Case No. 08-9527 & 07-9580

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

N- A- M-**,**

Petitioner,

v.

MICHAEL MUKASEY, 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

Steven H. Schulman

Vivek Arora
Akin Gump Strauss Hauer & Feld
Robert S. Strauss Building
1333 New Hampshire Ave.
Washington, DC 20036
(202) 887-4000
(202) 887-4288 (fax)

STATEMENT OF INTERESTED PARTIES

Pursuant to Fed. R. App. P. Rule 29, the undersigned counsel of record certifies that the following listed persons and entities have an interest in this *amicus curiae* brief. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

_____

Steven Schulman
Vivek Arora
Akin Gump Strauss Hauer & Feld LLP
1300 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000
(202) 887-4288 (fax)

***Amicus Curiae* Supporting Petitioner**
Office of the United Nations High Commissioner for Refugees

Counsel for *Amici*
Steven Schulman
Vivek Arora
Akin Gump Strauss Hauer & Feld LLP
1300 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000
(202) 887-4288 (fax)

Petitioner
N-A-M-

Counsel for Petitioner
Laura L. Lichter
Lichter & Associates, P.C.
1601 Vine Street
Denver, CO 80206

Respondent
Michael Mukasey
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Counsel for Respondent
Thomas B. Fatouros
U.S. Department of Justice
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

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STATEMENT OF INTEREST

The United Nations General Assembly established the Office of the United Nations High Commissioner for Refugees ("UNHCR") to provide international protection to refugees within its mandate and to seek durable solutions to the problems of refugees. *See* Statute of UNHCR, U.N. Doc.A/RES/428 (V), Annex, ¶¶ 1, 6 (Dec. 14, 1950). In particular, the Statute of the Office of the High Commissioner specifies that the High Commissioner's duty to provide protection for refugees includes, *inter alia*, "promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." *Id.* ¶ 8(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, 189 U.N.T.S. 150 ("1951 Convention" or "Convention"), and its 1967 Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 ("1967 Protocol" or "Protocol"). States Parties to the 1967 Protocol, in turn, commit to cooperate with the Office of the UNHCR in the exercise of its functions and, in particular, to facilitate UNHCR's duty to supervise the application of the Convention. 1951 Convention at Preamble ¶ 2. In 1968, the United States acceded to the 1967 Protocol, which incorporates by reference the substantive provisions of the 1951 Convention.[1]

The views of UNHCR are informed by more than fifty years of experience supervising the Convention and its Protocol. UNHCR, which has a presence in more than

[1] The Protocol through its Article I adopts the same definition of refugee found in Article 1 of the 1951 Convention including the provisions dealing with exclusion, cessation and availment of protection, except that the Protocol removes the time and geographic limits found in the 1951 Convention's definition of a refugee. Article I(2) and (3) of the 1967 Protocol. In addition, by acceding to the Protocol, States Parties undertake to apply Articles 2 through 34 of the 1951 Convention. Article I(1) of the 1967 Protocol.

110 countries and currently serves over thirty-two million people, provides guidance in connection with the establishment and implementation of national procedures for refugee status determinations, and also 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 and should provide substantial guidance to this Court.

This case involves the legal grounds in the Immigration and Nationality Act ("INA") under which an individual can be barred from obtaining withholding of removal because she has "been convicted…of a particularly serious crime" and is found to be "a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii); INA § 241(b)(3)(B)(ii).[2] This bar, enacted as part of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) ("1980 Refugee Act"), implements one of the two exceptions to protection against *refoulement*, or return to the country where a refugee has reason to fear persecution. The protection against *refoulement* is set forth in Article 33 of the 1951 Convention and is the cornerstone of international refugee protection. This protection may only be withdrawn under exceptional circumstances, as set forth in Article 33(2) of the Convention.[3]

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[2] The "particularly serious crime" bar to withholding of removal under United States law also serves as a bar to eligibility for asylum. 8 U.S.C. § 1158(b)(2)(A)(ii); INA § 208(b)(2)(A)(ii). The views presented in this brief should apply with equal force in the context of asylum eligibility. Because the Petitioner in this case was deemed ineligible for asylum for reasons other than the "particularly serious crime" bar, this brief addresses the application of the bar in the context of withholding of removal.

