



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

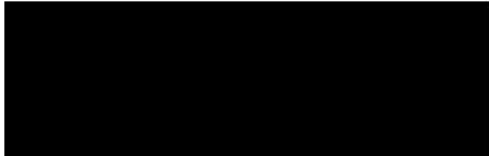
UNHCR

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BY FACSIMILE [REDACTED] & FIRST CLASS MAIL



Re: Request for Advisory Opinion

Dear [REDACTED]

I am writing in response to your request for an advisory opinion from the United Nations High Commissioner for Refugees (UNHCR) regarding the denial of refugee protection to persons who have contributed funds or goods/services to organizations that have allegedly engaged in “terrorist activity.” It is our understanding that your client was barred from asylum and withholding of removal (*non-refoulement* protection) for having provided “material support” to a “terrorist organization,” as those terms are defined by the Immigration and Nationality Act (INA). Please note that this opinion does not address the particular facts of your client’s case.

As discussed in more detail below, any decision to deny refugee protection to an individual must be based on an individualized assessment of the person’s act(s), his or her circumstances, and his or her individual responsibility. While the regular payment of large sums of money to an organization engaged in crimes within the scope of Article 1F of the 1951 Convention relating to the Status of Refugees (1951 Convention) may be grounds for exclusion under that provision, payments that are not of great significance generally should not result in exclusion. To deny *non-refoulement* protection under Article 33(2) of the 1951 Convention, there also must be an individualized finding that reasonable grounds exist to regard that the person poses a present or future danger to the security of the country of refuge.

Under US law, US courts have an obligation to interpret domestic law in a manner consistent with international law if fairly possible. As a result, in applying the “material support” bar to refugee protection, it would need to be assessed whether the offense, on account of the regularity and amount of funds or goods/services provided, is sufficiently serious to warrant exclusion. The necessary *mens rea* (intent and knowledge) must also be established with regard to all material elements of the offense. With regard to the application of Article 33(2), it must also be demonstrated that the “material support” provided renders the person a present or future danger to the security of the United States.

The Office of the United Nations High Commissioner for Refugees

UNHCR has been charged by the United Nations General Assembly with responsibility for providing international protection to refugees and other persons within its mandate and for seeking permanent solutions to the problem of refugees by assisting governments and private organizations.¹ As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."² UNHCR's supervisory responsibility is mirrored in Article II of the 1967 Protocol relating to the Status of Refugees,³ to which the United States acceded in 1968. The Protocol incorporates the substantive provisions of the 1951 Convention relating to the Status of Refugees.⁴

The views of UNHCR are informed by over 50 years of experience supervising international refugee instruments. UNHCR is represented in 116 countries. UNHCR 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 1951 Convention and 1967 Protocol are considered an authoritative view which should be taken into account when deciding on questions of refugee law.

Analysis

I. Role of International Law in US Court Proceedings

It is an accepted principle of US law that domestic law is constituted, in part, by international law. As noted by the US Supreme Court in the case *The Paquete Habana*,⁵ "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." Two branches of international law are of particular relevance to the issue presented here, treaty law and customary international law.⁶

A. Treaty Law

The US Constitution and US court jurisprudence make clear that treaties signed and ratified by the US are the "supreme law of the land," alongside the US Constitution and statutes passed by Congress. Article VI, Clause 2, of the US Constitution provides:

¹ See *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), Annex, U.N. Doc. A/1775, paras. 1, 6 (1950).

² *Id.*, para. 8(a).

³ The 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force 4 Oct. 1967 [hereafter "1967 Protocol"].

⁴ The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, entered into force 22 Apr. 1954 [hereafter "1951 Convention"].

⁵ *The Paquete Habana*, 175 US 677, 700 (1890).

⁶ The generally recognized sources of international law are enumerated at Article 38 of the *Statute of the International Court of Justice* (ICJ), 59 Stat. 1031, 1060 (1945). See *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 157-58 (2nd Cir. 2003) (citing Article 38 of the ICJ to identify relevant sources of international law); *Aquamar S.A. v. Del Monte Fresh Produce, N.A.*, 179 F.3d 1279, 1295 (11th Cir. 1999) (same).

