

APPENDIX I

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APPENDIX 2

**United States Failure to Comply
with the Refugee Convention:**

Misapplication of the Particularly Serious Crime Bar to Deny Refugees Protection from Removal to Countries Where Their Life or Freedom is Threatened

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FALL 2018

Abstract

Article 33(1) of the 1951 Convention Relating to the Status of Refugees enshrines the principle of non-refoulement, i.e., non-return of refugees to countries where they would be at risk of persecution. Article 33(2) qualifies this prohibition, allowing signatories to overcome the prohibition on refoulement for any 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 judgment of a particularly serious crime, constitutes a danger to the community of that country.” This report explores the drafters’ original intent behind the exception to non-refoulement and the position of the United Nations High Commissioner for Refugees, both pointing to the limited reach of this exception. The report then examines how the United States’ implementation and interpretation of the “particularly serious crime” bar provision fails to comply with its responsibilities under the Refugee Convention and diverges from the interpretation endorsed by the international community and implemented in other countries. It reveals the extent of this divergence through a comparison of the United States’ approach with the approaches of Refugee Convention signatories. Finally, this report identifies legislative, judicial, and executive avenues for reform in the United States to bring U.S. implementation more in line with the nation’s obligations under the Refugee Convention.

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Executive Summary

In 1968, the United States acceded to the 1967 Protocol Relating to the Status of Refugees (“Protocol”), which largely incorporated the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”).¹ Article 33(1) of the Refugee Convention enshrines the principle of *nonrefoulement*: “[n]o Contracting State shall expel or return (‘refouler’) 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 Article 33(2) qualifies that *refoulement* prohibition, creating an exception for any 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 judgment of a particularly serious crime, constitutes a danger to the community of that country.”³ This report examines how the United States’ implementation and interpretation of Article 33(2) diverges from the interpretation endorsed by the international community and implemented in other countries, resulting in a “particularly serious crime” bar in the United States that sweeps much more broadly than originally intended.

The drafters of the Refugee Convention intended the particularly serious crime exception to *nonrefoulement* to apply only to refugees who constitute a serious threat to the host country’s national security. The interpretation of the United Nations High Commissioner for Refugees (“UNHCR”)—which is mandated to supervise the implementation of the Refugee Convention—consequently restricts the scope of Article 33(2) to only the most extreme cases (such as those involving a conviction of murder, arson, rape, or armed robbery), and even then requires an individualized analysis to determine whether the refugee in question has committed a sufficiently grave crime considering all the circumstances.⁴ In addition, UNHCR instructs adjudicators to consider any mitigating factors concerning the offense, to conduct an individualized assessment of whether the refugee poses an ongoing danger to the host community independent of that previous offense, and to consider the persecutory harm the refugee may face if *refouled* (sometimes known as the “proportionality principle”) before exercising the particularly serious crime exception.⁵

While many countries around the world have adopted UNHCR’s interpretations of the original intent of Article 33(2), the United States has deviated substantially from this norm. In the United States, refugees can be barred from relief from removal by statute for relatively minor,

1 See Convention Relating to the Statute of Refugees art. 33(1), July 28, 1951, 140 U.N.T.S. 1954 (hereinafter “Refugee Convention”); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 (1968) (hereinafter “Protocol”); see also *INS v. Stevic*, 467 U.S. 407, 416 (1984) (“The Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees . . . with respect to ‘refugees’ as defined in Article 1.2 of the Protocol.”). The Convention and Protocol have been ratified by 145 and 146 countries, respectively. See U.N. TREATY COLLECTION, *Convention relating to the Status of Refugees* (last updated Mar. 19, 2018); U.N. TREATY COLLECTION, *Protocol relating to the Status of Refugees* (last updated Mar. 19, 2018), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-5&chapter=5&clang=en.

2 Refugee Convention, *supra* note 1, art. 33(1).

3 Refugee Convention, *supra* note 1, art. 33(2).

4 See *infra* Section III.

5 See *id.*

nonviolent offenses like theft, filing a false tax return or failing to appear in court, with no individualized assessment of the circumstances surrounding those offenses and whether such individuals currently pose a credible threat to national security. And, even if a refugee's conviction does not fall within these categories of crimes deemed particularly serious *per se*, the immigration agency in individual case adjudications has extended the bar to other relatively minor offenses such as minor drug offenses, resisting arrest or prostitution without consideration of mitigating circumstances and without an individualized assessment of current dangerousness. Additionally, U.S. adjudicators are not required to balance possible persecution in the country of origin against the gravity of the offense and threat to national security. Finally, commission of particularly serious crimes can bar individuals from asylum and withholding of removal under United States law, even though Article 33(2) was only intended to apply to individuals who were already granted refugee status.

The United States' misapplication of the particularly serious crime exception has resulted in the deportation of individuals back to countries where they are at serious risk of physical harm or even death. Those individuals are often barred from refugee protection because of relatively minor offenses despite posing no present danger to the United States. This contravention of the United States' treaty and moral obligations to protect refugees under the Refugee Convention and customary international law should not be allowed to continue and can be set right through legislative change, judicial reinterpretation, and/or executive intervention.

