No. 06-1346

In The

Supreme Court of the United States

AHMED ALI,

Petitioner,

v.

DEBORAH ACHIM, MICHAEL CHERTOFF, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY, AND MICHAEL MUKASEY, UNITED STATES ATTORNEY GENERAL,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

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

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INTEREST OF THE *AMICUS CURIAE*[1]

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.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

A/RES/428(V), Annex, PP1, 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.* at P8(a). UNHCR's supervisory responsibility with respect to the 1951 Convention relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 ("1951 Convention" or "Convention"), and the 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"), is provided in Article 35 of the 1951 Convention and Article II of the 1967 Protocol, to which the United States became a party in 1968. 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 the Office's duty to supervise the application of the provisions of the Convention, the substantive provisions of which are incorporated in its 1967 Protocol. 1951 Convention at Preamble ¶ 2.

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 111 countries and currently serves thirty-two million people, both 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, inte-

gral to the global regime for the protection of refugees and will provide substantial guidance to this Court.

This case involves the legal grounds under the Immigration and Nationality Act ("INA") under which an individual can be barred from seeking withholding of removal because he has "been convicted of a particularly serious crime" and is also 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). This bar, which was enacted as part of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), implements one of the two exceptions to protection against *refoulement* set forth in Article 33(2) of the 1951 Convention, which is the cornerstone of international refugee protection.

This case accordingly presents questions squarely within UNHCR's mandate. First, it is likely to affect the United States' implementation of the 1951 Convention and its 1967 Protocol with regard to the expulsion of refugees based on the exceptions to the principle of *non-refoulement*, which protects refugees from being expelled or returned to a country in which they will be persecuted. Second, because Section 241(b)(3)(B)(ii) implements Article 33(2) of the 1951 Convention and its 1967 Protocol, this Court's ruling will likely also influence the manner in which other countries apply the same provisions of those international agreements. Third, as part of its general responsibility to supervise the application of the 1951 Convention, UNHCR gathers country-of-origin information; for this purpose, it closely monitors conditions on the ground in a number of countries, including Somalia. Because this case involves the potential return of a refugee of the Rehanweyn tribe to his na-

tive country of Somalia, UNHCR's substantial expertise with regard to Somalia may also be useful to the Court's consideration.

SUMMARY OF ARGUMENT

Because the purpose of the 1951 Convention is to ensure the protection of the life and freedom of refugees, any limitation to its core provision of *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 individual has been convicted of a "particularly serious crime." Second, if such a finding is made, there must then be an individualized assessment of whether the person does, in fact, constitute a future "danger to the community." It is the second prong – whether the person poses a future danger to the community – that is the essential inquiry. Accordingly, carrying out this two-fold inquiry is necessary to ensure compliance with the obligation to protect against *refoulement*.

Expelling a refugee on the grounds that he had been convicted of a "particularly serious crime" without making a distinct, individualized assessment of whether he "constitutes a danger to the community" would fail to take into account the central basis of the exception: to protect against a refugee's return to persecution unless he poses a danger to the community in which he resides. An erroneous application of the exception to Article 33's protection against *non-refoulement* would deprive Petitioner of the most essential of refugee protections – not to be returned to a country where his life or freedom would be threat-

ened without the benefit of an individualized assessment of whether he actually poses a danger.

Indeed, an individualized assessment of the facts of this case is likely to lead to the conclusion that Petitioner does not pose a danger to the community and thus cannot be returned to Somalia, where he continues to face a high risk of persecution. When Petitioner committed the crime at issue, he was suffering from Post Traumatic Stress Disorder ("PTSD") as a result of the persecution he endured in Somalia; moreover, both the lower court and expert physicians specifically found that Petitioner did *not* pose a danger to the community.

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.

