

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Case No. 06-60646

THAWNG VUNG THANG,
Petitioner,

v.

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

On Appeal from the Board of Immigration Appeals

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

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STATEMENT OF INTEREST

The Office of the United Nations High Commissioner for Refugees (UNHCR) has been charged by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate and for seeking durable solutions to the problems of refugees by assisting governments and private organizations. Statute of the Office of the United Nations High Commissioner for Refugees, U.N. Doc. A/RES/428(v), annex para. 1 (1950). As set forth in its Statute, UNHCR fulfills its protection mandate by, *inter alia*, “promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.” *Id.* annex para. 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") and its 1967 Protocol relating to the Status of Refugees art. 2, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 ("1967 Protocol").¹

The views of UNHCR are informed by more than 50 years of experience supervising the 1967 Protocol and the 1951 Convention. UNHCR is represented in 116 countries and provides guidance in connection with the establishment and

¹ In analyzing refugee protection issues, the most relevant international treaties are the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. The United States signed the 1967 Protocol, which incorporates by reference the substantive provisions (Articles 2-34) of the 1951 Convention, in 1968.

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.

The present case involves the legal grounds under the Immigration and Nationality Act (“INA”) upon which an asylum-seeker may be denied refugee protection based on assistance provided to a “terrorist organization” as defined by the INA.² This case raises fundamental issues regarding the proper interpretation of the 1951 Convention and its 1967 Protocol and their application in the United States. UNHCR is expressly mandated to supervise these multilateral treaties, which serve as the foundation of United States asylum law. This case concerns the proper interpretation of Article 1F of the 1951 Convention, providing for the exclusion from refugee status of individuals under certain circumstances, and Article 33(2) of the 1951 Convention, allowing for limited exceptions to State Parties’ *non-refoulement* (non-return) obligations. Given the potentially serious consequences of the denial of refugee protection—possible return to persecution—this case implicates UNHCR’s core mandate.³

² 8 U.S.C. §1182(a)(3)(B)(vi).

³ UNHCR submits this *amicus curiae* brief in order to explain the analytic framework for resolving issues related to exclusion from international refugee protection and exceptions to the principle of *non-refoulement* as provided for under the Convention and not to offer an opinion on the merits of the applicant’s claim.

SUMMARY OF ARGUMENT

In denying Petitioner asylum on the grounds that he provided “material support” to a terrorist organization, the Board of Immigration Appeals (the Board) failed to construe the “material support” bar consistently with United States obligations under the 1967 Protocol. In fact, the Board made no mention of international law or its effect on the interpretation of the INA, even though the Petitioner raised these issues on appeal. For two reasons, proper construction of the INA’s “material support” bar must be construed consistently with international law.

First, the INA’s “material support” bar can, and therefore should, be interpreted consistently with United States obligations under international law. Every indication of congressional intent demonstrates that Congress intended for courts to construe those provisions of the INA affecting refugee protection, including the “material support” bar, in a manner consistent with United States obligations under the 1967 Protocol. For more than two hundred years, it has been the law that “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.” *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 81 (1804) (Marshall, C.J.). The “law of nations” unquestionably includes the 1951 Convention and 1967 Protocol, as well as the customary international law principle of *non-refoulement*. This principle prohibits

the expulsion of a refugee to a country of feared persecution unless he is a threat to the security of the country of refuge or, having been convicted of a particularly serious crime, constitutes a danger to the community of that country.

The *Charming Betsy* doctrine has evolved into a clear statement rule: when a statute can be read in conformity with international obligations, it should be so construed absent a clear indication from Congress that it intended otherwise. There is no such clear statement in the INA. As the Supreme Court recognized in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the legislative history of the 1980 Refugee Act, which created the current framework of asylum law in the United States, makes clear that a primary purpose of the Act's amendments to the INA was to bring the United States into compliance with its obligations under the 1967 Protocol. In no amendment since passing the 1980 Act, including those amendments that implemented the "material support" bar, has Congress ever indicated any intent to depart from those obligations.