I. Introduction

Article 33(1) of the 1951 Convention Relating to the Status of Refugees ("Refugee Convention") enshrines the principle of *non-refoulement*: "[n]o Contracting State shall expel or return ('refouler') 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."⁶ *Non-refoulement* is the cornerstone of international refugee law,⁷ a principle of customary international law,⁸ and possibly even *jus cogens*—a peremptory norm of international law from which no state can derogate.⁹ Given the fundamental character of this protection, the Refugee Convention permits only one exception

6 Refugee Convention, *supra* note 1, art 33(1).

7 See U.N. HIGH COMM'R FOR REFUGEES (UNHCR), NOTE ON NON-REFOULEMENT (1997) ("The most essential component of refugee status and of asylum is protection against return to a country where a person has reason to fear persecution. This protection has found expression in the principle of non-refoulement which, as will be seen below, is widely accepted by States.").

8 See 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 (adopted Dec. 13, 2001) ("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.").

9 See Jean Allain, *The jus cogens Nature of non-refoulement*, 13 INT'L J. OF REFUGEE L. 533 (2001); GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 218 (2007) ("[C]omments . . . have ranged from support for the idea that non-refoulement is a long-standing rule of customary international law and even a rule of *jus cogens*, to regret at reported instances of its non-observance of fundamental obligations . . ."); Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 1, 8 (2008) ("there is near-universal consensus that non-refoulement is a central, foundational norm in the refugee protection regime. For decades, as discussed below, it has been considered a principle of customary international law, and is emerging as a *jus cogens* norm. Non-refoulement's fundamental character and broad application suggest that any exceptions to the principle should be extremely limited.").

to *non-refoulement*: Article 33(2), which allows signatories to excuse the prohibition on *refoulement* for any 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 judgment of a particularly serious crime, constitutes a danger to the community of that country.”¹⁰

When the United States acceded to the 1967 Protocol Relating to the Status of Refugees (“Protocol”), which largely incorporated the Refugee Convention, it bound itself to uphold the principle of *non-refoulement*.¹¹ The United States therefore has an obligation to promulgate and interpret domestic law so as to comply with its obligations under the Refugee Convention’s *non-refoulement* mandate.¹² Nevertheless, the United States’ implementation of the limited Article 33(2) exception diverges substantially from the narrow interpretation of this exception set forth by the international community and implemented in other countries, resulting in a “particularly serious crime” bar in the United States that sweeps much more broadly than intended.

This report begins by examining the historical context behind what was intended to be the limited exception to *non-refoulement*. It then explains the position of the United Nations High Commissioner for Refugees and the United States’ implementation of Article 33(2). Next, it presents information gathered from in-country experts on how the “particularly serious crime” exception has been interpreted and implemented by other Refugee Convention signatories. Finally, this report identifies legislative, judicial, and executive avenues for reform in the United States to bring U.S. law and policy more in line with U.S. treaty and moral obligations, including the protection of bona fide refugees whose life or freedom would be threatened in their home country.

II. Drafting History of Article 33(2) of the 1951 Refugee Convention

The United Nations Secretary-General initiated the drafting of the Refugee Convention in 1949. Within a year, an *ad hoc* drafting Committee comprised of representatives from Belgium, Brazil, Canada, China, Denmark, France, Israel, Turkey, the United Kingdom, the United States, and Venezuela produced a first draft of the Refugee Convention. During the initial drafting process, the British representative proposed an exception to the principle of *non-refoulement* “to deal with cases where a refugee was disturbing the public order of the UK”—a qualification the French and U.S. representatives found “highly undesirable” and “contrary to the very purpose of the Convention.”¹³ Nevertheless, by the Conference of the

10 Refugee Convention, *supra* note 1, art. 33(2).

11 See 19 U.S.T. 6223 (1968); *Stevic*, 467 U.S. at 416.

12 See U.S. Const. art. VI, cl. 2 (“[A]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”); see also *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”); *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 . . . as often as questions of right depending upon it are duly presented for their determination.”).

13 RESEARCH CTR. FOR INT’L LAW, UNIV. OF CAMBRIDGE, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PREPARATOIRES ANALYSED 326–27 (Paul Weis ed., 1995) [hereinafter “RES. CTR. FOR INT’L L.”].

Plenipotentiaries in July 1951, the idea had gained traction: two similar exceptions were proposed, one by Sweden and the other by the United Kingdom and France.¹⁴ The latter read: “The benefit of [the protection against *refoulement*] 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 residing, or who, having been lawfully convicted in that country of particularly serious crimes of [sic] offences, constitutes a danger to the community thereof.”¹⁵ An amended version of this proposal—omitting the word “offences” and adding “by final judgment”—was eventually adopted as Article 33(2).

Notably, none of the proposals were intended to enable *refoulement* of refugees who had committed “ordinary crimes.”¹⁶ In fact, several amendments to the British and French proposals were rejected for being insufficiently specific to crimes presenting a significant danger to the host community. For example, a suggestion to substitute the term “acts” for the term “crimes” was rejected as “subject to arbitrary interpretations,”¹⁷ as was a proposal to widen the exception to encompass habitual offenders for those with “an accumulation of petty crimes.”¹⁸ In short, the drafters of the Refugee Convention intended to empower states to expel only those refugees who posed a serious risk to the host country’s security.