[3] Under the Convention framework, the exceptions to the *non-refoulement* obligation under Article 33 are invoked, if applicable, after an individual has been determined to be a refugee. This is in contrast to the clauses of Article 1F of the Convention, which exhaustively enumerate the grounds for exclusion from refugee status based on serious reasons for considering that the individual has committed certain heinous acts, and are considered at the time of the initial assessment of whether an individual satisfies the refugee definition.

This case accordingly presents questions squarely within UNHCR's mandate. It concerns the manner in which a federal court interprets and applies the statutory provisions enacted to implement the 1951 Convention and its 1967 Protocol regarding the expulsion of refugees based on exceptions to the principle of *non-refoulement*. The decision in this case can be expected to influence the manner in which the authorities of the United States and of other countries interpret and apply the provisions contained in the 1951 Convention and the 1967 Protocol.

SUMMARY OF ARGUMENT

Because the purpose of the 1951 Convention is to ensure the broadest protection of the life and freedom of refugees, any limitation to its core provision against *non-refoulement* must be construed in the most restrictive fashion. The plain language of Article 33(2)'s "danger to the community" exception requires two distinct determinations. First, there must be a finding that the person seeking refugee protection has been convicted by a final judgment of a "particularly serious crime." Second, if such a finding is made, there must then be an individualized assessment of whether the refugee does, in fact, constitute a future "danger to the community." It is this second prong – whether the refugee poses a future danger to the community – that is the essential inquiry in this analysis.

The immigration judge found that Petitioner met the definition of a refugee because she had suffered persecution in her country of origin and had a viable claim to withholding of removal, the United States' version of protection against *non-refoulement*. Administrative Record ("AR") 131-32. The judge denied that protection however, on the basis that Petitioner had been convicted of a "particularly serious crime." AR 132. The immigration judge did not make a distinct, individualized assessment of whether Petitioner "constitutes a danger to the community," relying instead on a 1991 ruling of the Board of Immigration

Appeals ("Board" or "BIA"), *Matter of K-*, 20 I. & N. Dec. 418 (B.I.A. 1991), that such a determination was not necessary. AR 131. Upon its review of the immigration court decision, the Board upheld the court's determination and reiterated unequivocally that, once a determination has been made that a crime is particularly serious, there is no separate, individualized determination as to danger to the community. AR 56.

As are the decisions of the Board and the Immigration Court in the instant case, this Court's 1995 finding in *Al-Salehi v. INS,* 47 F.3d 390, 393 (10th Cir. 1995), that once a crime is determined to be particularly serious, no inquiry into "danger to the community" is needed, is contrary to United States obligations under international law. As explained below, when this Court decided *Al-Salehi* it explicitly stated that it had no reason to approach the language of Article 33(2) any differently. Amicus demonstrates in this brief through an expert examination of the text and purpose of the 1951 Convention that the language of Article 33(2) is clear on its face, and, even if the language were ambiguous, this Court should interpret it consistent with the expert views of UNHCR and leading international refugee law scholars.

The decision to expel Petitioner despite a finding of her need for protection against *refoulement,* without making a distinct, individualized assessment of whether she "constitutes a danger to the community" was inconsistent with Article 33's prohibition against the return of a refugee to persecution unless it is determined that she poses a future danger to the community in which she resides. A thorough assessment of all the factors indicative of whether Petitioner actually poses a future danger to the country of asylum must be performed to ensure against a violation of the obligation of *non-refoulement*.

ARGUMENT

I. THE EXCEPTIONS TO WITHHOLDING OF REMOVAL IN 8 U.S.C. § 1231(B)(3)(B) SHOULD BE INTERPRETED CONSISTENTLY WITH THE UNITED STATES' OBLIGATIONS UNDER THE 1967 PROTOCOL AND 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES

The principle of *non-refoulement*, codified in Article 33 of the 1951 Convention, provides that Contracting States shall 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." It is the central component of refugee protection and has been regularly reaffirmed by the Executive Committee of the UNHCR Programme,[4] of which the United States is a longstanding member. *See, e.g.*, UNHCR Executive Committee Conclusions 1, ¶ (b) (1975) (urging States "scrupulously to observe the principle [of *non-refoulement*] whereby no refugee should be forcibly returned to a country where he fears persecution"); 17, ¶ (b) (1980) (reaffirming "the fundamental character" of the principle of *non-refoulement*); 25, ¶ (b) (1982) (reaffirming the principle of *non-refoulement* and that it was "progressively acquiring the character of a peremptory rule of international law"); 42, ¶ (c) (1986) (recognizing that the 1951 Convention and 1967 Protocol "incorporate fundamental principles of refugee law including . . . *non-refoulement*" and "constitute the cornerstone of international [refugee] protection"); 82, ¶ (d)(i) (1997) (finding it "timely to draw attention to

[4] The UNHCR Executive Committee is an intergovernmental group, currently comprised of seventy-six Member States of the United Nations and the Holy See, that advises the UNHCR in the exercise of its protection mandate. In carrying out this role, the Committee meets annually and publishes its discussions in Conclusions on International Protection. Although the Committee's Conclusions are not formally binding, they are relevant to the interpretation and application of the international refugee protection regime as expressions of opinion that are broadly representative of the views of the international community. The Committee's specialized knowledge and the fact that its conclusions are reached by consensus add further weight. UNHCR Executive Committee Conclusions are available at http://www.unhcr.org/doclist/excom/3bb1cd174.html (last visited May 9, 2008).

the following particular aspects [of refugee protection]: the principle of *non-refoulement*"); 102, ¶ (j) (2005) (calling on States to refrain "in particular from returning or expelling refugees contrary to the principle of *non-refoulement*"). The Convention specifically prohibits any reservations to Article 33. 1951 Convention at Article 42(1).

The obligation of *non-refoulement* is a fundamental humanitarian principle that has attained the status of customary international law.[5] As customary international law, the obligation of *non-refoulement* is binding on all nations. The Supreme Court has ruled that international law, including both treaty and customary law, is "part of our [United States] law," and creates enforceable rights and obligations for individuals in United States courts. *The Paquete Habana*, 175 U.S. 677, 700 (1900). *Non-refoulement* obligations have also been established by international human rights law, complementing those in the 1951 Convention.[6]

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[5] *See, e.g.,* Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol adopted at the Ministerial Meeting of States Parties of 12-13 Dec. 2001, HCR/MMSP/2001/09 (Jan. 16, 2002). ("[a]cknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law"); *see also* Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, Opinion ¶ 216 (2001), *available at* http://www.unhcr.org/publ/PUBL/419c75ce4.pdf. ("The view has been expressed … that 'the principle of non-refoulement of refugees is now widely recognized as a general principle of international law' … in view also of the evident lack of expressed objection by any State to the normative character of the principle of non-refoulement, we consider that non-refoulement must be regarded as a principle of customary international law."); Louis B. Sohn & Thomas Burgenthal, *The Movement of Persons Across Borders*, 123 (1992) ("The general prohibition against a State's return of a refugee to a country where his or her life would be threatened … has become a rule of customary international law."); Guy Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 Va. J. Int'l L. 899, 902 (1986) ("The binding obligations associated with the principle of non-refoulement are derived from conventional and customary international law.").

[6] An explicit *non-refoulement* provision is contained in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 465 U.N.T.S. 85 (*entered into force* June 26, 1987), which the United

Exceptions to the principle of *non-refoulement* under international refugee law are permitted only under the circumstances expressly provided for in Article 33(2) of the 1951 Convention. Given the humanitarian character of *non-refoulement* and the serious consequences to a refugee of being returned to a country where he or she faces persecution, the exceptions to *non-refoulement* should be interpreted restrictively and with caution. *See, e.g.*, Lauterpacht & Bethlehem, *supra* note 5, ¶¶ 158-59.