Article 33 of the 1951 Convention, which codifies the principle of *non-refoulement* of refugees – *i.e.*, the protection against return to a country where a person has reason to fear persecution – is the Convention's cornerstone. It 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."[2] Res-

[2] 1951 Convention at Article 33(1).

ervations to Article 33 are specifically prohibited.[3] The obligation of *non-refoulement* is a fundamental humanitarian principle that has also attained the status of customary international law. [4] It is the central component of refugee protection and has been regularly reaffirmed by the Executive Committee of

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[3] *Id*. at Article 42(1).

[4] *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). ("Acknowledging 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 at 149, ¶ 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 Buergenthal, *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."). Customary international law is binding on all nations and, as "part of our [U.S.] law," creates enforceable rights and obligations for individuals in United States courts. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

the UNHCR Programme[5] of which the United States is a longstanding member. *See* UNHCR Executive Committee Conclusions 17 ¶ (d) (1980), 25 ¶ (b) (1982), 42 ¶ (c) (1986), 81 ¶ (d) (1997), 82 ¶ (d)(i) (1997).

Non-refoulement obligations complementing those under the 1951 Convention have been established under international human rights law. Specifically, States are prohibited from expelling any individual to another country if doing so would expose him to serious human rights violations, notably arbitrary deprivation of life or torture or other cruel, inhuman or degrading treatment or punishment.[6]

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[5] The UNHCR Executive Committee is an intergovernmental group, currently comprised of seventy-two 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. 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/cgi-bin/texis/vtx/doclist?page=excom&id=3bb1cd174 (last visited Nov. 21, 2007).

[6] An explicit *non-refoulement* provision is contained in Article 3 of the 1984 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 prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Obligations under the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23,

In 1968, the United States acceded to the 1967 Protocol, which incorporates by reference the substantive provisions of the 1951 Convention, including Article 33.[7] As this Court recognized in *INS* v. *Cardoza-Fonseca* when Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) ("1980 Refugee Act" or "Refugee Act"), it made explicit its intention to "bring United States refugee law into conformance with the 1967 United Nations

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1976) ("ICCPR") as interpreted by the Human Rights Committee, also encompass the obligation 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, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. *See* Human Rights Committee's *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment),* U.N. Doc. HRI/GEN/1/Rev.7 at 152, ¶ 9 (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*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 12 (May 26, 2004).

[7] Article I of the Protocol adopts the same definition of "refugee" found in Article 1 of the 1951 Convention, including the provisions dealing with exclusion, cessation, and availment of other protection, but it removes the temporal and geographic limits found in the 1951 Convention's definition of "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.

Protocol Relating to the Status of Refugees" including the internationally accepted definition of the term 'refugee' set forth in the Convention and Protocol, 480 U.S. 421, 436-37 (1987) (citing H.R. Rep. No. 96-608 at 9 (1979)). In particular, Congress made clear that the provision of the Refugee Act requiring the Attorney General to withhold deportation was intended to conform to Article 33 of the Convention. *INS* v. *Stevic*, 467 U.S. 407, 421 (1984) (noting that § 243(h) as amended conforms to the language of Article 33 of the Protocol); *see also Cardozo-Fonseca*, 480 U.S. at 441 n.25 (stating that "[t]he 1980 Act made withholding of deportation under § 243(h) mandatory in order to comply with Article 33.1"). Consistent with Article 33, Congress provided in the Refugee Act 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, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

In the 1980 Refugee Act, 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. The Conference Report that accompanied the Act reflected Congress's 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* 1980 U.S.C.C.A.N. 160, 161. Indeed, the language of the "danger to the community" exception in the 1980 Refugee Act is almost identical to the language of the same exception in Article 33(2)

of the 1951 Convention: 8 U.S.C. § 1231(b)(3)(B)(ii)[8] provides that the restriction on an alien's removal does not apply if the Attorney General decides that "the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States," while Article 33(2) provides that:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Although several amendments to the Immigration and Nationality Act have addressed which crimes constitute "particularly serious" ones for purposes of this exception,[9] Congress has never suggested that it intended to depart from the purposes of the Refugee Act of 1980. Thus, 8 U.S.C. § 1231(b)(3)(B)(ii) should