In his commentary on the Refugee Convention, the United Nations High Commissioner for Refugees’ (“UNHCR”) first Protection Director, Paul Weis, stated that the particularly serious crime exception was “to be interpreted restrictively,” meaning “[n]ot every reason of national security may be invoked, the refugee must constitute a danger to the national security of the country.”¹⁹ Weis interpreted the exception to contain two elements, both of which must be met for the exception to apply. He explained that “the refugee must have been convicted by final judgment for a particularly serious crime, *and* he must constitute a danger to the community of the country.”²⁰ In other words, the prior conviction of a particularly serious crime is not, by itself, sufficient to demonstrate that the refugee in question presents an on-going danger to the host community. Second, quoting the words of the British representative at the Conference of Plenipotentiaries, Weis noted that “[t]he principle of proportionality has to be observed, that is, . . . whether the danger entailed to the refugee by expulsion or return outweighs the menace to public security that would arise if he were permitted to stay.”²¹

14 See Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 BOSTON UNIV. L. REV. 1427, 1455 (2017).

15 RES. CTR. FOR INT’L L., *supra* note 13, at 328.

16 Marouf, *supra* note 14, at 1454. The United Kingdom co-sponsoring delegate of the *non-refoulement* exception noted that “[he] hoped that the scope of the joint amendment would not be unduly widened.” RES. CTR. FOR INT’L L., *supra* note 13, at 333. The French co-sponsoring delegate agreed that “[t]here was no worse catastrophe for an individual who had succeeded after many vicissitudes in leaving a country where he was being persecuted than to be returned to that country” and that “[r]easons such as the security of the country were *the only ones* which could be invoked against [the] right [of asylum].” *Id.* at 327, 329 (emphasis added).

17 RES. CTR. FOR INT’L L., *supra* note 13, at 333.

18 *Id.*

19 *Id.* at 342.

20 *Id.* (emphasis added).

21 *Id.*; see also Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, 16th mtg., U.N. Doc. A/CONF.2/SR.16, at 8 (1951) (statement of Mr. Hoare of the United Kingdom) (“It must be left to States to decide whether the danger entailed to refugees by expulsion outweighed the menace to public security that would arise if they were permitted to stay.”).

III. Interpretation of Article 33(2) by the United Nations High Commissioner for Refugees

The United Nations General Assembly has mandated UNHCR to supervise the implementation of the Refugee Convention and Protocol.²² Federal agencies and courts, including the Supreme Court, have consequently relied on UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status—which pursuant to UNHCR’s supervisory responsibility sets out the Agency’s official position to “guide government officials, judges, practitioners, as well as UNHCR staff applying the refugee definition”²³—in their decisions.²⁴

UNHCR’s interpretation of the particularly serious crime exception restricts its application to “extreme cases”²⁵ of refugees “who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them.”²⁶ Indeed, the “double qualification—particularly and serious—is consistent with the restrictive scope of the exception and emphasizes that *refoulement* may be contemplated only in the most exceptional of circumstances.”²⁷ The threat must be “such that it can only be countered by removing the person from the country of asylum, including, if necessary, to the country of origin,” setting a very high bar for permissible *refoulement*.²⁸

22 See Refugee Convention, *supra* note 1, Preamble (“[T]he United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner”); see also G.A. Res. 428(V), annex ¶ 1, Statute of the Off. of the U. N. High Comm’r for Refugees (Dec. 14, 1950) (“The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.”).

23 See U.N. HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 2, U.N. Doc. HCR/IP/Eng/REV. 1, (1979, rev. 1992) [hereinafter “UNHCR HANDBOOK”].

24 See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987) (“the [UNHCR] Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.”); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (calling the UNHCR Handbook “a useful interpretive aid”); *Osorio v. INS*, 18 F.3d 1017, 1027-29 (2d Cir.1994) (citing to the UNHCR Handbook multiple times for clarification on the grounds of persecution in an asylum case); *McMullen v. INS*, 658 F.3d 1312, 1319 (9th Cir. 1981) (also citing the UNHCR Handbook); *Matter of S-M-J-*, 21 I. & N. Dec. 721, 724–25 (BIA 1997) (repeatedly citing to the UNHCR Handbook to interpret essential elements of an asylum case, including the burden of proof, the role of the immigration judge and the requirement of an assessment of country conditions).

25 UNHCR HANDBOOK, *supra* note 23, ¶ 154.

26 U.N. HIGH COMM’R FOR REFUGEES (UNHCR), CRIMINAL JUSTICE AND IMMIGRATION BILL: BRIEFING FOR THE HOUSE OF COMMONS AT SECOND READING ¶ 7 (July 2007) [hereinafter “BRIEFING FOR HOUSE OF COMMONS”], <http://www.unhcr.org/en-us/576d237f7.pdf>.

27 Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION* 139 ¶ 186 (Erika Feller et al. eds., 2003).