The United States Constitution provides that "[the] Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const., Art. VI, cl.2. In 1804, Chief Justice Marshall wrote 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. (2 Cranch) 64, 117-

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States ratified in 1994. Article 3 expressly prohibits the removal of an individual to a country where there are substantial grounds for believing that he or she would be in danger of being subject to torture. There are no exceptions to this prohibition. The International Covenant of Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976), ratified by the United States in 1995, as interpreted by the Human Rights Committee, also encompasses the obligation of States not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 [right to life] and 7 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment] of the Covenant. This prohibition applies to the country to which removal is to be effected and to any country to which the person may subsequently be sent. *See* Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, ¶ 9, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004) ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or *refoulement*"); and its *General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

118, (1804);[7] *see also Clark v. Allen*, 331 U.S. 503, 508-11 (1947); *Cook v. United States*, 288 U.S. 102, 118-20 (1933). The "*Charming Betsy*" presumption has been reaffirmed by the Supreme Court and a number of federal circuit courts of appeal. *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), *remanded on other grounds*, 421 F.3d 795 (9th Cir. 2005).

In enacting the 1980 Refugee Act, Congress intended to "bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (citing H.R. Rep. No. 96-608, at 9 (1979)). The Refugee Act incorporated the essential principle of *non-refoulement* through the remedy of withholding of removal, which provides that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality,

[7] 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 Art. 38 of the Statute of the International Court of Justice, 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.").

membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A), INA § 241(b)(3)(A).[8]

Congressional intent to conform to Article 33 of the Convention is clear. *See, INS v. Stevic*, 467 U.S. 407, 421 (1984) (noting that the statutory provision regarding withholding of deportation, as amended, conformed to the language of Article 33 of the Protocol); *see also Cardoza-Fonseca*, 480 U.S. at 441 n.25 (stating that "[t]he 1980 Act made withholding of deportation under [INA] § 243(h) mandatory in order to comply with Article 33.1").

The Supreme Court has affirmed on more than one occasion that "'one of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (quoting *INS v. Cardoza-Fonseca,* 480 U.S. 421, 436-37) (citing H.R. Rep. No. 96-781, at 19 (1980)); *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 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), now codified at 8 U.S.C. § 1231(b)(3) (2006)).

Consistent with its intention for the law to comport with the Convention and Protocol, Congress carved out two exceptions to the obligation to withhold deportation that mirror the two exceptions to *non-refoulement* in Article 33(2) of the Convention. Indeed, the

[8] Originally codified at 8 U.S.C. § 1253(h), INA § 243(h)(2)(B) and later renumbered by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

Conference Report that accompanied the Refugee Act reflects Congress' explicit "understanding that [the exceptions 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* 198 U.S.C.C.A.N. 160, 161. Accordingly, the language of the "danger to the community" exception in the 1980 Refugee Act is almost identical to the language of the corresponding exception in Article 33(2) of the 1951 Convention. Although several amendments to the INA have specified certain crimes as being "particularly serious" for purposes of this exception,[9] Congress has never suggested that it intended to depart from the purposes of the 1980 Refugee Act. Thus, 8 U.S.C. § 1231(b)(3)(B)(ii) should be applied in a manner that ensures the United States' compliance with the 1967 Protocol and the 1951 Convention.

II. THE RELEVANT EXCEPTION TO THE OBLIGATION OF *NON-REFOULEMENT* APPLIES ONLY TO A REFUGEE WHO HAS BEEN CONVICTED OF A "PARTICULARLY SERIOUS CRIME" AND HAS BEEN FOUND TO CONSTITUTE A "DANGER TO THE COMMUNITY"

As with any treaty provision, the meaning of the "danger to the community" exception to *non-refoulement* under Article 33(2) begins with the text itself. "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Vienna Convention on the Law of Treaties, Art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.[10] The Supreme Court has

[9] 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, 100 Stat. 2114 (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).

[10] The United States has signed but not ratified the Vienna Convention. In submitting this treaty for ratification by the Senate, the Department of State acknowledged that the

embraced this well-established principle of international law, reiterating that "[a]s treaties are contracts between nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations.'"[11] *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (quoting *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890)).