In this case, the Board disregarded the clear statement rule and failed to construe the "material support" bar consistently with the 1951 Convention and its 1967 Protocol, despite the fact that such a construction is clearly possible. Article 1F and Article 33 of the 1951 Convention are directly relevant to the proper interpretation of the "material support" bar. Article 1F indicates the types of criminal acts which may give rise to exclusion of a person from international

refugee protection if it is established that he or she incurred individual responsibility for these acts. Article 33 codifies the principle of *non-refoulement* and prohibits a State from returning a refugee to a place where they risk persecution except in very limited circumstances. In interpreting the “material support” bar, the Board should have looked to these sources of international law for guidance.

Second, although the Board recently held differently, *see In re S-K-*, 23 I. & N. Dec. 936, 942-43 n.7 (BIA 2006), the fact that the Executive Branch can waive the material support bar does not displace the requirement that the provision itself be construed consistently with international law. Absent a clear statement from Congress that it intends to diverge from the United States’ obligations under international law, this requirement remains intact. Neither the text nor the legislative history of the waiver provision provides any indication that Congress intended to exempt the Board or federal courts from their obligation to interpret the “material support” bar in conformity with the 1951 Convention and the 1967 Protocol. Moreover, there is no support in United States domestic law for interpreting a discretionary waiver as exempting federal agencies or courts from their obligation to apply accepted rules of statutory construction; courts cannot relinquish their duties in the hope another branch of government will step in to compensate. Finally, the Board’s interpretation of the waiver provision in *In re S-*

K- is unsupported in practice: in more than five years since the waiver provision's enactment, the Executive Branch has never granted a waiver in an asylum case and has only recently announced it will establish a process for its potential use.⁴

The Board's failure to interpret the "material support" bar consistently with the 1951 Convention and the 1967 Protocol cannot be squared with Congress' intent that the provisions of the INA that affect refugee protection be interpreted and applied in a manner consistent with these international obligations. In reviewing the Board's decision and interpreting the "material support" bar, this Court should remedy the Board's error.

ARGUMENT

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

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

Under INA § 212(a)(3)(B)(iv)(VI),⁵ an individual who is found to have provided "material support" for the commission of "terrorist activity" or to a

⁴ See Press Release, United States Department of Homeland Security, Statement by Homeland Security Secretary Michael Chertoff on the Intention to Use Discretionary Authority for Material Support to Terrorism (Jan. 19, 2007) ("DHS Press Release").

⁵ 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" for the commission of "terrorist activity" or to a terrorist organization or an individual engaged in "terrorist activity."

“terrorist organization”—as those terms are defined under the statute—is statutorily ineligible for asylum⁶ and withholding of removal.⁷ In applying the “material support” bar, this Court must be guided by the proper interpretation of the 1951 Convention and its 1967 Protocol.

When Congress enacted the “material support” bar, it legislated against the backdrop of the long-established rule that “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.” *The Charming Betsy*, 6 U.S. at 81. Since Justice Marshall’s frequently-cited decision, the Supreme Court and lower federal courts have reaffirmed the “*Charming Betsy*” presumption on numerous occasions. *See, e.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641, 646-47 (5th Cir. 2004) (*rev’d on other grounds by Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005)); *United States v. Suerte*, 291 F.3d 366, 373-74 (5th Cir. 2002); *Ali v. Ashcroft*, 213 F.R.D. 390, 405 (W.D. Wash. 2003) (“Because Respondents’ proposed interpretation of the statute may result in persecution or deprivation of life in violation of international law, Petitioners’ proposed construction is preferred as it reconciles the statute with the law of nations”), *aff’d on other grounds*, 346 F.3d 873 (9th Cir. 2003).

⁶ INA § 208(b)(2)(A)(v).