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

[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, 110 Stat. 1214 (1996); H.R. Conf. Rep. 104-518 (1996); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); H.R. Conf. Rep. No. 101-955 (1990); Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986); H.R. Cong. Rep. 99-1000 (1986).

be applied in a manner which ensures the United States' compliance with the 1967 Protocol.[10]

II. THE SECOND EXCEPTION TO THE OBLIGATION OF *NON-REFOULEMENT* APPLIES ONLY TO A REFUGEE WHO HAS BEEN BOTH CONVICTED OF A PARTICULARLY SERIOUS CRIME AND, ON THE BASIS OF AN INDIVIDUALIZED INQUIRY, 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 the 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.[11] This Court has embraced this

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[10] U.S. Const., Art. VI, cl. 2, provides: "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." In *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-118, (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." *See also Clark* v. *Allen*, 331 U.S. 503, 508-11 (1947); *Cook* v. *United States*, 288 U.S. 102, 118-20 (1933).

[11] Although the United States has signed but not ratified the Vienna Convention, the Department of State, in submitting this treaty for ratification by the Senate, acknowledged that the Convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L, 92d Cong., 1st Sess. 1 (1971).

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.'" *Santovincenzo* v. *Egan*, 284 U.S. 30, 40 (1931). Further, this Court has consistently recognized that when treaty "interpretation follows from the clear treaty language, [it] must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji America*, *Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982). *See also United States* v. *Stuart*, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (if "the Treaty's language resolves the issue presented, there is no necessity of looking further to discover 'the intent of the Treaty parties'"); *id*. at 370 (Kennedy, J., concurring) (same).[12] Thus, the plain meaning of Article 33 is controlling here.

The text of Article 33(2) makes clear that it only applies to refugees who have been convicted of a "particularly serious crime" and, in addition, constitute a "danger to the community" in which they have taken refuge.[13] The first inquiry operates as a

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[12] *See also* Restatement (Third) of Foreign Relations Law of the United States § 325(1) (1987) ("Restatement") ("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.").

[13] The plain meaning of this exception has been repeatedly recognized by commentators and leading refugee law experts. *See* Paul Weis, The Refugee Convention, 1951: The Travaux Préparatoires Analyzed with a Commentary at 342 (1995) ("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."); Gunnel Stenberg, *Non-Expulsion and Non-Refoulement: the Prohi-*

threshold requirement for application of the exception; if it is not satisfied, an evaluation of whether the refugee poses a "danger to the community" need not be made. It necessarily follows that a refugee who has been convicted of a particularly serious crime but does not pose a danger to the community shall not be *refouled*.

The plain language of the treaty 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. This Court has recognized the importance of hewing to the purposes that animate international agreements: it has counseled not only that those purposes 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

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bition Against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees 221 (1989) (same); Lauterpacht & Bethlehem, *supra*, at 140 ¶ 191 (requirement that the refugee constitute a danger to the community is not met simply because the refugee has been convicted of a particularly serious crime; there must be an additional assessment of dangerousness); James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT'L L.J. 257, 291 (2001) ("Article 33(2) authorizes refoulement for refugees who have been 'convicted by a final judgement of a particularly serious crime' and who are found to constitute a 'danger to the community' of the asylum state.").

preferred." *Asakura* v. *City of Seattle*, 265 U.S. 332, 342 (1924), *accord. United States* v. *Stuart*, 489 U.S. 353, 368 (1989).

Further evidence that the 1951 Convention was intended 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.[14] For instance, 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."[15] The United Kingdom delegate later stated that "the authors of [this provi-

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[14] The Report of the *Ad Hoc* Committee on Refugees and Stateless Persons stated 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, at 13 (Aug. 25, 1950). 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*, 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").