28 *Id.*

UNHCR “has shown concern for consistency” in the application of Article 33(2) across countries.²⁹ The Agency insists “the gravity of the crimes should be judged against international standards, not simply by its categorization in the host State or the nature of the penalty.”³⁰ In contrast to the United States approach discussed below, UNHCR notes, “[c]rimes such as petty theft or the possession for personal use of illicit narcotic substances [do] not meet the threshold of seriousness.”³¹ In fact, “the offence must normally be a capital crime (murder, arson, rape, armed robbery, etc.).”³² This is further highlighted by the fact that the qualifying term “serious” as used in the lesser “serious non-political crime” exclusion clause of the Refugee Convention requires “a capital crime or a very grave punishable act.”³³ UNHCR explains that because “it is generally understood that a ‘serious crime’ is a capital or a very grave crime normally punished with long imprisonment, it follows that a ‘particularly serious crime’, [sic] must belong to the gravest category.”³⁴

When evaluating the seriousness of a crime, adjudicators are instructed to consider “the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, and *whether most jurisdictions would consider the act in question as a serious crime.*”³⁵ UNHCR requires an individualized analysis to determine whether the refugee in question has committed a crime that falls within this ‘gravest category.’ It urges adjudicators to consider “the overall context of the offence, including its nature, effects and surrounding circumstances, the offender’s motives and state of mind, and the existence of extenuating (or aggravating circumstances).”³⁶ The Agency stipulates a distinct showing of dangerousness, only applying Article 33(2) to refugees who have been convicted of a particularly serious crime and, *in addition*, pose a “present or future danger” to the community.³⁷

29 Marouf, *supra* note 14, at 1457.

30 BRIEFING FOR HOUSE OF COMMONS, *supra* note 26, ¶ 10.

31 *Id.*

32 ATLE GRAHL-MADSEN, COMMENTARY ON THE REFUGEE CONVENTION, DIVISION OF INTERNATIONAL PROTECTION OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 142 ¶ 9 (1963) [hereinafter “1963 COMMENTARY ON CONVENTION”]. This guidance was notably issued before the United States’ accession in 1968 to the 1967 Protocol, which makes it likely that the United States’ understanding of the particularly serious crime exception at the time it acceded to the Protocol was informed by this commentary.

33 UNHCR HANDBOOK, *supra* note 23, ¶ 155.

34 BRIEFING FOR HOUSE OF COMMONS, *supra* note 26, ¶ 7.

35 *Id.* (emphasis added).

36 U.N. HIGH COMM’R FOR REFUGEES, THE NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002: UNHCR COMMENTS ON THE NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002 (SPECIFICATION OF PARTICULARLY SERIOUS CRIMES) ORDER 2004 4 (2004) [hereinafter “COMMENTS ON NATIONALITY, IMMIGRATION & ASYLUM ACT”].

37 See BRIEFING FOR HOUSE OF COMMONS, *supra* note 26, ¶ 11 (requiring “an assessment of the *present or future* danger posed by the wrong-doer”); Brief for U.N. High Comm’r as Amici Curiae Supporting Petitioner, *Ali v. Achim*, 552 U.S. 1085 (2007) (No. 06-1346) (“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 to the community of the country.”) (citing *RES. CTR. FOR INT’L L.*, *supra* note 13, at 342)); Gunnel Stenberg, *Non-Expulsion and Non-Refoulement: the Prohibition Against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees* 221 (1989) (same); Lauterpacht & Bethlehem, *supra* note 27, at 140 ¶ 191 (“Regarding the word ‘danger’, as with the national security exception, this must be construed to mean very serious danger. This requirement is not met simply by reason of the fact that the person concerned has been convicted of a particularly serious crime. An additional assessment is called for which will hinge on an appreciation of issues of fact such as the nature and circumstances of the particularly serious crime for which the individual was convicted, when the crime in question was committed, evidence of recidivism or likely recidivism, etc. Thus, it is unlikely that a conviction for a

Conviction of a particularly serious crime “is not determinative of a refugee’s dangerousness because the refugee may have since become rehabilitated or disabled, which would suggest that he or she is no longer a danger to the community.”³⁸ If the asylum state is capable of removing this danger by rehabilitating the refugee who presents it, Article 33(2) should not apply. Safe reintegration can be assessed by determining “whether the refugee may be regarded as incorrigible in light of prior convictions for grave offences, and the prospects for the refugee’s reform, rehabilitation and reintegration into society.”³⁹

Finally, UNHCR requires adjudicators to balance the seriousness of the crime and danger to the host country against the severity of the persecution the refugee would likely experience in his or her country of origin, calling such proportionality “a fundamental principle in international human rights and international humanitarian law.”⁴⁰

IV. U.S. Implementation of the Particularly Serious Crime Bar

To qualify for asylum or withholding of removal in the United States, noncitizens must demonstrate that they have a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion” in their home country.