This 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*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.⁷

Under US law, US courts remain bound to interpret US statutes in a manner consistent with US treaty obligations if fairly possible. In the seminal decision *Murray v. Schooner Charming Betsy*, the US Supreme Court clearly stated that “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.”⁸ This principle has been reiterated by numerous federal courts.⁹

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

UNHCR has issued various documents to provide guidance to States in their interpretation of the 1951 Convention. These include the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (“UNHCR Handbook”),¹⁰ Guidelines on International Protection,¹¹ and other background documents. Of particular relevance to the matter under review are UNHCR’s *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*¹² and its accompanying *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, which forms an integral part of the

⁷ U.S. Const., Art. VI, Cl. 2 (emphasis added).

⁸ 6 US (2 Cranch) 64, 118 (1804). See also *Weinberger v. Rossi*, 456 US 25, 32 (1982); *Restatement (Third) of Foreign Relations Law of the United States* § 114 (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

⁹ See *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.*, 125 S.Ct. 2169 (2005)); *United States v. Suerte*, 291 F.3d 366, 373-74 (5th Cir. 2002); *Mississippi Poultry Ass’n, Inc. v. Madigan*, 992 F.2d 1359, 1365 (5th Cir. 1993).

¹⁰ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, reedited, Geneva, Jan. 1992) (hereafter “UNHCR Handbook”). UNHCR issued its *Handbook* in 1979 at the request of its Executive Committee to provide States with guidance in the application and interpretation of the 1951 Convention and its 1967 Protocol.

¹¹ UNHCR has issued these Guidelines pursuant to its mandate, as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the 1951 *Convention relating to the Status of Refugees* and Article II of its 1967 *Protocol*. These Guidelines complement the UNHCR *Handbook*. These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determinations in the field.

¹² UNHCR *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 Sept. 2003 (hereafter “UNHCR *Guidelines on Exclusion*”), available at: <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/openssl.pdf?tbl=PUBL&id=3f7d48514>

Guidelines.¹³ The US Supreme Court has found that, while not legally binding on US officials, the UNHCR *Handbook* provides “significant guidance” in construing the 1967 Protocol and in giving content to the obligations established therein.¹⁴ US federal courts have also UNHCR’s Guidelines on International Protection with approval.¹⁵ The Executive Committee of the High Commissioner’s Programme has also issued relevant guidance in the form of Conclusions.¹⁶

B. Customary International Law

Customary law consists of principles that nations acknowledge as binding legal norms, in the absence of a treaty or other legal obligation.¹⁷ Examples of accepted rules of customary international law include the prohibition against torture,¹⁸ the prohibition against piracy,¹⁹ and, of particular relevance here, the prohibition against *refoulement* to persecution or torture.²⁰ US courts are bound to apply customary international law where there is no treaty, controlling executive or legislative act, or precedent judicial decision that conflicts with it.²¹

II. Denial of Refugee Protection Due to Involvement in Terrorist Acts

There is no internationally accepted legal definition of terrorism. Certain acts have been prohibited under international treaties pertaining to aspects of international terrorism.²² Those involved in the commission of such crimes could, in certain circumstances, be denied refugee protection under the 1951 Convention. There are two provisions of the 1951 Convention that are of particular relevance when deciding whether to deny refugee protection for terrorism-related reasons. The first is Article 1F, which enumerates the grounds for exclusion from protection under the 1951 Convention on account of certain serious crimes. The second is Article 33(2),

¹³ See UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 Sept. 2003 (hereafter “UNHCR Background Note on Exclusion”).

¹⁴ See, e.g., *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

¹⁵ See, e.g., *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (citing UNHCR *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*).

¹⁶ The UNHCR Executive Committee is an intergovernmental group currently consisting of 68 Member States of the United Nations (including the United States) and the Holy See that advises the UNHCR in the exercise of its protection mandate. While the Conclusions are not formally binding, they represent elements relevant to the interpretation and application of the international refugee protection regime. Conclusions of the Executive Committee constitute expressions of opinion which are broadly representative of the views of the international community. The specialized knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight.

¹⁷ See Art. 38(1)(b), *Statute of the International Court of Justice* (in deciding disputes, ICJ shall apply, *inter alia*, “international custom, as evidence of a general practice accepted as law”).

¹⁸ See, e.g., *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2766 (2004); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (“[T]he law of nations contains a ‘clear and unambiguous’ prohibition of official torture.”); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992).

