICUS CURIAE*

The Office of the United Nations High Commissioner for Refugees ("UNHCR") is mandated by the United Nations to lead and coordinate international action for the worldwide protection of refugees and the resolution of refugee problems. UNHCR's primary purpose is to safeguard the rights and well-being of refugees. The Statute of UNHCR specifies that UNHCR shall provide for the protection of refugees by, *inter alia*, "promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."[1] The supervisory responsibility of UNHCR is formally recognized in the 1951 Convention Relating to the Status of Refugees[2] and its 1967 Protocol.[3] The United States is a State Party to the 1967 Protocol. Both conventions provide that the State Parties "undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions [of these conventions]."[4] The views of UNHCR are informed by over 50 years of experience supervising the treaty-based system of refugee protection established by the international community. UNHCR provides international protection and direct assistance to refugees throughout the world and has staff in over 100 countries. It has twice received the Nobel Peace Prize, in 1954 and 1981, for its work on behalf of refugees.

The case at bar involves the legal grounds under the Immigration and Nationality Act ("INA") by which an asylum-seeker can be deemed inadmissible to the United States and, as a result, denied refugee protection, because of 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

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[1] Statute of the Office of the United Nations High Commissioner for Refugees, G.A. res. 428(V), annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950).
[2] The 1951 Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (*entered into force* Apr. 22, 1954) [hereinafter 1951 Convention].
[3] The 1967 Protocol relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6257, U.N.T.S. 267 (*entered into force* Oct. 4, 1967) [hereinafter 1967 Protocol].
[4] 1951 Convention, *supra* note 2, art. 35, ¶ 1; *Id.* at art. II, ¶ 1.

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 allows for the exclusion from refugee status of individuals under certain circumstances and Article 33(2) of the 1951 Convention, which provides for limited exceptions to State Parties' *non-refoulement* (non-return) obligations. Given the potentially serious consequences of the denial of refugee protection to an individual, that is, possible return to persecution, this case implicates the core mandate of UNHCR.

SUMMARY OF ARGUMENT

While fully sharing States' concerns over condemning terrorism, UNHCR is concerned that efforts to fight terrorism should not suggest any automatic linkage between terrorists and refugees and asylum-seekers, who are very often victims of terrorist acts rather than perpetrators of such acts. Such a linkage would also be unwarranted, as the 1951 Convention contains a system of checks and balances which prevent the abuse of the institution of asylum by persons responsible for certain serious crimes or acts, including those commonly considered to be of a terrorist nature. Reference is made, in particular, to the exclusion clauses of Article 1F of the 1951 Convention and exceptions to the principle of *non-refoulement* provided for under Article 33(2) for those who are a danger to the national security of the host country. Properly applied, these provisions permit States and UNHCR to make certain that persons responsible for terrorist acts do not benefit from international refugee protection, while at the same time ensuring that such protection is extended to those in need of, and entitled to it.

UNHCR is concerned that the "material support" bar to asylum and withholding of removal as contained in United States law may be applied in a manner which will result in denying protection to individuals who are entitled to it under the 1951 Convention. The 1951 Convention contains at Article 1F "exclusion clauses" which function to exclude persons who have committed serious crimes, including terrorist acts.

In addition, the 1951 Convention contains at Article 33(2) an exception from the prohibition on *refoulement* for those who are a danger to national security. If properly applied, the 1951 Convention will exclude those responsible for terrorist acts, and may even assist in their identification and eventual prosecution. This brief *amicus curiae* addresses the Board's obligation to apply the "material support" bar in a manner consistent with the United States' obligations under international refugee law.

The *Charming Betsy* doctrine obliges courts to interpret acts of Congress consistent with international obligations unless the intention to abrogate or modify a treaty has been clearly expressed.[5] Without any indication that Congress intended to abrogate its obligations under the 1967 Protocol, the Board is obliged to apply the "material support" bar in a manner consistent with international refugee law. The relevant provisions of international refugee law are found in the exclusion clauses of Article 1F and the exception from *non-refoulement* in Article 33(2) of the 1951 Convention. In considering whether the provision of "material support" may bring an individual within the scope of Article 1F, it should be noted that only conduct which meets the criteria of an excludable act under Article 1F may give rise to exclusion. Exclusion would also require a finding of individual responsibility, including the necessary *mens rea* for committing, or participating in the commission of, a crime covered by Article 1F. Duress has long been recognized as a defense in international and criminal law. Under applicable standards, if there is a finding that the defense of duress applies, the individual would not be held individually responsible and exclusion from refugee protection would not be justified.