⁴¹ Asylum is a discretionary form of relief available to those who can show a reasonable

crime committed in the distant past, where there may have been important mitigatory circumstances, and where there is no evidence of recidivism could justify recourse to the exception.”); James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder* 22 IMMIGR. & NAT'LITY L. REV. 191, 289 (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.”); Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* 239–40 (3d ed. 2007) (“The refugee’s danger to the community is a fundamental part of the inquiry into whether the particularly serious crime exception applies in a given case.”); see also DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* § 6:20 (10th ed. 2017) [hereinafter “LAW OF ASYLUM”] (noting that the Refugee Act’s “danger to the community” requirement, which is derived from the Refugee Convention, “is especially critical”).

³⁸ 1963 COMMENTARY ON CONVENTION, *supra* note 32, at 142 ¶ 9.

³⁹ See COMMENTS ON NATIONALITY, IMMIGRATION & ASYLUM ACT, *supra* note 36, at 4 (“Where the refugee has responded to rehabilitative measures, or where there are indications that the refugee can be reformed, Article 33(2) should not apply because the potential threat to the community would have been (or could be) removed. Other relevant considerations would include the refugee’s behavior while serving his earlier sentence, the fact that they are released on parole, and the refugee’s co-operation in the reform programs.”).

⁴⁰ *Id.*; but see Hathaway & Harvey, *supra* note 37, at 294 (“If compelling evidence exists that the refugee is a danger to asylum-state security or safety of the community of that country, there is no additional proportionality requirement to satisfy. By definition, no purely individuated risk of persecution can offset a threat to the vital security interests of the receiving state. Because the objective of Article 33(2) is protecting the host state and its community, a risk to important collective interests defeats the refugee’s right to invoke protection against *refoulement*. Refugee law does not require the application of a proportionality test once the enumerated standards are met.”).

⁴¹ See 8 U.S.C. § 1158(b)(1)(B)(i) (asylum) (citing 8 U.S.C. § 1101(a)(42)(A)); 8 U.S.C. § 1231(b)(3)(A) (withholding of removal). Asylum affords greater benefits than withholding of removal. See Cardoza-Fonseca, 480 U.S. at 428-29 n.6 (citing *Matter of Lam*, 18 I. & N. Dec. 15, 18 (BIA 1981)). Withholding of removal only forecloses deportation to the country of origin, but not to a hospitable third country. See *Lam*, 18 I. & N. at 18. Furthermore, while an asylee may be eligible for adjustment of status to lawful permanent resident, noncitizens granted withholding of removal do not have this option. See *id.* Also, when a noncitizen is granted asylum, he or she is temporarily admitted into the United States, see H.R. Rep. No. 109-72, at 168 (2005), while noncitizens granted withholding of removal are not granted legal entry into the United States and may be deported to their countries of origin once they no longer face

chance of future persecution, which can be as low as ten percent.⁴² Withholding of removal, on the other hand, requires applicants to demonstrate a greater than fifty percent chance of persecution,⁴³ and courts grant it much more rarely as a result.⁴⁴ Once that threshold is met, however, withholding of removal is mandatory, in accordance with the Refugee Convention's obligation of *non-refoulement*.⁴⁵ This section will focus, however, on how the U.S. has applied the Refugee Convention's "particularly serious crime" bar to eligibility for both asylum and withholding of removal in ways that are not in compliance with the Convention's *non-refoulement* obligation.

A. U.S. Treaty Obligations Generally

International treaties are incorporated into domestic law in a variety of ways, including through legislative ratification and judicial application.⁴⁶ State constitutions often require ratification of international legal instruments by the national legislature (as in the case of the United Kingdom, Canada, and Australia), although some specify that treaties shall automatically have internal effect (as in the Netherlands, France, Belgium, Switzerland, and Japan).⁴⁷ Some constitutions go a step further, giving international treaties ratified by the legislature absolute precedence in the event of any inconsistencies between them and national laws.⁴⁸

In the United States, courts draw a distinction between "self-executing" and "non-self-executing" treaties. Courts can directly apply the former, while the latter require enabling legislation to be effective.⁴⁹ Courts weigh a number of different factors to make this determination, but give particular weight to the intent of the drafters, including as expressed or implied by the language of the treaty itself.⁵⁰ Applying the Supremacy Clause of the United States Constitution,⁵¹ courts have repeatedly ruled that a self-executing treaty has the same

any threat of persecution. *See id.*

42 *See* *Cardoza-Fonseca*, 480 U.S. at 440 (holding that a well-founded fear of future persecution can exist even if the applicant "only has a 10% chance of being shot, tortured, or otherwise persecuted.").

43 *See* 8 C.F.R. § 208.16(b)(2) (2017) (outlining the "more likely than not" standard).

44 *See* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2016 STATISTICS YEARBOOK, at K1, K5 (2017), <https://www.justice.gov/eoir/page/file/fysb16/download> (showing that, in 2016, immigration courts granted only seven percent of applications for withholding of removal, compared to forty-three percent for asylum).

45 *See* *Stevic*, 467 U.S. at 413; *INS v. Doherty*, 502 U.S. 314, 332 (1992) ("Because of the mandatory nature of the withholding-of-deportation provision, the Attorney General's power to deny withholding claims differs significantly from his broader authority to administer discretionary forms of relief such as asylum . . .").