¹⁹ See, e.g., *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2756 (2004); *United States v. Smith*, 18 U.S. 153 (1820); *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (“[C]ertain forms of conduct violate the law of nations An early example . . . is the prohibition against piracy.”).

²⁰ See, e.g., *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987).

²¹ See *The Paquete Habana*, 175 US 677, 700 (1890) (“[w]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations”); *Matter of Medina*, 19 I&N Dec. 734, 743 (BIA 1988).

²² See UNHCR *Background Note on Exclusion*, *supra* note 13, Annex D.

which is the exception to the 1951 Convention's prohibition regarding *non-refoulement* and, as matter of international law, applies to persons already recognized as refugees.

A. Exclusion from Refugee Status

In providing international protection to refugees, UNHCR and governments are governed by legal provisions which restrict refugee protection in certain circumstances. The 1951 Convention obliges States to deny refugee status to certain persons who would otherwise satisfy the refugee definition. These provisions are commonly referred to as “exclusion clauses.”

Article 1F of the Convention contains those exclusion clauses that address cases where the individual has committed acts so grave as to render him or her undeserving of international protection as a refugee.²³ Thus, the primary purpose of Article 1F is to deprive the perpetrators of heinous acts and serious crimes of international refugee protection, and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. These underlying purposes, notably the determination of an individual as *undeserving* of protection, must be borne in mind in interpreting the applicability of Article 1F.

As with any exceptions to provisions of human rights law, the exclusion clauses need to be interpreted restrictively. As emphasized in the UNHCR *Handbook*, a restrictive interpretation and application is also warranted in view of the serious possible consequences of exclusion for the applicant.²⁴ The exclusion clauses should be used with utmost caution being, in effect, the most extreme sanction provided for by the relevant international refugee instruments.

Article 1F 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.²⁵

In analyzing allegations of terrorist activity, Article 1F(b) (“serious non-political crime[s]”) is generally considered the most relevant of Article 1F’s exclusion clauses.²⁶ Articles 1F(a) (“crime[s] against peace”) and 1F(c) have generally been interpreted as requiring action by someone in a high position of authority representing a State or a State-like entity.²⁷ The other exclusion grounds under Article 1F(a) are applicable only to serious

²³ UNHCR *Handbook*, *supra* note 10, para. 140 (Article 1F “enumerates the categories of persons who are not considered to be deserving of international protection”).

²⁴ *Id.*, para. 149.

²⁵ 1951 Convention, *supra* note 14, Art. 1F.

²⁶ UNHCR *Guidelines on Exclusion*, *supra* note 12, para. 26; UNHCR *Background Note on Exclusion*, *supra* note 13, para. 81.

²⁷ See UNHCR *Handbook*, *supra* note 10, para. 163; UNHCR *Guidelines on Exclusion*, *supra* note 12, paras. 11 & 17; UNHCR *Background Note on Exclusion*, *supra* note 13, para. 50.

violations of international humanitarian law committed during an international or non-international armed conflict ('war crimes') or inhumane acts when committed as part of a widespread or systematic attack against a civilian population (crimes against humanity).²⁸ This is not to say that Article 1F(a) and 1F(c) could never apply, but rather that the circumstances in which crimes of a terrorist nature are committed do not normally meet the criteria required under these clauses.²⁹

B. Application of Exclusion Clauses to Persons Who Provide Funds or Goods/Services to Organizations Alleged to Have Engaged in Terrorist Activity

Bearing in mind the above general considerations regarding application of the exclusion clauses, the following issues should be addressed when determining whether an individual who provided funds or goods/services to an organization allegedly involved in terrorist activity should be excluded from refugee status.

1. *Is the provision of material assistance to the "terrorist organization" an excludable act under Article 1F?*

For the reasons noted above, it is UNHCR's opinion that the most relevant exclusion clause with regard to the provision of funds to an organization allegedly engaged in terrorist activity is Article 1F(b), commission of a "serious non-political crime" prior to admission to the country of refuge.