Furthermore, the Board should apply the "material support" bar in a manner consistent with the United States' *non-refoulement* obligations under Article 33(2). Article 33(2) requires that *non-refoulement* protection be denied only if there are "reasonable grounds" for regarding the individual concerned as a present or future danger to the security of the country of refuge. An individual who provided "material support" involuntarily or under duress does not necessarily pose a danger to the security of the

[5] *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804).

United States. In view of the above, the Board must apply the material support bar in a manner which takes into account acts committed under duress. It is fairly possible for the Board to do so either by statutorily interpreting the "material support" bar to require voluntariness or by recognizing the implicit common law defense of duress.

Finally, it should be noted that the existence of a discretionary executive waiver of the "material support" bar should not affect the Board's interpretation of the scope of the underlying statute and its conformity with international law. To the extent that a statutory provision is, in and of itself, inconsistent with a State's obligations under international law, the existence of such a waiver, or its exercise in an individual case, does not render the provision compatible with international obligations, nor does it discharge the Board of its obligation to interpret and apply the statute in a manner consistent with international obligations.

ARGUMENT

I. THE BOARD IS OBLIGED TO APPLY THE "MATERIAL SUPPORT" BAR IN A MANNER CONSISTENT WITH INTERNATIONAL REFUGEE LAW

A. The Obligations of the United States Must Be Construed Consistently with Treaties to Which the United States is a Party and with Customary International Law

It is an accepted principle of United States law that international law constitutes part of United States domestic law. As noted by the United States Supreme Court in *The Paquete Habana,* "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction."[6] Two branches of international law are of particular relevance in the area of refugee protection: treaty law and customary international law.[7]

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[6] *The Paquete Habana*, 175 U.S. 677, 700 (1890).

[7] The generally recognized sources of international law are enumerated at Article 38 of the *Statute of the International Court of Justice*, 59 Stat. 1031, 1060 T.S. 993 (1945). *See Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 157-58 (2d Cir. 2003) (*citing* Article 38 of the International Court of Justice [hereinafter ICJ]

The United States Constitution and domestic jurisprudence make clear that treaties signed and ratified by the United States are the "supreme law of the land," alongside the United States Constitution and statutes passed by Congress.[8] Under domestic law, courts remain bound to interpret United States statutes in a manner consistent with United States obligations under international law, if fairly possible.[9] In the seminal decision, *Murray v. Schooner Charming Betsy*, the United States Supreme Court clearly stated that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."[10] This principle has been reaffirmed by the Supreme Court and lower federal courts on numerous occasions,[11] including in asylum cases.[12] Unless Congress's intent to modify or abrogate a treaty "has been clearly expressed," a United States court should not interpret a statute in a manner contrary to United States treaty obligations.[13]

United States courts are similarly bound to apply customary international law when there is no treaty, controlling executive or legislative act, or precedent judicial decision that conflicts with it.[14] Customary international law consists of principles that

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to identify relevant sources of international law); *Aquamar S.A. v. Del Monte Fresh Produce, N.A.*, 179 F.3d 1279, 1295 (11th Cir. 1999) (same).

[8] U.S. Const., art. VI, cl. 2.

[9] *See* Restatement (Third) of Foreign Relations Law of the United States § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States").

[10] *Murray v. Schooner Charming Betsy, supra* note 5.

[11] *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); *Empresa Cubana Del Tabaco v. Culbro Corp.*, 399 F.3d 462, 481 (2d. Cir. 2005).

[12] *See, e.g., United States v. Schiffer*, 836 F. Supp. 1164, 1170 n. 4 (E.D. Pa. 1993), *aff'd*, 31 F.3d 1175 (3d Cir. 1994); *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).

[13] *Transworld Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("legislative silence is not sufficient to abrogate a treaty"); *See also Weinberger, supra* note 11, at 32.

[14] *See The Paquete Habana, supra* note 6, at 700 ("[w]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations"); *Matter of Medina*, 19 I&N Dec. 734, 743 (BIA 1988) (same).

nations acknowledge as binding legal norms.[15] Examples of accepted rules of customary international law include, for example, the prohibition against torture,[16] the prohibition against piracy,[17] and, of particular relevance with regard to the case at bar, the prohibition against *refoulement* to persecution or torture.[18]

In analyzing refugee protection issues, the most relevant international treaties are the 1951 Convention and its 1967 Protocol. The United States signed the 1967 Protocol, which incorporates by reference the substantive provisions of the 1951 Convention, in 1968, and passed implementing legislation in 1980. United States courts are therefore bound to construe United States statutory law, including the INA, in a manner consistent with the 1967 Protocol if fairly possible.

UNHCR has issued various documents to provide guidance to States in the interpretation and application of their international obligations. These include the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*[19] and Guidelines on International Protection.[20] The Executive Committee of the High

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[15] *See Statute of the ICJ, supra* note 7, art. 38(1)(b) (in deciding disputes, ICJ shall apply, *inter alia*, "international custom, as evidence of a general practice accepted as law").