⁷ INA § 241(b)(3)(B)(iv).

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

The *Charming Betsy* presumption has evolved into a clear statement rule. *See Cook v. United States*, 288 U.S. 102, 120 (1933) (“A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.”); *see also United States v. Payne*, 264 U.S. 446, 448 (1924) (same); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (“There is . . . a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action.”). Indeed, the Supreme Court has recognized that the

“cardinal principle” of constitutional avoidance—itsself the most robust of clear statement rules—originates from the *Charming Betsy* presumption. *DeBartolo Corp. v. Fla. Gulf Coast Bldg. Constr. Trades Council*, 485 U.S. 568, 574-575 (1988). In evaluating the existence of a clear statement, legislative silence alone is not sufficient to violate a treaty. *Weinberger*, 456 U.S. at 32. Rather, when Congress intends to depart from international legal obligations, it must “make an affirmative expression of congressional intent to this effect.” *Trans World Airlines*, 466 U.S. at 252.⁸

The INA’s text generally, and the “material support” provision specifically, evince no such intent. To the contrary, as the Supreme Court recognized in *INS v. Cardoza-Fonseca*, “if one thing is clear from the legislative history of the new

⁸ This Court’s decision in *Mississippi Poultry Assoc., Inc. v. Madigan*, 992 F.2d 1359 (5th Cir. 1993), does not require a contrary outcome. In *Mississippi Poultry*, the Court relied on the Federal Circuit’s decision in *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660 (Fed. Cir. 1992), to construe a statute in violation of the United States obligations under the General Agreement on Tariffs and Trade (GATT). However, *Mississippi Poultry* and *Suramerica* concerned statutory provisions that were facially incompatible with GATT. Here, as explained in *infra* part I.B., the “material support” provisions clearly *are compatible* with the 1967 Protocol. Moreover, “abrogation” under the clear statement rule does not occur merely when Congress intends to abrogate a treaty vis-à-vis other signatories, which requires Executive action to have international effect, *see* Henkin, *Foreign Affairs and the U.S. Constitution* 212-213 (2d ed. 2002), but also occurs when Congress repudiates an international obligation through subsequent legislation that puts the United States in violation of that obligation. In the latter case, the effect, while not on the validity of the treaty itself, constitutes an abrogation *pro tanto* of the superseded treaty provision as *internal law* of the United States. *See Sutherland Statutory Construction* § 32:8 (6th ed. 2002). Such an abrogation, however, requires a clear statement by Congress of its intent. *See Restatement (Third) of Foreign Relations* § 115 comment (a)(1) (“It is generally assumed that Congress does not intend to repudiate an international obligation . . . by making it impossible for the United States to carry out its obligations The courts do not favor a repudiation of an international obligation by implication and require clear indication that Congress, in enacting legislation, intended to supersede the earlier agreement or other international obligations.”).

definition of ‘refugee,’ and indeed the entire 1980 Act, it is that *one of Congress’ primary purposes was to bring United States refugee law into conformance with the . . . Protocol . . .*” 480 U.S. at 436 (emphasis added) (discussing Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (“Refugee Act”)); *see also* H.R. Rep. No. 96-608, at 9 (1979) (stating Congress’ intention to “bring United States law into conformity with the internationally-accepted definition of the term ‘refugee’ set forth in the . . . Convention and Protocol”). Congress’ desire to conform to the 1967 Protocol was not limited to the definition of “refugee.” Rather, Congress also 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 withholding of deportation provision presently codified at 8 U.S.C. § 1231(b)(3) (2006)). This includes each of the exceptions to that withholding obligation. *See* 8 U.S.C. § 1231(b)(3)(B). Indeed, the conferees evidently included these exceptions in the Refugee Act based on their explicit “understanding that [they were] based directly upon the language of the Protocol” and would be “construed consistent with the Protocol.” H.R. Conf. Rep. No. 96-781, at 20 (1980), reprinted in 1980 U.S.C.C.A.N. 160, 161.