The Convention's plain meaning is controlling here. The text of Article 33(2) is clear that it only applies to a refugee who has been convicted of a "particularly serious crime" *and* who constitutes a "danger to the community" in which he has taken refuge. The plain meaning of this exception has been repeatedly recognized by commentators and leading refugee law experts. The pre-eminent international refugee law scholar and commentator, Atle Grahl-Madsen, has stated that: "It must be remembered that irrespective of how the expression 'a particularly serious crime' can be interpreted, expulsion or return to a country of persecution may only be effected if the refugee 'constitutes a danger to the community.'" *Commentary on the Refugee Convention 1951: Articles 2-11, 13-23, 24-30 & Schedule, 31-37*, 239 (1963). Another leading commentator, Paul Weis, has similarly underscored that "two conditions must be fulfilled: the refugee must have been convicted by final judgment of a particularly serious crime, *and* he must constitute a danger the community of the country." *The Refugee Convention, 1951: The Travaux Preparatoires Analyzed with a Commentary*, 342 (1995) (emphasis added). International refugee law experts Sir Elihu Lauterpacht and Daniel Bethlehem concur with this understanding stating: "the requirement that the refugee constitute a danger to the community is not met simply because the refugee has been

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Convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971).

[11] *See also* Restatement (Third) of Foreign Relations Law of United States § 325(1) (1987) ("An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose").

convicted of a particularly serious crime; there must be an additional assessment of dangerousness," and "the critical factor here is not the crimes that come within the scope of the clause, but whether, in the light of the crime and conviction, the refugee constitutes a danger to the community of the country concerned." Lauterpacht & Bethlehem, *supra* note 5, ¶¶ 191, 187, respectively. Others who share this view include Gunnel Stenberg, author of *Non-Expulsion and Non-Refoulement: The Prohibition Against Removal of Refugees With Special Reference to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees*, 221 (1989) and more recently, James C. Hathaway and co-author Colin J. Harvey, who have reaffirmed that "Article 33(2) authorizes refoulement for refugees who have been 'convicted by a final judgment of a particularly serious crime' and who are found to constitute a 'danger to the community' of the asylum state." *Framing Refugee Protection in the New World Disorder*, 34 Cornell Int'l L.J. 257, 291 (2001).

The first inquiry, concerning the seriousness of the crime, operates as a threshold requirement for application of the exception. If it is not satisfied, an evaluation of whether the refugee poses a "danger to the community" is not necessary. Correlatively, if it is determined that a refugee has been convicted of a particularly serious crime, a forward-looking assessment must then be made as to whether he or she constitutes a danger to the community. If a refugee has been convicted of a particularly serious crime but does not pose a danger to the community, he or she must not be subject to *refoulement*.

The plain language of Article 33 is consistent with the purpose of the 1951 Convention, which – as stated expressly in its Preamble – is "to assure refugees the widest possible exercise of [these] fundamental rights and freedoms," 1951 Convention at Preamble ¶ 2, and with the general principle of law that exceptions to protections under international

human rights treaties must be interpreted narrowly. The Supreme Court has recognized the importance of hewing to the purposes that animate international agreements. It has counseled not only that treaties must "be construed in a broad and liberal spirit," but also that "when two constructions are possible, one restrictive of rights that may be claimed under [them] and the other favorable to [those rights], the latter is to be preferred." *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924) (internal citations omitted); *accord United States v. Stuart*, 489 U.S. 353, 368 (1989).

Further evidence that a fundamental purpose of the 1951 Convention is to assure protection of the basic human rights of refugees can be found in the reluctance of the Convention's drafters to include any exception to the Convention's *non-refoulement* obligation.[12] The *Report of the Ad Hoc Committee on Refugees and Stateless Persons* stated, regarding the Convention drafting process, that "[w]hile some question was raised as to the possibility of exceptions to Article 28 [later Article 33(1)] the Committee felt strongly that the principle here expressed was fundamental and should not be impaired." UN Doc. E/1850;E/AC.32/8 (Aug. 25, 1950) at 13. Notably, the United States delegate indicated – in response to a proposal from the delegate from the United Kingdom to create exceptions to the *non-refoulement* prohibition – that "it would be highly undesirable to suggest … that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution." *Ad Hoc* Committee on Refugees and Stateless Persons, *Summary Record of the 40th Meeting* at 31, UN Doc. E/AC.32/SR.40 (Aug. 22, 1950). The United Kingdom

[12] Preeminent refugee law scholars have noted this point as well. *See Weis, supra*, at 342 (Article 33(2) "constitutes an exception to the general principle embodied in paragraph 1 and has, like all exceptions, to be interpreted restrictively."); Lauterpacht & Bethlehem, *supra* note 5, at 136 ("The fundamental character of the prohibition against *refoulement*, and the humanitarian character of the 1951 Convention more generally, must be taken as establishing a high threshold for the operation of exceptions to the Convention.").

delegate later stated that "the authors of [this provision] … sought to restrict its scope so as not to prejudice the efficiency of the article as a whole." Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: *Summary Record of the 16th Meetings* at 8, UN Doc. A/CONF.2/SR.16 (Nov. 23, 1951).