[16] *See, Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) ("[T]he law of nations contains a 'clear and unambiguous' prohibition of official torture."); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (same).

[17] *See, e.g., United States v. Smith*, 18 U.S. 153, 162 (1820) ("[P]iracy, by the law of nations, is robbery upon the sea."); *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) ("[C]ertain forms of conduct violate the law of nations . . . . An early example . . . is the prohibition against piracy.").

[18] *See, e.g., I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) ("The basic withholding provision of § 1253(h)(1) parallels Article 33."); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987) ("Article 33.1 of the Convention, ... which is the counterpart of § 243(h) of our statute, imposed a mandatory duty on contracting States not to return an alien to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons").

[19] United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Doc. No. HRCP/IP/4 (Rev.1 Jan. 1992) (1979) [hereinafter, UNHCR *Handbook*]. UNHCR issued its *Handbook* in 1979 at the request of its Executive Committee to provide States with guidance on the application and interpretation of the 1951 Convention and its 1967 Protocol.

[20] The United Nations High Commissioner for Refugees (UNHCR) has issued these Guidelines pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (V), at 46, U.N. GAOR Supp. No. 20, U.N. Doc. A/1775 (1950). in conjunction with Article 35 of the 1951 Convention, *supra* note 2, and Article II of its 1967 Protocol, *supra* note 3. These Guidelines complement the UNHCR *Handbook, supra* note 19. These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determinations in the field. Of particular relevance to the matter under review are UNHCR's *Guidelines on International Protection: Application of*

Commissioner's Programme has also issued relevant guidance in the form of Conclusions.[21] While not legally binding, UNHCR documents have been cited with approval by United States federal courts in the consideration of asylum claims.[22]

B. The "Material Support" Bar Should Be Interpreted and Applied in a Manner Consistent with the 1951 Convention Relating to the Status of Refugees and with Customary International Law

Under the INA, 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 and withholding of removal. The underlying provision for the "material support" bar to refugee protection under United States law is found at INA § 212(a)(3)(B)(iv)(VI).[23] Persons described under this provision are barred from asylum[24] and withholding of removal.[25]

The exact contours of the material support provision are a matter of statutory interpretation.[26] As the application of the "material support" bar has a direct bearing on

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the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, Doc. No. HCR/GIP/03/05 (Sept. 4, 2003) and its accompanying *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, Doc. No. HCR/GIP/03/05 (Sept. 4, 2003).

[21] The UNHCR Executive Committee is an intergovernmental group currently consisting of 68 Member States of the United Nations (including the United States) and the Holy See that advises the UNHCR in the exercise of its protection mandate. While the Conclusions are not formally binding, they represent elements relevant to the interpretation and application of the international refugee protection regime. Conclusions of the Executive Committee constitute expressions of opinion which are broadly representative of the views of the international community. The specialized knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight.

[22] *See, e.g. I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (UNHCR *Handbook* provides "significant guidance" in construing the 1967 Protocol and in giving content to the obligations established therein); *INS v. Aguirre-Aguirre*, 526 U.S. at 426-427; *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (*citing* UNHCR *Guidelines on International Protection: Religion-Based Refugee Claims*, Doc. No. HCR/GIP/04/06 (Apr. 2, 2004)); *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*, Doc. No. HCR/GIP/02/02 (May 7, 2002)).

[23] 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.

[24] INA § 208(b)(2)(A)(v).

[25] INA § 241(b)(3)(B)(iv).

[26] For example, courts are currently examining whether the material support bar has a *de minimis* requirement, a voluntariness requirement, and an implied duress defense. *See, e.g., Singh-Kaur v. Ashcroft,*

the situation of persons seeking international protection from persecution, reference must be made to the primary treaties regulating the international refugee protection regime, the 1951 Convention and its 1967 Protocol, and to the customary international law prohibition against *refoulement*. In passing the 1980 Refugee Act, the domestic foundation of the United States asylum system, Congress sought to bring United States law into conformity with the 1967 Protocol, which it signed in 1968.[27] There is no indication that, in passing the "material support" provision of the INA, Congress intended to abrogate these same obligations, a point recently noted by the Board in *Matter of S-K-*.[28] Consistent with the *Charming Betsy* doctrine, the Board has a responsibility to apply the "material support" bar of the INA in a manner that would avoid violations of these international obligations if fairly possible.