Legislation following the Refugee Act confirms Congress’ continued commitment that provisions in the INA relating to refugee protection be construed

so as to comply with the 1967 Protocol. *See, e.g., In re L-S-*, 22 I. & N. Dec. 645, 653 (BIA 1999) (noting that the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) “further clarified [Congress’] understanding of our nation’s obligations under the Protocol”). Neither the legislative history nor the text of any major amendment to the INA since 1980—including the Immigration Act of 1990, which added the “material support” provision—contains any statement suggesting Congress intended to depart from the purposes of the Refugee Act.⁹ Indeed, the Board recently stated that it was “not convinced that it was the intent of Congress” that the “material support” bar should conflict with international law. *In re S-K-*, 23 I. & N. Dec. at 942-43 n.7. In interpreting the “material support” bar, “it is thus appropriate to consider what [“material support”] means with relation to the Protocol.” *Cardoza-Fonseca*, 480 U.S. at 437.

In sum, Congress plainly intended for courts to construe the “material support” bar consistently with United States obligations under international law. The absence of a clear statement to the contrary, coupled with the legislative

⁹ REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005); H.R. Conf. Rep. 109-72 (2005); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002); H.R. Rep. No. 107-609 (2002); USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); 147 Cong. Rec. H7159, 130 (2001); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); H.R. Conf. Rep. 104-863 (1996); Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996); H.R. Conf. Rep. 104-518 (1996); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); H.R. Conf. Rep. No. 101-955 (1990); Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986); H.R. Conf. Rep. 99-1000 (1986).

history, compels the conclusion that any interpretation of the bar that fails to honor United States obligations under international law is incorrect.¹⁰

B. This Court Can Apply The “Material Support” Bar In A Manner Consistent With United States Obligations Under The 1967 Protocol And Customary International Law

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

¹⁰ For the foregoing reasons, because Congress’ intent to conform to the 1967 Protocol is clear, the Board’s decision is not entitled to deference under *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837-843, 843 n.9 (1984) ([W]here Congress’ intent “is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”). However, even if this Court concludes that the “material support” provision is ambiguous, the Supreme Court has held that where, as here, interpretation of a statute implicates a clear statement rule, the agency’s interpretation (even if the statute is ambiguous) should not receive *Chevron* deference if the agency’s interpretation conflicts with the result required by that rule of construction. *See, e.g., DeBartolo*, 485 U.S. at 574-575 (refusing to apply *Chevron* deference to the National Labor Relations Board’s interpretation of the National Labor Relations Act where, although the NLRA was ambiguous, the NLRB’s interpretation necessarily implicated the constitutional avoidance canon which “*has its roots in Chief Justice Marshall’s opinion for the Court in . . . Charming Betsy*”) (emphasis added); *INS v. St. Cyr*, 533 U.S. 289 (2001) (declining to give *Chevron* deference to the BIA’s interpretation of the Antiterrorism and Effective Death Penalty Act of 1996 and IIRIRA because the statutes’ ambiguity implicated the long-standing presumption that statutes should not apply retroactively); *Equal Employment Opportunity Comm’n v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (declining to give *Chevron* deference to the EEOC’s “plausible interpretation” in light of the rule of statutory construction requiring that Congress clearly express its intent that a statute apply extraterritorially). Thus, because Congress has not provided a clear statement of its intent to construe the INA inconsistently with international law, even if this Court concludes the statute is ambiguous, *Chevron* deference to the Board’s decision is not required because such deference would require an outcome at odds with the clear statement rule. *DeBartolo*, 485 U.S. at 574-575.

First, within the eligibility criteria for international refugee protection, an individual is excluded from such protection if he or she falls within the “exclusion clauses” of the 1951 Convention. Article 1F of the 1951 Convention, in particular, provides for exclusion from international refugee protection on the grounds that an individual is responsible for certain heinous acts or serious crimes.¹¹ Thus, Article 1F directly relates to how the “material support” bar to asylum should be interpreted.