As the plain language of the Article 33(2) states, the "danger to the community" exception to the principle of *non-refoulement* is satisfied only when a refugee has been convicted of a "particularly serious" crime *and* has been found to present a *future* danger to the community. To comport with United States obligations under international law, separate assessments must be made with respect to each criterion of the bar to asylum or withholding of removal.

A. To Be Deemed "Particularly Serious," A Crime Must Be Exceptionally Grave

Article 33(2) makes clear that the exception to *non-refoulement* may be considered only when the refugee is convicted of a crime that is deemed "particularly serious." Although the 1951 Convention does not specifically list the crimes that come within the ambit of Article 33(2), it is significant that the term "crime" is doubly qualified by the terms "particularly" and "serious," thereby underscoring the high degree of gravity required for the crime to meet this prong of the exception. By comparison, Article 1F(b) of the 1951 Convention excludes from refugee protection anyone who "has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee." The "serious non-political crime" ground was intended to apply to persons who had committed an act so grave and unconscionable—a "capital crime or a very grave

punishable act"[13]—as to render them undeserving of international protection. UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, ¶ I(A)(2) HCR/GIP/03/05 (Sept. 4, 2003) ("UNHCR Exclusion Guidelines").

Consistent with the drafters' view that Article 33(2) be applied narrowly, the addition of the second qualifier "particularly" must be construed to require an even higher threshold and an even more restrictive application than the "serious non-political crime" ground of exclusion in Article 1F(b). *See* Hathaway *supra*, at 290 ("While Article 1(F)(b) requires a 'serious' crime, Article 33(2) authorizes refoulement only if the crime is 'particularly serious' … Logically, refoulement under Article 33(2) should be considered only where the crimes usually defined as 'serious' – for example, rape, homicide, armed robbery, and arson – are committed with aggravating factors, or at least without significant mitigating circumstances.") (internal citations omitted). This double qualification—"particularly" and "serious"—is also consistent with the restrictive scope of the exception and underscores that *refoulement* may be contemplated pursuant to this provision only in the most exceptional circumstances. *See, e.g.*, Lauterpacht & Bethlehem, *supra* note 5, ¶ 186. The Board of Immigration Appeals has recognized this view in principle. *In re Frentescu*, 18 I. & N. Dec. 244, 245 (B.I.A. 1982) (noting that, although the term "particularly serious crime" is neither defined in the 1980 Refugee Act nor in the 1967 Protocol, "the specific language chosen by Congress reflects that a 'particularly serious crime' is more serious than a 'serious

[13] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 155 (1979, re-edited 1992).

nonpolitical crime.'") *modified on other grounds*, *In re C-*, 20 I. & N. Dec. 529 (B.I.A. 1992) and *In re Gonzalez*, 19 I. & N. Dec. 682 (B.I.A. 1988).

A determination as to whether a crime is "particularly serious" for purposes of Article 33(2), then, hinges not merely on whether the crime is "grave" but on whether it is "exceptionally grave." The gravity of the crime should not be judged solely by its categorization in the country in question, but rather international standards should be applied in making such an assessment. This means that it is not enough to rely simply on the definition of the crime in the text of the local statute for which the refugee has been convicted. The application of the term "particularly serious crime" in the context of an exception to *non-refoulement* must involve the examination of all circumstances related to the crime. A number of factors therefore must be examined. At a minimum, these factors must include the nature of the act, the actual harm inflicted, the intention of the perpetrator and the circumstances of the crime, the conduct of the individual, the form of procedure used to prosecute the crime, the nature of the penalty imposed, and whether most jurisdictions would consider it a particularly serious crime. Only a determination that accounts for all of these factors will satisfy the imposition of the exception to *non-refoulement* under international law.