[15] *Ad Hoc* Committee on Refugees and Stateless Persons, *Summary Record of the 40th Meeting*, UN Doc. E/AC.32/SR.40, at 31 (Aug. 22, 1950).

sion] . . . sought to restrict its scope so as not to prejudice the efficiency of the article as a whole."[16]

In understanding the meaning of the terms of an international treaty, State practice in applying it should also be taken into account. Vienna Convention on the Law of Treaties, Art. 31(3)(b). As this Court has stated, in considering matters which an international treaty addresses, "the opinions of . . . sister signatories [are] entitled to considerable weight." *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (internal quotation marks and citation omitted); *see also Olympic Airways* v. *Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting). Article 33(2)'s requirement of a separate inquiry into "danger to the community" is reflected by the State practice of other signatories to the 1951 Convention or its 1967 Protocol. For instance, the Supreme Court of Canada has ruled that an immigration judge "must . . . make the added determination that the person poses a danger to the safety of the public . . . to justify *refoulement*." *Pushpanathan* v. *Canada*, (*Minister of Citizenship and Immigration*), [1998] 1 S.C.R. 982, 999 (Can.). The Administrative Appeals Tribunal of Australia has also cited the risk of recidivism and whether a refugee continues to be a danger to the community as determinative factors when considering whether *refoulement* should take place. *In re Tamayo and Department of Immigration* (1994) 37 A.L.D. 786 (Austl.) (indicating that "[t]he reference in Article 33(2) of the convention to a refugee who 'constitutes a

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[16] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: *Summary Record of the 16th Meeting*, UN Doc. A/CONF.2/SR.16, at 8 (Nov. 23, 1951).

danger to the community' is . . . concerned with the risk of recidivism)."

A. In Order to Constitute A "Particularly Serious Crime," The 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 noteworthy 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"[17] – as to render them undeserving of international protection.[18] Consistent with the drafters' view that Article 33(2) be applied narrowly, the

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[17] 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, Reedited 1992.

[18] UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 2, ¶ I(A)(2) HCR/GIP/03/05 (Sep. 4, 2003).

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.[19]

A determination whether a crime is "particularly serious" for purposes of Article 33(2), then, hinges not merely on whether the crime is "grave" but instead on whether it is "exceptionally grave."[20] The factors to be considered must include, for example, the nature of the act, the actual harm inflicted, the intention of the perpetrator and the circumstances of the crime, 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.

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[19] This view has been recognized by a leading refugee law scholar James C. Hathaway. *See 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). The Board of Immigration Appeals has also 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 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)

[20] *See*, *e.g.*, Lauterpacht & Bethlehem, *supra*, at 139 ("the text of Article 33(2) makes it clear that it is only convictions for crimes of a particularly serious nature that will come within the purview of the exception.").

B. The Inquiry Into Whether The Refugee Poses a Danger to The Community Must be an Individualized Inquiry Which Takes Into Account All Relevant Factors.

Because the principle of *non-refoulement* is designed to protect each individual refugee or asylum-seeker from *refoulement*, 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.[21] As discussed above, this provision is concerned with the risks associated with the refugee's continued presence in the community in which he has taken refuge; as such, the decisive factor for determining whether the exception should apply is the future danger posed to the community by the refugee rather than the seriousness or

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[21] UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* at 3, ¶ I(B)(4). Leading refugee law scholars have affirmed both of these points. *See* Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951*: Articles 2-11, 13-23, 24-30 & Schedule, 31-37 at 234 (1963) (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*, at 138, ¶183 (discussing requirement to consider individual circumstances); *id*. at 140 ¶ 191 (stating that separate dangerousness inquiry involves assessment of issues of fact and listing factors to be considered); *id*. at 129 ¶ 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").

categorization of the crime that the refugee has committed.[22] The conviction for a particularly serious crime is a threshold requirement for application of this exception; however, the key inquiry is whether the individual 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 Congress has done in Section 8 U.S.C. § 1231(b)(3)(B),[23] a separate inquiry into whether the refugee will constitute a "danger to the community" is even more essential to ensure compliance with Article 33.