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

¹¹ Such persons are considered not to be deserving of international protection as refugees. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para. 140, HCR/IP/4/Eng/REV.1 (1992 ed.) (UNHCR Handbook). The UNHCR Handbook and UNHCR’s Guidelines on International Protection are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary in interpreting the terms of the refugee treaties. Federal courts and the Board have recognized the Handbook and the Guidelines as providing guidance in construing the 1967 Protocol. *See, e.g., Cardoza-Fonseca*, 480 U.S. at 439 n.22; *Rodriguez-Roman v. INS*, 98 F.3d 416, 425 (9th Cir. 1996) (noting the BIA “is bound to consider the principles for implementing the Protocol established by” UNHCR); *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (citing UNHCR’s Guidelines on International Protection: Religion-based Refugee Claims); *Castellano-Chacon v. INS*, 341 F.3d 533, 547-48 (6th Cir. 2003) (citing UNHCR Guidelines on International Protection: Membership of a Particular Social Group); *In re S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996) (noting that in adjudicating asylum cases the BIA must be mindful of “the fundamental humanitarian concerns of asylum law,” and referencing the UNHCR Handbook).

United States obligations under Article 33, any denial of withholding of removal under the material support bar must comply with the exceptions already provided for in that Article.

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

The primary purpose of Article 1F is to deny those guilty of heinous acts and serious crimes international refugee protection and to ensure that such persons do not abuse the system of asylum in order to avoid being held legally accountable for their acts. UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, para. 2, HCR/GIP/03/05 (4 Sept. 2003) (UNHCR Exclusion Guidelines). Article 1F contains three exclusion clauses which exhaustively enumerate the acts that may result in the exclusion of an individual from international refugee protection. It provides that the Convention “shall not apply to any person with respect to whom there are serious reasons for considering” that:

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

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

In determining the clause(s) of Article 1F under which “terrorist” crimes should properly be assessed, it is necessary to consider the nature of the acts in question as well as the context in which they occurred. Such acts may fall within the scope of Article 1F(a)—“crimes against humanity”—if they involve inhumane acts committed as part of a widespread or systematic attack against civilians.

UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees paras. 33-36 (4 Sept. 2003), [http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=](http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=3f5857d24)

[RSDLEGAL&id=3f5857d24](http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=3f5857d24) (UNHCR Background Note).¹² In a situation involving potentially excludable acts committed during an international or non-international armed conflict, the adjudicator must assess whether the acts constitute

¹² The UNHCR Background Note forms an integral part of the UNHCR Exclusion Guidelines, which summarize the Background Note and state UNHCR’s positions on the issue of exclusion under Article 1F.

serious violations of applicable international humanitarian law. If so, the acts in question are to be considered “war crimes” under Article 1F(a). Conversely, conduct in conformity with the laws and customs of armed conflict is lawful under international standards and does not give rise to exclusion from international refugee protection. UNHCR Background Note paras. 30-32.

In many cases, crimes considered to be “terrorist” in nature constitute “serious non-political crimes” within the meaning of Article 1F(b). To qualify as “serious,” the underlying crime must either be capital or an otherwise very grave punishable act. UNHCR Handbook para. 155. In determining seriousness, international rather than national standards are relevant, and it is necessary to consider whether most jurisdictions would consider the acts in question a serious crime. UNHCR Exclusion Guidelines para. 14. In assessing whether a crime is “non-political” under Article 1F(b), the adjudicator should first consider the crime’s nature and purpose, *i.e.*, whether it has been committed out of genuine political motives and not merely for personal reasons or gain. Additionally, the political element of the offense should outweigh its common-law character. Thus, acts that are grossly out of proportion to the political objectives sought would not satisfy these criteria. UNHCR Handbook para. 152. Egregious acts of violence, including acts commonly considered to be “terrorist” in nature, are wholly disproportionate to any political objective and will almost certainly fail this test.