B. To Determine Whether a Refugee Poses a Danger to the Community, an Individualized Inquiry Assessing All Relevant Factors Must Be Conducted

While the conviction for a particularly serious crime is a threshold requirement for application of this exception, the key inquiry is whether the individual actually poses a future threat to the community of refuge. When a State adopts a categorical approach to its definition of a "particularly serious" crime, as the United States Congress has done in 8

U.S.C. § 1231(b)(3)(B),[14] a separate inquiry into whether the refugee will constitute a "danger to the community" is even more essential to ensure compliance with Article 33. The requirement of constituting a "danger to the community" does not operate as a presumption arising out of a past conviction, but instead requires a separate assessment that is both *individualized* and *prospective.* UNHCR Exclusion Guidelines, *supra*, ¶ I (B)(4). Leading refugee scholars have affirmed both of these points. *See* Atle Grahl-Madsen, *supra*, at 234 (emphasizing that "Article 33(2) clearly calls for deciding each individual case on its own merits" and stating that the word danger "can clearly not refer to a past danger, but only to a present or future danger"); Lauterpacht & Bethlehem, *supra* note 5, ¶ 183 (discussing requirement to consider individual circumstances); *id.* ¶ 191 (stating that separate dangerousness inquiry involves assessment of issues of fact and listing factors to be considered); *id.* ¶ 147 (indicating that the application of the exception "hinges on an appreciation of a *future* threat from the person concerned rather than on the commission of some act in the past"). The decisive factor is not the seriousness or categorization of the crime that the refugee has committed, but, rather, whether the refugee, in light of the crime and conviction, poses a *future* danger to the community.

An individualized assessment as to whether a refugee poses a "danger to the community" requires consideration of a variety of factors. At a minimum, the factors to be examined must include the nature and circumstances of the criminal act, the motivation in committing it, when the crime in question was committed, and any mitigating factors such as

[14] While the purpose of this brief is not to address specifically the issue of whether crimes not categorized as aggravated felonies could constitute particularly serious crimes for purposes of 8 U.S.C. § 1231(b)(3)(B)(ii) or the appropriateness of a categorical approach, we would note that, given the over-breadth of the aggravated felony definition, it is difficult for UNHCR to conceive of a crime outside that category that would be particularly serious.

the individual's mental state at the time the crime was committed, past criminal activities, the possibility of rehabilitation and reintegration within society, and evidence of the likelihood of recidivism. *See Note on Non-Refoulement submitted by the High Commissioner for Refugees to the Executive Committee of the High Commissioner's Programme*, 29th Session, Subcommittee of the Whole on International Protection, ¶ 14 (Aug. 23, 1977) (noting that "where the refugee has been convicted of a serious criminal offence, it is important to take into account any mitigating factors and the possibilities of rehabilitation and reintegration within society."); *see also* Lauterpacht & Bethlehem, *supra* note 5, ¶ 191 (recognizing the need for an assessment of the facts of the case including mitigating factors). Only a determination that accounts for all of these factors will satisfy the imposition of the "danger to the community" exception to *non-refoulement* under Article 33(2).

III. THE BOARD'S FAILURE TO TAKE INTO ACCOUNT FACTORS RELATED TO WHETHER PETITIONER POSES A FUTURE DANGER TO THE UNITED STATES WAS CONTRARY TO UNITED STATES OBLIGATIONS UNDER THE 1967 PROTOCOL

Despite the requirements of Article 33(2), the Board unequivocally stated that "once an alien is found to have committed a particularly serious crime, we no longer engage in a separate determination to address whether the alien is a danger to the community." AR 56. In upholding the immigration court's decision to bar Petitioner from the protection of *non-refoulement,* the Board's decision was fundamentally inconsistent with the intent and meaning of the "danger to the community" exception and thus contrary to United States' obligations under the 1967 Protocol and Article 33 of the Convention.