II. THE BOARD SHOULD APPLY THE "MATERIAL SUPPORT" BAR IN A MANNER CONSISTENT WITH THE EXCLUSION CLAUSES OF ARTICLE 1F OF THE 1951 CONVENTION

In providing international protection to refugees, UNHCR and States are governed by legal provisions which oblige them to deny refugee status to certain persons who would otherwise satisfy the refugee definition. These provisions are commonly referred to as the "exclusion causes." Article 1F of the 1951 Convention contains those exclusion clauses that address cases in which the individual has committed acts so grave as to render him or her undeserving of international protection as a refugee.[29] The primary purpose of Article 1F is to deprive of international refugee protection the perpetrators of heinous acts and serious crimes, and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts.

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385 F.3d 293 (3d Cir. 2004); *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006); and *Matter of R-K-* (A # 97-447-879) (BIA oral argument presented on 24 August 2006).

[27] *INS v. Cardoza-Fonseca*, 480 U.S. at 436-437 ("one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees").

[28] *Matter of S-K-*, *supra* note 26 at 942 n. 7 (BIA 2006) ("It is ... well established that Congress may enact statutes that conflict with international law... However, we are not convinced that it was the intent of Congress to do so here").

[29] UNHCR *Handbook*, *supra* note 19, at ¶ 140 (Article 1F "enumerates the categories of persons who are not considered to be deserving of international protection").

Bearing in mind its purpose, the applicability of Article 1F must be interpreted restrictively, as with any exceptions to provisions of human rights law. The exclusion clauses should be used with utmost caution in view of the serious possible consequences of exclusion for the individual, *i.e.*, return to persecution, the most extreme sanction provided for by the relevant international refugee instruments.[30] Article 1F provides that the 1951 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.[31]

If there are indications that an asylum-seeker may have been involved in conduct which gives rise to exclusion, the adjudicator must determine whether the conduct at issue constitutes an excludable act and whether the person is individually responsible for the excludable act, including any grounds for rejecting individual responsibility, such as whether the individual acted under duress.

A. Only Conduct Which Meets the Criteria of Article 1F of the 1951 Convention May Give Rise to Exclusion

Article 1F of the 1951 Convention exhaustively enumerates the kinds of conduct which may give rise to exclusion from international refugee protection on the grounds that the individual is undeserving of such protection. Certain conduct related to terrorist activity, which meets the criteria required under one or more of its clauses, may lead to exclusion under this provision.

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[30] UNHCR *Handbook*, *supra* note 19, at ¶149.
[31] 1951 Convention, *supra* note 2, art. 1F.

In considering whether the provision of "material support" to a "terrorist group" may bring an individual within the scope of Article 1F, it should be noted that certain forms of material support, notably related to the financing of terrorism, are criminal offenses in domestic jurisdictions[32] and under international law.[33] Certain activities, however, which fall within the "material support" bar may not be covered by Article 1F as they may not be considered crimes in most jurisdictions.[34] Depending on the circumstances, it may be necessary to examine whether a person who engages in such activities would thereby participate in the commission of excludable crimes by others.[35]

B. Exclusion from International Refugee Protection Requires a Finding of Individual Responsibility

For exclusion to be justified, individual responsibility must be established in relation to a crime covered by Article 1F. This requires an analysis of the applicant's conduct as well as his or her state of mind (*mens rea*). In line with applicable international standards as set out in the Rome Statute of the International Criminal Court (the "Rome Statute"),[36] individual responsibility, and therefore the basis for exclusion, arises where the individual has committed a crime within the scope of Article 1F him or herself and did so with the necessary *mens rea*, or where he or she participated in the commission of such a crime by others, for example by making a substantial contribution to the criminal act in the knowledge that his or her act or omission would facilitate the criminal conduct. [37]

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[32] UNHCR, *Background Note on Exclusion, supra* note 20, at ¶ 82.

[33] International Convention for the Suppression of the Financing of Terrorism, art. 2, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/109 (1999) (*entered into force* July 26, 2002) (*signed* by the United States Apr. 10, 2002).

[34] *See* INA § 212(a)(3)(B)(iv)(VI); *see also* UNHCR, *Background Note on Exclusion, supra* note 20, at ¶¶ 38–40 ("Moreover, the gravity of the crime should be judged against international standards, not simply by its characterisation in the host State or country of origin").

[35] While not addressing the issue in this brief *amicus curiae*, UNHCR notes that whether providing medical treatment in circumstances such as those pertaining to the case at bar would bring an individual within the scope of Article 1F of the 1951 Convention is an issue which involves consideration of several questions, including the fundamentally humanitarian nature of providing medical assistance, the ethical obligations upon medical professionals to provide assistance to those in need, and the internationally recognized neutrality of medical providers in armed conflict.

[36] Rome Statute of the International Criminal Court, art. 30(1), 2187 U.N.T.S. 90 (*entered into force* July 1, 2002).