46 *See generally* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 48-111 (5th ed. 1998); ANTONIO CASSESE, *INTERNATIONAL LAW* 213-234 (2d ed. 2005); UNITED KINGDOM NATIONAL COMMITTEE OF COMPARATIVE LAW, *THE EFFECT OF TREATIES IN DOMESTIC LAW* (1987); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992).

47 *See* Jackson, *supra* note 46, at 319-21.

48 *See, e.g.*, LA CONSTITUTION art. 55 (Fr.); KONSTITUTSIIA ROSSISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 15(4) (Russ.).

49 *See* BROWNLIE, *supra* note 46, at 77.

50 *See* Jackson, *supra* note 46, at 320.

51 U.S. CONST. art. I, § 8, cl. 10. ("[A]ll Treaties made or which shall be made with the authority of the United States, shall be the supreme Law of the Land and the Judges in every state shall be bound thereby, anything in the Constitution of Laws of any state to the contrary notwithstanding.")

weight as federal law.⁵² Consequently, where federal law directly conflicts with a self-executing international treaty, the most recently enacted law will prevail.

While the question of whether the Protocol and Refugee Convention provisions of *non-refoulement* are self-executing in the United States is disputed, there is strong reason to believe they are.⁵³ Regardless, when the United States acceded to the Protocol, it bound itself to uphold the Refugee Convention principle of *non-refoulement*,⁵⁴ and the Convention's provisions have largely been incorporated into domestic law through the Refugee Act of 1980 ("Refugee Act").⁵⁵ Thus, even if the question of whether the Refugee Convention provisions themselves are self-executing may be unclear, the U.S. Constitution and Supreme Court case law make absolutely clear that federal law must be interpreted such that it does not run afoul of U.S. treaty obligations—including the Refugee Convention's *non-refoulement* mandate and its limited exceptions.⁵⁶

B. Refugee Act of 1980—Initial Departures from the Refugee Convention

The Refugee Act incorporated withholding of removal as a form of refugee protection into the Immigration and Nationality Act ("INA") in order to comply with the international obligation of *non-refoulement* under the Refugee Convention and Protocol.⁵⁷ By codifying the United States' Protocol obligations almost verbatim,⁵⁸ Congress intended the Refugee Act to be interpreted in accordance with international refugee law norms.⁵⁹

52 See Jackson, *supra* note 46, at 320.

53 See, e.g., Carlos Manuel Vázquez, *The "Self-Executing" Character of the Refugee Protocol's Nonrefoulement Obligation*, 7 GEO. IMMIGR. L.J. 39, 39–65 (1993).

54 See 19 U.S.T. 6223 (1968).

55 Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

56 See U.S. Const. art. VI, cl. 2 ("[A]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."); see also *Charming Betsy*, 6 U.S. at 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."); *The Paquete Habana*, 175 U.S. at 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts . . . as often as questions of right depending upon it are duly presented for their determination.").

57 Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in non-consecutive sections of 8 U.S.C.); see also REP. NO. 96-608, at 17-18 (1979) ("The Committee wishes to insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law . . .").

58 Compare 8 U.S.C. §1231(b)(3) (requiring the Attorney General not to deport an individual to a country if such "alien's life or freedom would be threatened in such country because of the alien's race, religion, nationality, membership in a particular social group or political opinion" with 19 U.S.T. at 6276 (requiring Contracting States not to deport any refugee to 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").

59 See *Stevic*, 467 U.S. at 426 n.20 ("Although this section has been held by court and administrative decisions to accord aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the [Refugee] Convention. . . . [T]he Committee feels that the proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements.") (quoting H.R. Rep. No. 96-256, at 17–18 (1979) (emphasis added)); see also *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

Nevertheless, the INA, as amended by the Refugee Act, departs substantially from the Refugee Convention's framework by barring noncitizens guilty of particularly serious crimes from withholding of removal (the equivalent of Article 33(2)'s exception to *non-refoulement*),⁶⁰ as well as rendering them ineligible for asylum.⁶¹ That approach conflicts with the exclusion clauses enumerated in Article 1(F) of the Convention, which provides the grounds for denying an individual refugee status, and which explicitly do not include commission of a particularly serious crime in the country of asylum as a basis for exclusion from refugee status.⁶² As stated above, commission of a particularly serious crime under Article 33(2) is a ground for a host country to remove a refugee when doing so would otherwise violate *non-refoulement*, rather than a condition under which an individual may be denied refugee status in the first place.

Furthermore, while the INA, as amended by the Refugee Act, deliberately mirrors the language of Article 33(2), it divides the particularly serious crime exception to withholding of removal into two separate parts.⁶³ The first provides an exception to withholding of removal where "there are reasonable grounds to believe that the alien is a danger to the security of the United States."⁶⁴ The second applies if "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States."⁶⁵

Although there was little discussion of the particularly serious crime exception during the drafting of the Refugee Act, there is some evidence that the Act's drafters may have conflated the two elements of the Refugee Convention's provision. A House committee report notes that the Refugee Convention provides exceptions to the protection against *refoulement* for "aliens . . . who have been convicted of particularly serious crimes *which* make them a danger to the community of the United States."⁶⁶ This may explain why "[a]lthough the INA preserves the language of Article 33(2), by breaking up the exception into two different statutory provisions, it loses sight of the relationship between particularly serious crimes and concerns about threats to national security, thereby opening the door to a broader interpretation of a 'particularly serious crime' than the drafters of the Refugee Convention intended."⁶⁷