In determining whether a crime is "serious," certain factors should be considered, including: the nature of the act, the actual harm inflicted, the nature of the penalty, and whether most jurisdictions would consider it a crime.³⁰ According to UNHCR's *Handbook*, "a 'serious' crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1F(b), even if technically referred to as 'crimes' in the penal law of the country concerned."³¹

As noted in UNHCR's *Handbook*, in assessing whether a crime is "non-political," "regard should be given in the first place to its nature and purpose, *i.e.*, whether it has been committed out of genuine political motives and not merely for personal reasons or gain."³² In addition, the "political element of the offence should...outweigh its common-law character."³³ Acts that are grossly out of proportion to the political objectives sought would not satisfy this test. Finally, there should be a balancing between the "nature of the offence presumed to have been committed...and the degree of persecution feared."³⁴

The provision of "material support," to a "terrorist group" is a criminal offense in many domestic jurisdictions³⁵ and under international law.³⁶ In applying the above analysis,

²⁸ See UNHCR *Guidelines on Exclusion*, *supra* note 12, paras. 12 and 13.

²⁹ UNHCR *Background Note on Exclusion*, *supra* note 13, para. 49 and 83.

³⁰ UNHCR *Guidelines on Exclusion*, *supra* note 12, para. 14.

³¹ UNHCR *Handbook*, *supra* note 10, para. 155

³² *Id.*, para. 152.

³³ *Id.*, para. 152.

³⁴ *Id.*, para. 156.

³⁵ UNHCR *Background Note on Exclusion*, *supra* note 13, para. 82.

³⁶ International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, Art. 2 at 408, U.N. Doc. A/54/49 (Vol. I) (1999), *adopted* 9 December 1999, *entered into force* Apr. 10, 2002.

however, it is clear that not all financing offenses would “reach the gravity required to fall under Article 1F(b).”³⁷ As noted in UNHCR’s *Background Note on the Application of the Exclusion Clauses*:

The particulars of the specific crime need to be looked at – 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.³⁸

The regularity and amount of funds provided (or, by analogy, the regularity and value of any goods or services provided) are therefore relevant and address the “seriousness” of the offense under Article 1F(b).³⁹ With regard to the “non-political” prong of the Article 1F(b) analysis, the political objective of the contribution must be weighed against the acts committed by the recipient organization. “Egregious acts of violence...will almost certainly fail the predominance test, being wholly disproportionate to any political objective.”⁴⁰

2. *Is the refugee applicant individually responsible for the excludable act?*

If it is determined that an excludable act has occurred, then individual responsibility must be assessed. “In general, individual responsibility, and therefore the basis for exclusion, arises where the individual committed, or made a substantial contribution to, the criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct.”⁴¹ In determining individual responsibility, the adjudicator must first determine whether the individual perpetrated the acts in question himself or herself or facilitated or assisted the commission of such acts through conduct which had a significant effect. The adjudicator must then determine whether the individual had the necessary *mens rea* for commission of all material elements of the crime. To satisfy the *mens rea* requirement, the individual must have acted with both “intent”⁴² and “knowledge.”⁴³

Two types of “serious non-political crimes” are implicated by the provision of funds to a “terrorist organization.” First, as discussed above, the very act of providing funds to a terrorist organization could constitute a “serious non-political crime.” Second, the provision of such funds could constitute a substantial contribution to another “serious non-political crime”

³⁷ UNHCR *Background Note on Exclusion*, *supra* note 13, para. 82.

³⁸ *Id.*, para. 82.

³⁹ While this advisory opinion does not seek to address what constitutes a “terrorist organization,” it should be noted that the provision of funds or goods/services to a group engaged in armed conflict that abides by the relevant rules of international humanitarian law, would not constitute a terrorism-related financing offense under relevant international standards. This is recognized by Article 2(1)(b) of the 1999 Convention for the Suppression of the Financing of Terrorism. UNHCR *Background Note on Exclusion*, n. 86; International Convention for the Suppression of the Financing of Terrorism, Art. 2(1)(b).

⁴⁰ UNHCR *Background Note on Exclusion*, *supra* note 13, para 41.

⁴¹ *Id.*, para. 51.

⁴² “Intent” has been defined as requiring that the person meant to engage in conduct at issue or bring about its particular consequences, or was aware that those consequences would follow from the act in the ordinary course of events. Rome Statute of the International Criminal Court, Art. 30(2), U.N. Doc. A/Conf. 183/9 (1998), 2187 U.N.T.S. 90 (1998), *entered into force* Jul. 1, 2002.

⁴³ “Knowledge” has been defined as awareness that certain circumstances exist or awareness that consequences would follow from the act in the ordinary course of events. *Id.*, Art. 30(3).