[37] *Background Note on Exclusion, supra* note 20, at ¶¶ 50-55.

The mental element, or *mens rea,* must be established with regard to the commission of all material elements of the crime in order for individual responsibility to be assigned. As a general rule, to satisfy the *mens rea* requirement for the commission of a crime, the individual must have acted with both "intent" and "knowledge."[38] "Intent" is generally defined as requiring, in relation to conduct, that the person meant to engage in the conduct at issue and, in relation to consequence, that the person meant to cause that particular consequence, or was aware that those consequences would follow from the act in the ordinary course of events.[39] "Knowledge" is generally defined to mean awareness that a circumstance exists or a consequence will occur in the ordinary course of events.[40]

The definitions of certain crimes contain additional requirements with regard to the mental element. For example, a person who commits a crime against humanity must not only have intent and knowledge with regard to the underlying inhumane act (*e.g.* murder, rape), but also act in the knowledge that his or her crime forms part of an ongoing systematic or widespread attack against civilians. Other crimes require a specific intent, *e.g.* genocide,[41] or persecution as a crime against humanity.[42]

When the mental element is not satisfied, a fundamental aspect of the criminal offense is missing and therefore individual criminal responsibility does not arise.[43] In the refugee context, this would mean that Article 1F is not applicable.

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[38] Rome Statute, *supra* note 38, art. 30(1).
[39] *Id.* at art. 30(2).
[40] *Id.* at art. 30(3).
[41] *See* Convention on the Prevention and Punishment of the Crime of Genocide, art. II, 102 Stat. 3045, 78 U.N.T.S. 277 (1948) (*entered into force* Jan. 12, 1951) (*ratified by* the United States Nov. 4, 1988); *see also* Rome Statute, *supra* note 36, art. 6 ("...intent to destroy, in whole or in part, a national, ethnic, racial or religious group...").
[42] *See, e.g.*, Rome Statute, *supra* note 36, art. 7(1)(h) (persecution "...on political, racial, national, ethnic, cultural, religious, gender, ..., or other grounds..."). This would be in addition to the *mens rea* requirements for crimes against humanity in general.
[43] *Background Note on Exclusion, supra* note 20, at ¶ 64.

C. An Individual Who Commits an Excludable Act Under Duress Should Not Be Excluded from Refugee Status

Duress has long been recognized in domestic criminal law systems and international law as either a justification or excuse to criminal responsibility. The defense of duress equally applies in the context of refugee status determination.[44] Even if it is established that an applicant has incurred individual responsibility for an act within the scope of Article 1F of the 1951 Convention, exclusion will not apply if the person has a valid defense, that is, if there are circumstances which exempt him or her from individual responsibility. Whether an asylum-seeker acted involuntarily, or under duress, would be a critical factor in determining whether individual responsibility for the underlying act should be assigned. As noted by the Nuremberg Tribunal, "[t]he criterion for criminal responsibility...lies in moral freedom in the perpetrator's ability to choose with respect to the act of which he is accused."[45]

The definition of duress for purposes of exclusion from refugee status is guided by the Rome Statute, under which duress is an available defense for all crimes within the Court's jurisdiction.[46] Article 31 of the Rome Statute delineates the various "grounds for excluding criminal responsibility." Article 31(1)(d) addresses the defense of duress and provides that a person shall not be criminally responsible if, at the time of that person's conduct:

> The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.[47]

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[44] UNHCR's *Guidelines on Exclusion* provide that, in evaluating individual responsibility for excludable acts under Article 1F, factors generally considered to constitute defenses to criminal responsibility should be considered. UNHCR, *Guidelines on Exclusion*, *supra* note 20, at ¶ 22.
[45] Quoted in Nancy Weisman, *Article 1F(a) of the 1951 Convention Relating to the Status of Refugees in Canadian Law*, 8 Int'l J. Refugee L. 111 (1996).
[46] Rome Statute, *supra* note 36, art. 31(1)(d).
[47] *Id.*

The duress defense thus comprises three elements: (1) a threat of imminent death or imminent or continuing serious bodily harm against the person concerned or another person; (2) a necessary and reasonable action to avoid the threat, that is, acts which are not only suitable measures to avert the threat, but also proportionate, in the sense that no lesser action would have been sufficient to prevent the danger from materializing; and, (3) the intent not to cause a greater harm than the one sought to be avoided. International case law adds an additional element for consideration, being that the situation leading to the duress must not have been voluntarily brought about by the person coerced.[48] Each element would necessarily require a consideration of the particular factual circumstances in which the individual concerned acted. If these factors are satisfied, exclusion would not be justified.[49]

III. THE BOARD SHOULD APPLY THE MATERIAL SUPPORT BAR IN A MANNER CONSISTENT WITH UNITED STATES *NON-REFOULEMENT* OBLIGATIONS UNDER ARTICLE 33(2)

In applying the material support provision of the INA, the Board should seek to ensure that only those refugees for whom there are reasonable grounds for regarding as a danger to the security of the country of refuge are denied *non-refoulement* protection under Article 33 of the 1951 Convention.