Furthermore, for a crime to be considered political in nature, the political objectives should be consistent with human rights principles. UNHCR Exclusion Guidelines para. 15.

Although providing and collecting funds for a terrorist organization are criminal offenses under international law, *see* International Convention for the Suppression of the Financing of Terrorism art. 2, *adopted* Dec. 9, 1999, 39 I.L.M. 270, not all financing offenses reach the gravity required to fall under Article 1F(b). The regularity and amount of funds provided or collected are critical to the exclusion analysis. UNHCR Background Note para. 82 (“If the amounts concerned are small and given on a sporadic basis, the offence may not meet the required level of seriousness. On the other hand, a regular contributor of large sums to a terrorist organization may well be guilty of a serious non-political crime.”).

In line with fundamental principles of criminal law, exclusion from international refugee protection under Article 1F also requires a determination of “individual responsibility.” This determination is guided by international standards, as set out in the Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 2187 U.N.T.S. 90. Individual responsibility can be incurred either through the individual’s own commission of the crimes in question or through participation in the commission of such crimes by others (*e.g.*, by

making a substantial contribution). This involves an examination of the person's conduct and state of mind (*mens rea*) in relation to the excludable crime(s) in question. UNHCR Background Note paras. 50-55, 64.

To justify exclusion for a crime under Article 1F, it must be established that the individual committed the material elements with intent and knowledge regarding the conduct and its consequences, as required under the definition of the crime in question.¹³ For individual responsibility to arise on the basis that the person concerned made a substantial contribution to a crime committed by another person, it must be established that the individual's conduct had a significant effect on the commission of the crime and that he or she acted in the knowledge that it would facilitate the criminal conduct of others. UNHCR Guidelines on Exclusion para. 18. Thus, the provision of funds to an organization engaged in criminal acts of a terrorist nature could either constitute a "serious non-political crime" itself, or could constitute a substantial contribution to another "serious non-political crime" (for example, murder of civilians) committed by the recipient organization.

Of particular relevance here, "aiding or abetting" requires that an individual engage in conduct that *substantially contributes* to the commission of a crime.

UNHCR Background Note para. 53. Moreover, the individual concerned must

¹³ The definitions of certain crimes which may give rise to exclusion from international refugee protection contain a specific *mens rea* requirement. This is the case, for example, for financing offenses which fall within Article 1F.

know that the conduct assists in the principal offender’s commission of the specific crime in question, and must be aware of that crime’s essential elements. This includes knowledge of the principal offender’s *mens rea*, though the individual need not share that *mens rea* to be culpable. *See, e.g.,* Prosecutor v. Krnojelac, Case No. IT-97-25, Judgment, ¶ 90 (March 15, 2002).

As required under the *Charming Betsy* doctrine, the “material support” provision in the INA can be interpreted in a manner consistent with Article 1F of the 1951 Convention. The Board has recognized that “[a] common dictionary definition of the word ‘material’ includes such terms as substantial, noticeable, of importance, and relevant” *In re S-K-*, 23 I. & N. Dec. at 944 n.9; *see also Singh-Kaur v. Ashcroft*, 385 F.3d 293, 304 (3d Cir. 2004) (Fisher J., dissenting) (“Even a cursory examination of the ‘material support’ provision makes it clear that both meanings of ‘material’—relevance and importance—are embraced by the statute.”). Accordingly, when the “material support” bar is applied to the participation in the commission of “terrorist” acts by others, the term “material” can and should be construed consistently with international standards requiring that the support have a significant effect on the commission of crimes which fall within the scope of Article 1F.