60 See 8 U.S.C. § 1231(b)(3)(B)(ii).

61 See 8 U.S.C. § 1158(b)(2)(A)(ii).

62 See LAW OF ASYLUM, *supra* note 37, § 6:14 ("While the 'persecutor of others' and 'serious nonpolitical crime bars' to asylum have counterparts in the Convention's requirements for exclusion from refugee status, commission of a particularly serious crime in the country of refuge is not a basis, under Article 1, for exclusion from refugee status. The Convention's Article 1(F) exclusion clause is concerned only with crimes committed prior to entry; these are included within the "serious nonpolitical crime" provision. The Convention assumes that those who commit crimes in the country of refuge, including serious crimes, will be subject to the sanctions and the procedural protections of the criminal law, and that such criminal conduct generally will not affect a person's ability to obtain international protection in the first instance.").

63 See H.R. 96-608, at 1–5 ("although [United States law] has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention.").

64 8 U.S.C. § 1231(b)(3)(B)(iv).

65 8 U.S.C. § 1231(b)(3)(B)(ii).

66 H.R. REP. NO. 96-608, at 18 (1979) (emphasis added). Although the Senate version of the Act was passed, the final version incorporated the House provisions on Asylum and Withholding of Deportation. See S. REP. NO. 96-590, at 141 (1980).

67 Marouf, *supra* note 14, at 1456.

C. Subsequent Congressional Enactment of Statutory *Per Se* Particularly Serious Crimes—Major Departure from the Refugee Convention

Congress has repeatedly amended both the definition of a particularly serious crime and the authority granted to executive agencies to shape or depart from that definition.⁶⁸ For example, since 1980, Congress has made convictions for certain crimes *per se* particularly serious: the INA stipulates that any “aggravated felony” conviction⁶⁹ is a particularly serious crime that bars asylum eligibility, and one or more aggravated felony convictions with an aggregate sentence of at least five years is a particularly serious crime that bars withholding of removal eligibility.⁷⁰ Congress also authorized the Attorney General to designate by regulation offenses that are *per se* particularly serious crimes.⁷¹ The Board of Immigration Appeals (“BIA”) and a majority of U.S. courts of appeals have interpreted that authority broadly, holding that the Attorney General is permitted to decide on a case-by-case basis when a criminal conviction is one that qualifies as a *per se* particularly serious crime.⁷² This, in turn, has allowed for the development of judicial definitions that depart substantially from the international norms discussed above.

68 See, e.g., Selective Service Act of 1948, Pub. L. No. 80-864, 62 Stat. 1206, 1206 (providing for the “unfettered discretion of the Attorney General” to grant relief from deportation when he deemed it appropriate, *Jay v. Boyd*, 351 U.S. 345, 354 (1956)); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (importing the Refugee Convention and Protocol’s *non-refoulement* provision and exception into domestic law); Immigration Act of 1990, Pub. L. No. 101-649, § 515, 104 Stat. 4978, 5053 (“an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.”); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, § 222, 108 Stat. 4305, 4320-22 (expanding the definition of aggravated felony); Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, § 413(f), 110 Stat. 1214, 1269 (amending former 8 U.S.C. § 1253(h) to give the Attorney General discretionary authority to override the categorical bar that designated any aggravated felony a particularly serious crime, if necessary, to comply with the *non-refoulement* obligations under the Refugee Convention and Protocol); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 305, 110 Stat. 3009-546, 3009-602 (“[A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.”).

69 For the full list of aggravated felonies, see 8 U.S.C. § 1101(a)(43).

70 8 U.S.C. § 1231(b)(3)(B) (“[A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime.”); 8 U.S.C. § 1158(b)(2)(B)(i) (“[A]n alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.”). The higher bar for withholding of removal purportedly reflects the United States *non-refoulement* obligations under the Refugee Convention and Protocol. See Marouf, *supra* note 14, at 1438.

71 8 U.S.C. § 1158(b)(2)(B)(ii) (“The Attorney General may designate by regulation offenses that will be considered to be a [particularly serious] crime . . .”). The withholding of removal statute does not include the same explicit authorization to establish new categorical bars, but does state that its designation of certain aggravated felony convictions as particularly serious crimes “shall not preclude the Attorney General from determining that . . . an alien has been convicted of a particularly serious crime.” 8 U.S.C. § 1231(b)(3)(B).

72 See, e.g., *Matter of N-A-M-*, 24 I. & N. Dec. 336, 338 (BIA 2007); *Delgado v. Holder*, 563 F.3d 863, 872 (9th Cir. 2009); *Ali v. Achim*, 468 F.3d 462, 469–70 (7th Cir. 2006); but see *Alaka v. Attorney General of U.S.*, 456 F.3d 88, 101 (3d Cir. 2006) (holding that whether an offense is a particularly serious crime for withholding of removal purposes is reviewable by a federal court because Congress did not specify that the Attorney General has the discretion to make such determinations). For an in-depth discussion of the development of statutory and judicial definitions of particularly serious crimes, see Michael McGarry, *A Statute in Particularly Serious Need of Reinterpretation: The Particularly Serious Crime Exception to Withholding of Removal*, 51 B.C. L. Rev. 209 (2010).