A central issue in this case was to determine the evidence that may be considered in assessing whether a crime is "particularly serious." The Board affirmed that it must, in the first instance, "examine the nature of the conviction, the type of sentence imposed, and the

circumstances and underlying facts of the conviction." AR 56 (internal citations omitted). As is clear from this articulation, some of these factors also relate to whether an individual poses a "danger to the community." Despite this initial recognition that such factors should be examined in this case, in the end—and with no explanation—the Board simply did not do so. Rather, the Board next stated that the first step in this analysis was to look to the elements of the crime. If this preliminary step led to a finding that that the crime could potentially fall "within the ambit of a particularly serious crime, all reliable information may [then] be considered in making a particularly serious crime determination . . . ." *Id.* (internal citations omitted). Surprisingly, the Board then found the crime at issue here to be particularly serious "based solely on its elements, i.e., that the offense by its 'nature' is a particularly serious one" without examining any of the other factors it had delineated as necessary to assess in determining whether a crime is particularly serious, and with no assessment at all as to whether the Petitioner posed an actual future danger to the community. AR 57.

More than thirteen years ago, this Court considered the issue of whether the statutory language of the "particularly serious crime" bar to withholding of removal is plain on its face and found that it was not. *Al-Salehi v. INS,* 47 F.3d 390 (10th Cir. 1995). Explicitly acknowledging that it had been provided with no authority to suggest that Article 33(2) should be interpreted to require a separate inquiry into whether the applicant is a danger to the community, the Court found reasonable the BIA's statutory interpretation that no separate "danger to the community" assessment was needed when an applicant has been convicted of an aggravated felony. *Id.* at 395. The Court did express support for the "general legal premise" that the statute must be interpreted consistent with Article 33(2), but since

Petitioner had advanced his arguments concerning Article 33(2) in a "conclusory fashion" and did not "cite any authority for his reading of the Convention," the Court was compelled to follow the BIA's reading of the statute. *Id.*

This Court is not faced with the same limitations that hampered the *Al-Salehi* court. Unlike that case, here amicus provides the Court with a detailed, expert analysis of the applicability and appropriate construction of the 1951 Refugee Convention and 1967 Protocol regarding the "danger to the community" bar to eligibility for withholding of removal. The language of Article 33(2) clearly requires two tests: whether the crime is one that is particularly serious and, if so, whether the individual constitutes a danger to the community in which he or she seeks refuge. All of the leading experts on the Convention agree with this plain reading of Article 33(2). The conclusion in *Al-Salehi* is contrary to the plain text of Article 33, inconsistent with international law and not in accord with United States obligations under the 1967 Protocol and Article 33 of the Convention. Given the authority presented to this Court, it should find that the ruling in *Al-Salehi* is not binding on the instant case.

The Board's conclusion that no separate inquiry into dangerousness was required and its failure to examine all of the relevant factors related to whether Petitioner poses a future danger to the United States is contrary to the spirit, purpose and requirements of Article 33(2).

CONCLUSION

For the foregoing reasons, UNHCR respectfully urges that the decision of the Board of Immigration Appeals be reversed and that this Court hold that in order for the application of the bar to asylum under 8 U.S.C. § 1158(b)(2)(A)(ii); INA § 208(b)(2)(A)(ii) and withholding of removal under 8 U.S.C. § 1231(b)(3)(B)(ii); INA § 241(b)(3)(B)(ii) to

comport with United States' obligations under the 1967 Protocol and the 1951 Convention, there must be a separate inquiry into whether the individual poses a future danger to the United States, which includes, at a minimum, an examination of the nature of the conviction, the type and length of sentence imposed, the circumstances and underlying facts of the conviction, and any mitigating factors as to the commission of the act.

Dated: June 19, 2008

Respectfully Submitted,

Steven H. Schulman
Vivek Arora
Akin Gump Strauss Hauer & Feld
Robert S. Strauss Building
1333 New Hampshire Ave.
Washington, DC 20036
(202) 887-4000
(202) 887-4288 (fax)

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), this Brief for Amici Curiae in Support of Petitioner complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5395 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. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft© Word 2003 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

CERTIFICATE OF SERVICE

I**,** Steven Schulman, hereby certify that I served a copy of the foregoing Motion via Federal Express this 19th Day of June, 2008 on the following:

Petitioner
N-A-M-

Counsel for Petitioner
Laura L. Lichter
Lichter & Associates, P.C.
1601 Vine Street
Denver, CO 80206

Respondent
Michael Mukasey
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Counsel for Respondent
Thomas B. Fatouros
U.S. Department of Justice
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

Steven Schulman