(for example, murder of civilians) committed by the recipient organization. In either scenario, the necessary *mens rea* must be proven for all material elements of the crime.⁴⁴

3. Are there any grounds for rejecting individual responsibility?

Individual responsibility can be negated if, for example, the necessary *mens re* is absent or if the circumstances give rise to a defense, such as coercion or self-defense. These principles would apply equally with regard to the provision of funds or goods/services to a “terrorist organization.”

C. Exception to Non-Refoulement Obligation

1. General

Article 33 is considered the cornerstone of the 1951 Convention, codifying the principle of *non-refoulement* of refugees. Under Article 33(1), Contracting States may not “expel or return...a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁴⁵ It is a “fundamental humanitarian principle”⁴⁶ that has since achieved the status of customary international law.⁴⁷ Article 33(2) of the 1951 Convention provides for an exception to the obligation of *non-refoulement* in two situations: (1) where there are “reasonable grounds for regarding [the refugee] as a danger to the security of the country”; and, (2) where the refugee, “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”⁴⁸

Unlike Article 1F, Article 33(2) of the 1951 Convention “is directed to those who have already been determined to be refugees.” Under international standards, Article 33(2) is not to be considered when making an initial determination regarding refugee status. In implementing the 1967 Protocol, however, the US essentially merged the 1951 Convention’s exclusion clauses and its *non-refoulement* exceptions into a comprehensive set of bars to asylum and withholding of removal that are considered and applied at the time of the refugee status determination. Persons who provide “material support” to “terrorist organizations” under the INA are barred from withholding of removal (*non-refoulement* protection) on the grounds that there are “reasonable grounds to believe that [they are] a danger to the security of the United States.”⁴⁹ This is the standard applied under Article 33(2) of the 1951 Convention. In this

⁴⁴ *Id.*, Art. 30(1).

⁴⁵ 1951 Convention, *supra* note 4, Art. 33(1).

⁴⁶ UNHCR *Executive Committee*, Conclusion No. 6 (XXVIII), *Non-Refoulement*, para. (a) (1977).

⁴⁷ See, e.g., *Encyclopaedia of Public International Law*, Vol. 8, p. 456 (“the principle of *non-refoulement* of refugees is now widely recognized as a general principle of international law”).

⁴⁸ 1951 Convention, *supra* note 4, Art. 33(2).

⁴⁹ Provision of material support to a terrorist organization is a ground of inadmissibility INA § 212(a)(3)(B)(iv)(VI) and a ground of deportability under INA § 237(a)(4)(B) (by cross-reference). Persons who are deportable under INA § 237(a)(4)(B)) are barred from asylum and withholding of removal. See INA § 208(b)(2)(A)(v) (bar to asylum) and INA § 241(b)(3)(B) (bar to withholding of removal).

regard, the structure of the INA is inconsistent with the terms of the 1951 Convention. Given the relevance of Article 33(2) to the “material support” bar under US law, however, we provide below the criteria that should be applied for purposes of an Article 33(2) analysis.

2. *Criteria to be Considered when Applying Article 33(2)*

As with the 1951 Convention’s exclusion clauses, given the serious consequences of returning a refugee to a country where s/he is in danger of persecution, the exceptions found at Article 33(2) must be applied restrictively and with great caution.⁵⁰ This is consistent with the principle that exceptions to international human rights instruments are to be interpreted narrowly.⁵¹

It also should be noted that “Article 33(2) indicates a higher threshold than Article 1F insofar as, for the purposes of the former provision, it must be established that the refugee constitutes a danger to the security or to the community of the country of refuge. The provision thus hinges on an appreciation of a *future* threat from the person concerned rather than on the commission of some act in the past.”⁵²

Article 33(2) makes clear that a refugee may be subject to *refoulement* only if there are “reasonable grounds” for regarding him or her as a danger to the security of the country of refuge.⁵³ “The relevant authorities must specifically address the question of whether there is a future risk; and their conclusion on the matter must be supported by evidence.”⁵⁴ Given the serious consequences of removal, the danger to the security of the country must also be a “very serious danger,” not a danger of lesser order.⁵⁵

The danger to the security of the country must also be posed by the individual refugee himself or herself. This flows logically from the fact that the prohibition against *refoulement* is intended to protect the individual rights of the affected refugee. As a result, there must be an individual assessment of the danger posed and a determination that there is a real connection between the danger posed by the refugee and the elimination of that danger by the refugee’s removal. The danger to the security of the country should also be considered against the danger to the refugee were he or she to be removed (proportionality test).