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

Pursuant to Article 33(1) of the 1951 Convention, contracting States may not “expel or return ... a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” As mentioned previously, Article 33 codifies the principle of *non-refoulement* of refugees and is considered the cornerstone of the 1951 Convention. This is a fundamental humanitarian principle that has achieved the status of customary international law. *See* Ministerial Meeting of States Parties, Geneva, Switz., Dec. 12-13, 2001, *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, preamble para. 4, U.N. Doc. HCR/MMSP/2001/09 (Jan. 16, 2002).

Article 33(2) provides for exceptions 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.”¹⁴

¹⁴ The exceptions to the principle of *non-refoulement* provided for in Article 33(2) apply to those who have already been determined to be refugees. Unlike the exclusion clauses of Article 1F, which form part of the eligibility criteria for international refugee protection, international

When examining whether a refugee falls within the national security exception under Article 33(2), the authorities of the country of refuge must conduct an individualized assessment to determine whether the refugee constitutes a present or future danger to the security of that country. Their conclusion on the matter must be supported by evidence. Lauterpacht and Bethlehem, *The Scope and Content of the Principle of Non-Refoulement* para. 168 (June 2001), available at <http://www.unhcr.org/protect/PROTECTION/3b33574d1.pdf> (last visited on Jan. 31, 2007). Given the serious consequences of removal, the danger to the security of the country must be posed by the individual himself and must be a “very serious danger,” not a danger of lesser order. Lauterpacht and Bethlehem para. 169. As a result, there must be a determination that the danger will be eliminated by the refugee’s removal. As with any exception to a human rights guarantee, the exception to *non-refoulement* protection must be applied in a manner proportionate to its objective. *Refoulement* must be the last possible resort for eliminating the danger the individual presents to the host country, and the gravity of that danger must outweigh the possible consequences of *refoulement*, including the degree of persecution feared. Lauterpacht and Bethlehem paras. 177-179.

In drafting the withholding of removal provision, including its exceptions, Congress intended to establish a legal standard consistent with the terms of Article

standards dictate that Article 33(2) is not to be considered when making an initial determination regarding refugee status.

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

An individual who has provided support to an individual or an organization that has engaged in “terrorist activity” as broadly defined by the INA does not necessarily pose a danger to the security of the United States. To avoid a breach of Article 33, the relevant standards for applying the *non-refoulement* exception provided for in Article 33(2) should be considered when interpreting the scope of the “material support” provision itself. The adjudicator should therefore take into account the activities of the individual or organization receiving assistance—as well as the nature and extent of that assistance—to determine whether there are reasonable grounds to consider that person a danger to the security of the United States and whether his or her return to potential persecution is the only means of eliminating that danger.

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

In a recent decision, *In re S-K-*, the Board reasoned that it was not obligated to interpret the “material support” bar consistently with international law because Congress left the task of ensuring compliance “with our international treaty obligations” to Executive Branch officials authorized to grant a discretionary waiver as delineated in section 212(d)(3)(B) of the REAL ID Act (8 U.S.C. §1182(d)(3)(B)). *In re S-K-*, 23 I. & N. Dec. at 942-43 n.7 (noting that Congress “expressly provided a waiver that may be exercised in cases where the result reached under the terrorist bars to relief would not be consistent with our international treaty obligations . . .”). While it is unclear whether the Board followed similar reasoning in the case at bar, any interpretation of “material support” that relies on the waiver provision to eschew the application of international law is erroneous for three reasons.

First, neither the text of the waiver nor its legislative history makes any mention of international law, let alone any indication that Congress intended to absolve courts from their responsibility to construe the INA consistently with United States obligations under international treaties.¹⁵ *See Almendarez v. Barrett-*

¹⁵ In considering the function of the executive waiver, it may be instructive to look to other contexts where such a waiver exists. In the criminal context, for example, both the President and states have the discretionary authority to grant clemency or a pardon to an individual convicted