Article 33 is considered the cornerstone of the 1951 Convention, codifying the principle of *non-refoulement* of refugees. Under Article 33(1), 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."[50] This is a "fundamental humanitarian principle" that has achieved the status of customary

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[48] *See Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Joint Separate Opinion of Judge Cassese, ¶¶ 16-17 (Appeals Chamber, Oct. 7, 1997).

[49] For a discussion of the criteria required for the defense of duress under Article 31(1)(d) of the Rome Statute to apply, *see*, Kai Ambos, *Other Grounds for Excluding Criminal Responsibility, in* The Rome Statute of the International Criminal Court: A Commentary, 1035–1048 (Antonio Cassese, Paolo Gaeta and John R.W.D. Jones eds., Oxford Press 2002).

[50] 1951 Convention, *supra* note 2, art. 33(1).

international law.[51] Article 33(2) of the 1951 Convention 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."[52]

In determining whether an individual is a danger to the security of a country, the relevant authorities must specifically address the question of whether there is a future risk of danger, and their conclusion on the matter must be supported by evidence.[53] Given the serious consequences of removal, the danger to the security of the country must also be a "very serious danger," not a danger of lesser order.[54] The danger to the security of the country must also be posed by the refugee himself or herself. As a result, there must be an individualized assessment of the danger posed and a determination that the danger will be eliminated by the refugee's removal.

As structured under the INA, a finding that an asylum-seeker provided "material support" to a "terrorist organization" automatically establishes that there are "reasonable grounds to believe that [the individual is] a danger to the security of the United States"[55]

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[51] Office of the United Nations High Commissioner for Refugees, Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, No. 6 (XXVIII), *Non-Refoulement*, ¶ (a) (1977).
[52] 1951 Convention, *supra* note 2, art. 33(2).
[53] Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, ¶ 168 (June 2001).
[54] *Id.* at ¶ 169.
[55] INA § 241(b)(3)(B). We note that unlike Article 1F, Article 33(2) of the 1951 Convention is directed to those who have already been determined to be refugees. Under international standards, Article 33(2) is not to be considered when making an initial determination regarding refugee status. The United States applies the "material support" bar at the time of the refugee status determination. In this regard, the structure of the INA is inconsistent with the terms of the 1951 Convention.

and bars the individual from withholding of removal (*non-refoulement* protection). This approach is inconsistent with the individualized inquiry required under Article 33(2). In view of this, it is all the more important to apply the "material support" bar in a manner which takes into account whether the individual concerned is a present or future danger to the security of the country of refuge. In drafting the withholding of removal provision, including its exceptions, Congress intended to establish a legal standard consistent with the terms of Article 33(2).[56] If there are no reasonable grounds for regarding an individual who provided assistance to a terrorist organization under duress as a danger to the security of the United States under Article 33(2), then a denial of withholding of removal in that case would constitute a violation of the principle of *non-refoulement*.

An individual who provided "material support" involuntarily or under duress does not necessarily pose a danger to the security of the United States.[57] To avoid possible *refoulement* and a breach of the United States' international obligations, the relevant standards for applying the *non-refoulement* exception under Article 33(2) should be considered when interpreting the scope of application of the "material support" bar itself.

IV. IT IS "FAIRLY POSSIBLE" TO INTERPRET THE MATERIAL SUPPORT BAR IN A MANNER CONSISTENT WITH INTERNATIONAL OBLIGATIONS IN CASES IN WHICH THE INDIVIDUAL PROVIDED "MATERIAL SUPPORT" INVOLUNTARILY OR UNDER DURESS

There can be little doubt that it is "fairly possible" to interpret the "material support" bar in a manner consistent with its international obligations in cases in which the asylum applicant, through providing the support, incurred individual responsibility for

[56] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) ("The 1980 Act made withholding of deportation under § 243(h) mandatory in order to comply with Article 33.1").
[57] The Immigration Judge in the case at bar supported this conclusion in finding that DHS had not established that there were reasonable grounds to believe that the asylum-seeker was such a threat.

acts within the scope of Article 1F, but where he or she provided the support involuntarily or under duress such that individual responsibility would be rejected.

In this context, the Board may apply the "material support" bar in a manner consistent with international obligations through either of two approaches: (1) statutorily interpret the "material support" bar to require voluntariness; or (2) recognize the implicit common law defense of duress.