In applying these factors to the provision of funds or goods/services to a “terrorist organization,” the following issues should be addressed:

⁵⁰ See UNHCR Note on the Principle of Non-refoulement – EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures (1 November 1997).

⁵¹ *Klass v. Germany*, Eur. Ct. H.R. (ser. A) para. 42 (1978); *Winterwerp v The Netherlands*, Eur. Ct. H.R. (ser. A) para. 37 (1979).

⁵² Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, para. 147, Feb. 2003 (available at <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/openssl.pdf?tbl=MEDIA&id=419c75ce4>).

⁵³ 1951 Convention, *supra* note 4, Art. 33(2).

⁵⁴ Lauterpacht, *supra* note 52, para. 168.

⁵⁵ *Id.*, para. 169.

- 1) Has an individualized assessment been conducted of the present or future danger to the security of the country of refuge posed by the refugee who provided the funds/good/services? Are the conclusions of this assessment supported by evidence?
- 2) If the refugee is to be removed, will the danger to the security of the country of refuge be significantly alleviated?
- 3) Does the danger to the security of the country outweigh the danger to the refugee were he or she to be removed? If not, are options other than *refoulement* available?

D. Interpreting the “Material Support” Bar of US Law in a Manner Consistent with International Law

As noted above, in interpreting domestic statutes affecting refugee protection in the US, US courts must consider the relevant international legal obligations. In this regard, US courts must interpret the INA, to the extent that it affects refugee protection, in a manner consistent with the 1967 Protocol.⁵⁶ US courts must therefore interpret the bars to refugee protection under the INA in a manner consistent with the exclusion clauses of the 1951 Convention found at Article 1F and, if relevant, to the exceptions to the principle of *non-refoulement* found at Art. 33(2). US courts must also apply the customary international legal obligation of *non-refoulement* if there is no treaty, controlling executive or legislative act, or precedent judicial decision that conflicts with it.⁵⁷

The underlying provision for the “material support to a terrorist organization” bar to refugee protection under US law is found at INA § 212(a)(3)(B)(iv)(VI).⁵⁸ Persons described in INA § 212(a)(3)(B)(iv)(VI) are barred from asylum under INA § 208(b)(2)(A)(v) and barred from withholding of removal under INA § 241(b)(3)(B). The term “material support” under this provision of the INA, however, is not defined. The list of examples that follow the term provide some clarification regarding its scope, but its meaning remains ambiguous.

US courts must construe the “material support” provision of the INA in a manner consistent with Article 1F and Article 33(2) of the 1951 Convention if fairly possible. As noted above, both Article 1F(b) and Article 33(2) must be interpreted restrictively, bearing in mind the serious consequences of return to persecution. As with the terms of the 1951 Convention, the intention of the US bars to asylum and withholding of removal is to deny international refugee protection to persons deemed either undeserving of such protection and/or who pose a danger to the security of the United States. When determining whether the provision of “material support” falls within the scope of Article 1F(b), it would need to be assessed whether the offense, on account of the regularity and amount of funds or goods/services provided, is sufficiently serious to warrant exclusion. The necessary *mens rea*

⁵⁶ *Murray v. Schooner Charming Betsy*, 6 US (2 Cranch) 64, 118 (1804).

⁵⁷ *The Paquete Habana*, 175 US 677, 700 (1890); *Matter of Medina*, 19 I&N Dec. 734 (BIA 1988).

⁵⁸ INA § 212(a)(3)(B)(iv)(VI) (“As used in this Act, 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*, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training” to a terrorist organization.) (emphasis added).

must be considered with regard to all material elements of the offense, and any relevant defenses should also be applied. With regard to the application of Article 33(2), an exception to the non-refoulement protection of the 1951 Convention should only be applied if the person who provided “material support” has been determined to constitute a present or future danger to the security of the United States and that the removal of the individual would be necessary in order to eliminate the danger.

Conclusion

We hope the above analysis is useful to you and the US courts considering your case. Please do not hesitate to contact us if we can be of any further assistance.

Sincerely,




Regional Representative