Factors relevant to this determination should include the nature of the criminal act; the motivation in committing it; and any mitigating factors such as the individual's mental state at the time the crime was committed, past criminal activities, the possibil-

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[22] Commentators have also recognized this point. *See, e.g.*, Grahl-Madsen, *supra*, at 239 ("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.'"); Lauterpacht & Bethlehem, *supra*, at 139 ¶ 187 ("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").

[23] 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 as one that is particularly serious.

ity of rehabilitation and reintegration within society, and evidence of recidivism or likely recidivism.[24] In the present case, although the crime at issue undisputedly involved violence and physical injury, the application of these factors is unlikely to lead, in the view of UNHCR, to the conclusion that Petitioner is a danger to the community. First, Petitioner was suffering from – but was not being treated for – Post Traumatic Stress Disorder as a result of the persecution he endured in Somalia. Administrative Record ("AR") 713; AR 829; AR 1085; AR 1249. Moreover, it was the expert conclusion of the physicians who treated Petitioner shortly after the commission of the crime that his behavior at the time of the crime "was directly related to his illness," AR 1082; *see also* AR 1069, and that – in his physician's view – "a combination of medications, counseling and supportive case management would be effective in treating the hypervigilance and fear which undoubtedly contributed to his crime." AR 1082. It is also critical to consider that the state court did not consider Petitioner to be a danger to the community; because of Petitioner's PTSD and the fact that he was not regarded as a danger to the community, the court sentenced him under a provision that allowed him to leave the jail

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[24] *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*, at 140, ¶ 191 (recognizing the need for an assessment of the facts of the case including mitigating factors).

during the day and to be in the community. AR 1230. Substantial weight should also be given to the opinion of the court-appointed physician who concluded after examining Petitioner that he did not constitute a danger to the community. AR 836.

It is UNHCR's position that the gravity of the danger which the individual presents also must be weighed against the possible consequences of *refoulement*, including the degree of persecution feared.[25] However, if – as we believe – an assessment of all of the factors discussed above is unlikely to lead to a conclusion that Petitioner is a danger to the community of the United States, the risk of persecution that he faces would, in all likelihood, not need to be assessed. Nevertheless, because the likelihood of persecution goes to the heart of the need for international protection, it is essential to take note of the grave harm Petitioner may face if returned to Somalia.

Petitioner is a member of the minority Rehanweyn clan. In Somalia, majority clans have engaged in conflicts with – and attacks on – minority Rehanweyns for some time. Although that violence peaked in the 1990s, the Rehanweyns remain a minority clan in a generally precarious situation in Somali society. It is our opinion that a Rehanweyn, if returned to Somalia anywhere outside his clan base, is likely to face persecution because of his clan membership.

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[25] Based on the facts of this case, we believe the question of proportionality is not at issue here and need not be addressed. Whether this Court would agree with the need to balance the gravity of harm against the gravity of the crime is uncertain in light of *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425-427 (1999).

The regional authorities in Somaliland and Puntland would be unlikely to accept entry of a Rehanweyn, whom they consider a foreigner, to their "independent" areas. A Rehanweyn would be at serious risk within Somaliland, and any travel through Somalia would be highly dangerous. Moreover, Somalia remains subject to insecurity, lawlessness and violence, especially in the south, from where Petitioner hails. The current deterioration of security in Mogadishu could very well lead to a situation throughout Somalia much like that of the 1990s, in which minority clans such as the Rehanweyn would lack any protection from attacks by majority clans. It is our conclusion that country conditions have not changed to the degree that it can be said that Petitioner does not continue to face a high risk of persecution throughout all of Somalia.

CONCLUSION

For all the foregoing reasons, *amicus* respectfully urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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