Depending on an analysis of the statutory elements of the "material support" bar, for example whether the word "support" requires volition and purpose, a voluntariness requirement may be statutorily interpreted in the language of the "material support" bar itself.[58] Alternatively, the common law defense of duress can also be recognized as applicable to the "material support" bar. The statute does not clearly preclude a duress defense and an implied defense would be consistent not only with the "individual responsibility" assessed under international and criminal law, but also with domestic criminal and civil law.[59] Both of these approaches would enable the Board to interpret

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[58] We note that this approach was advanced by DHS in another case before the Board less than two years ago. *See* Government's Brief in Opposition to Respondent's appeal of the Denial of Asylum, Withholding of Removal and Protection Under the Convention Against Torture, at 9 *Walter Amaya-Arias (*A # 97-133-248) (Jan. 30, 2004) ("Given this analogous case *[Boim v. Quranic Literacy Institute, 291 F.3d 1000 (7th Cir. 2002)]* and the plain language of the statute, material support to a terrorist organization must be a voluntary act.")

[59] Similar to the international refugee law focus on "individual responsibility," federal courts also have looked to the "personal culpability" of an asylum-seeker when interpreting bars to asylum and withholding of removal. This standard has been applied in interpreting the "persecutor of others" bar to asylum under INA § 208(b)(2)(A)(i) and to withholding of removal under INA § 241(b)(3)(B)(i). *See, e.g., Federenko v. United States*, 449 U.S. 490, n. 34 (1981) (determination of whether an individual assisted in the persecution of another depends on examination of individual's personal conduct); *Hernandez v. Reno*, 258 F.3d 806, 813 (8th Cir. 2001) ("[u]nder Federenko, a court faced with difficult 'line-drawing' problems should engage in a particularized evaluation to determine whether an individual's behaviour was culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution"); *Harpal Singh v. Gonzalez*, 417 F. 3d 736, 740 (7th Cir. 2005).

the "material support" bar in a manner that ensures its application in accordance with the requirements under Article 1F and Article 33(2) of the 1951 Convention.

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

Under the INA, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, may waive the material support ground of inadmissibility for a person in removal proceedings under INA § 240 in his or her "sole unreviewable discretion."[60] This waiver authority was first established under the USA Patriot Act in 2001[61] and later amended under the REAL ID Act of 2005. The executive branch has not exercised its waiver authority to date for any asylum-seeker in the United States, nor has it issued any procedures or substantive guidelines for purposes of exercising this authority in the future.

In considering the international treaty implications of the "material support" bar in *Matter of S-K-*, the Board stated in a footnote that the waiver authority could be exercised "in cases where the result reached under the terrorist bars to relief would not be consistent with our international treaty obligations" and found "no reason to assume that *[the government authorities vested with the waiver authority]* will not act consistently with our treaty obligations in exercising their power to grant such a waiver."[62] While UNHCR certainly encourages the executive branch to exercise its waiver authority in a manner consistent with United States treaty obligations, the availability of a waiver is

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[60] INA § 212(d)(3)(B)(I). For persons not placed in removal proceedings under INA § 240, including individuals seeking asylum "affirmatively," and for refugees and asylees seeking to adjust their status to lawful permanent residents, the Secretary of State also has the authority to exercise the material support waiver, in consultation with the Secretary of Homeland Security and the Attorney General.

[61] INA § 212(a)(3)(B)(iv). Under the USA Patriot Act, both the Attorney General and the Secretary of State, in consultation with the other, had the authority to waive the material support provision, regardless of whether the asylum-seeker was in removal proceedings.

[62] *See Matter of S-K-, supra* note 26.

without prejudice to the question of whether the underlying statute is in conformity with international law or the impact of the underlying violation on the asylum-seeker in the interim.

A. The Proper Exercise of a Waiver Authority Neither Renders a Statutory Provision Compatible with International Obligations nor Discharges the Board of its Obligation to Interpret the Statute in a Manner Consistent with International Obligations if Fairly Possible

The 1951 Convention was drafted with the intent to codify, at the international level, State obligations toward refugees. The 1980 Refugee Act was passed by the United States Congress with the same intention, to codify the means by which the United States met its treaty obligations and to ensure that individuals who met the criteria set out in the refugee definition of the 1951 Convention received the protection to which they were entitled. While the INA provides the executive branch with the unreviewable discretion to waive the material support bar in those cases where it applies, the courts retain the authority, and responsibility, to determine whether the material support bar applies in the first instance, as well as to determine the scope of the underlying statute, and its conformity with other domestic or international legal requirements.