Fisher Co., 762 F.2d 1275, 1278 (5th Cir. 1985) (“In construing a statute, the ultimate goal is to discern and enforce Congress’ intent. The ordinary meaning of the language in a statute is the best indicator of that intent.”). It is well-established that Congress is presumed to legislate with Supreme Court precedent in mind and that legislation should be interpreted as conforming to existing precedent absent “a clear indication of contrary legislative intent.” *Albernaz v. United States*, 450 U.S. 333, 341-342 (1981) (explaining that Congress is presumed to legislate aware of existing precedent); *see also Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) (noting “the well-settled presumption that Congress understands the state of existing law when it legislates . . .”). Applying that principle, it cannot be inferred that Congress intended for courts interpreting the INA generally, and “material support” specifically, to depart from the *Charming Betsy* doctrine. *See Welch v. Texas Dept. of Highways & Public Transp.*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring in part and concurring the judgment) (observing that “[r]egardless of what one may think of [one of the Court’s 19th Century decisions], it has been assumed to be the law for nearly a century”). Instead, the waiver’s text suggests that Congress more likely intended to provide the Executive Branch with a means

of a criminal offense. The availability of such an executive waiver, however, has never been thought to absolve courts of their responsibility to decide the constitutionality of a given statute, nor alter a court's determination as to whether a statute is constitutional or unconstitutional. The same should hold true here: simply because Congress provided the Executive Branch with means to grant discretionary relief does not mean that Congress intended for courts to avoid engaging in the substantive application of international legal principles.

to grant discretionary relief, in addition to what is required by domestic and international law, that can be granted as a matter of policy where the relevant Executive officials see fit.

Second, reliance on the waiver provision would be misplaced given that, once the application of domestic law denies a *bona fide* refugee the legal status and rights to which he is entitled under the 1951 Convention and 1967 Protocol, a breach of those agreements has already occurred.¹⁶ The impact of such a denial is not ephemeral; it is real and tangible. In the United States, a *bona fide* refugee denied asylum and withholding of removal has no legal status in the United States, faces the possibility of *refoulement* (in breach of Article 33 of the 1951 Convention), has no right to a travel document (in breach of Article 28), has no right to work (in breach of Article 17), may be detained indefinitely in a prison or jail (in breach of Article 26), and may remain separated from family members who still reside outside of the United States (contrary to the principle of family unity).

¹⁶ According to the International Law Commission, “[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.” International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, article 12, Annex to General Assembly Resolution A/RES/56/83 (Dec. 12, 2001). The “act” (or omission) at issue “may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision.” *Id.*, commentary on article 12. The Articles of Responsibility were adopted without a vote and with consensus on virtually all points. The articles and their commentaries have been referred to the General Assembly, possibly with the view to drafting a convention on State responsibility. *See generally*, Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentary* (Cambridge University Press 2002).

See UNHCR Handbook paras. 181-188. The mere possibility of the application of an executive waiver at an indeterminate future time fails to cure these ongoing violations.

Finally, there can be no assurance that, even where required to ensure compliance with international law, the Executive Branch will grant a waiver. Despite its existence for over five years, the Executive Branch has not granted a waiver in a single asylum case. Though the Department of Homeland Security has recently announced that work is under way to establish guidelines for granting waivers in the future, it has not yet granted one.¹⁷ The possibility of a waiver does not obviate the need for the BIA and the courts to honor congressional intent when interpreting the INA. This Court should not permit the ongoing violation of United States obligations under the 1951 Convention and 1967 Protocol based on the hope that the Executive Branch will, at some indeterminate time, issue waivers in appropriate circumstances.

In sum, the INA's text and legislative history coupled with *Charming Betsy* demonstrate that Congress intended for the "material support" bar to be construed consistently with United States international obligations. The BIA's apparent assumption that it was not required to interpret "material support" consistently with

¹⁷ *See* DHS Press Release, *supra* note 3.

such obligations was therefore error because, as shown above, such an interpretation was plainly possible here.

CONCLUSION

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

Dated: February 9, 2007

Respectfully Submitted,

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