The above point is perhaps best illustrated by analogy. In the criminal context the President and states' executive branch 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 does not absolve courts of their responsibility to decide the constitutionality of a given criminal statute. This rationale applies with equal force to judicial determinations of whether a domestic statute is in conformity with international treaty obligations. For example, were Congress to pass a law that provided that "all persons found to meet the refugee definition shall be returned to their country of origin," yet added a clause allowing the executive branch to waive that provision of the law in its "sole, unreviewable discretion," it would be evident that the substantive legislation was an act not "in conformity" with the 1951 Convention. While it may appear as a matter of domestic law that Congress would have intended to violate its treaty obligations, neither the role of the Court in making that determination, nor the underlying violation of the

treaty obligation itself, would be diminished by the availability of an unreviewable, discretionary executive waiver.

The implications of the waiver argument advanced by the Board in *Matter of S-K-* are significant. It threatens to significantly diminish, if not eliminate, the role of the courts in ensuring that the international legal obligations of the United States are maintained. In matters of refugee protection, no less than in other areas of the law, the courts provide an interpretation of the law that is independent of the pressures that attach to the political branches of government.[63]

B. Application of a Waiver at an Indeterminate Time in the Future Fails to Address the Ongoing Violation of an International Obligation and Its Impact on Individual Refugees

The United States is required under the 1967 Protocol to provide protection to refugees and to ensure the maintenance of those rights, enumerated under Articles 2 through 34 of the 1951 Convention, that flow from one's status as a refugee. These rights include, for example, the right of protection from *non-refoulement* (Article 33); the right to a travel document (Article 28); the right, under prescribed circumstances, to wage-earning employment (Article 17); and, the right to freedom of movement (Article 26). At the point in time that a *bona fide* refugee is denied the legal status and rights to which he is entitled under the 1951 Convention based on a domestic law that is incompatible with the 1951 Convention, or when such a denial is likely based on the terms of the law itself, a breach of the 1951 Convention (or of the 1967 Protocol in the case of the United States) has occurred.[64]

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[63] The United States Supreme Court has recognized the dangers of entrusting the safeguarding of constitutional rights in the hands of the executive branch. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 416, 106 S. Ct. 2595, 2605 (1986) (holding that the Eighth Amendment to the United States Constitution prohibits a state from carrying out the death penalty against someone who is insane, and that, when evidence of insanity is discovered post trial, the ability to have that evidence heard by a state Governor without judicial review was not sufficient to protect against a constitutional violation and stating: "The commander of the State's corps of prosecutors cannot be said to have the neutrality that is necessary for reliability in the fact-finding proceedings.")

[64] 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." The "act" (or omission) at issue "may involve the passage of legislation or, or

Denial of refugee protection to an asylum-seeker who provided assistance to a terrorist organization involuntarily or under duress and who poses no danger to the security of the United States, would constitute a breach of international obligations. The impact of such a denial is not ephemeral, it is real and tangible. In the United States, an otherwise *bona fide* refugee denied asylum and withholding of removal for having provided assistance to a terrorist organization under duress has no legal status in the United States, faces the possibility of *refoulement* to his country of origin, has no right to travel, may remain separated from family members who still reside outside of the United States, and may be detained indefinitely in a prison or jail, co-mingled with persons serving criminal sentences. Despite having had the authority to waive application of the material support bar for over four years now, the executive branch has not applied it in a single asylum case, nor has it issued any guidelines regarding how it will be applied in the future. The Board should not accept the ongoing and potentially indefinite violation of a refugee's fundamental rights under the 1951 Convention based on the hope that the executive branch will issue a waiver in an appropriate manner.[65]

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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." International Law Commission, *Articles on Responsibility of States for Internationally Wrongful acts*, Annex to General Assembly Resolution A/RES/56/83, art. 12 (12 December 2001). 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* (2002).

[65] It should be noted in this regard that the granting of a subsidiary form of protection such as deferral of removal pursuant to 8 C.F.R. § 1208.17(a), (one of the forms of protection provided by regulation to comply with the United Nations Convention Against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/Res/39/708 (1984) (ratified by U.S. Senate Oct. 20, 1990)), which has occurred in some material support cases, does not cure the denial of protection under the 1951 Convention, including, in particular, the denial of rights and benefits such as those mentioned above. While it does ensure protection from *refoulement*, those who are granted deferral of removal have no legal status in the United States, are not entitled to a travel document or work authorization, and may be detained even after a grant of such protection. Their inability to adjust to lawful permanent resident status impedes their ability to locally integrate and they cannot petition for their family members to join them in the United States.

CONCLUSION

As described above, the Board is obliged to interpret the "material support" bar in a manner consistent with United States' obligations under Article 1F and Article 33(2) of the 1951 Convention. For the foregoing reasons, UNHCR, as *amicus curiae,* respectfully urges that the decision of the Immigration Judge be affirmed.

Respectfully submitted,

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