Many of the crimes that qualify as aggravated felonies—and consequently particularly serious crimes—fall far short of the high gravity threshold that the Refugee Convention’s drafters originally envisioned. As previously noted, the drafters intended the particularly serious crime exception to apply where a refugee posed a serious threat to the host country’s national security.⁷³ The class of aggravated felonies, per contrast, may include many minor crimes like theft,⁷⁴ filing a false tax return,⁷⁵ and failing to appear in court.⁷⁶ None of these offenses could plausibly be viewed as threatening the United States’ national security. Moreover, the Board of Immigration Appeals and federal courts have applied the aggravated felony *per se* bars without any separate individualized assessment of danger to the community as required by the Refugee Convention.⁷⁷ The BIA and courts of appeals have failed to require such a separate individualized assessment of current dangerousness despite congressional intent that a separate dangerousness analysis is required by the particularly serious crime exception. When Congress first enacted the aggravated felony bar to withholding of removal in the Immigration Act of 1990, Senator Edward Kennedy, who introduced the legislation in the Senate, wrote to the Immigration and Naturalization Service (“INS”) that Congress “contemplated that a showing of dangerousness to the community would be necessary in addition to proof of conviction of an aggravated felony.”⁷⁸

D. Board of Immigration Appeals’ Application of the Particularly Serious Crime Bar Beyond Statutory *Per Se* Offenses—Additional Departures from the Refugee Convention

Beyond the above-described Refugee Convention non-compliance issue concerning the statutory designation of *per se* particularly serious crime offenses, the Board of Immigration Appeals has deviated significantly from UNHCR’s interpretation of Article 33(2) in applying the particularly serious crime bar to other offenses in other ways that don’t comply with Refugee Convention requirements, including the following: (1) it has interpreted the particularly serious

73 See *supra* Section II.

74 8 U.S.C. 1101(a)(43)(G); see also *Ilchuk v. Att’y Gen. of U.S.*, 434 F.3d 618, 622–23 (3d Cir. 2006) (holding that a conviction for “theft of services” pursuant to Pennsylvania law is an aggravated felony barring asylum eligibility).

75 8 U.S.C. 1101(a)(43)(M)(i); see also *Kawashima v. Holder*, 565 U.S. 478, 484–85 (2012) (holding that knowingly filing a false tax return is an aggravated felony).

76 8 U.S.C. 1101(a)(43)(Q), (T); see also *Matter of Tamara Aleman*, A0703 110 365, 2013 WL 4041217, at *2 (BIA June 18, 2013) (holding that a conviction for “failure of defendant on bail to appear” with a sentence of over 2 years, was an aggravated felony).

77 See *supra* Section II. For examples of the BIA and federal court cases declining to apply this Refugee Convention separate dangerousness requirement in the U.S. see *Matter of Carballe*, 19 I. & N. Dec. 357, 360 (BIA 1986) (“[T]hose aliens who have been finally convicted of particularly serious crimes are presumptively dangers to [the] community.”); *Matter of U-M-*, 20 I. & N. Dec. 327, 330-31 (BIA 1991) (“We find that the crime of trafficking in drugs is inherently a particularly serious crime . . . no further inquiry is required into the nature and circumstances of the respondent’s convictions for sale or transportation of marihuana and sale of LSD.”); *Valerio-Ramirez v. Sessions*, 882 F.3d 289, 295–96 (1st Cir. 2018) (deferring to the BIA and holding that the particularly serious crime analysis does not require a distinct dangerousness finding); *Tian v. Holder*, 576 F.3d 890, 897 (8th Cir. 2009) (reasoning that the particularly serious crime analysis requires an examination of the nature of the offense and not the likelihood of future dangerousness); *Choeum v. INS*, 129 F.3d 29, 41 (1st Cir. 1997) (“This court, while acknowledging that there is ‘considerable logical force’ to the argument that the Particularly Serious Crime Exception requires a separate determination of dangerousness to the community, has upheld the agency’s interpretation . . .”).

78 See *Mosquera-Perez v. INS*, 3 F.3d 553, 556 (1st Cir. 1993).

crime exception to apply to crimes falling well below the threshold of gravity originally envisioned by the Refugee Convention’s drafters; (2) it does not require immigration judges to conduct an individualized analysis taking into account mitigating factors; (3) it has interpreted the bar to no longer require a distinct current dangerousness finding; and (4) it does not weigh the gravity of the offense against the persecution the refugee will face in his or her home country if returned..

In *Matter of Frentescu*—eight years before Congress included statutory classifications of certain offenses as particularly serious crimes in the INA—the BIA held that immigration judges could find some convictions *per se* particularly serious, while others would require an individualized inquiry.⁷⁹ In that case, the BIA articulated a multi-factor test for the individualized inquiry that required considering “the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.”⁸⁰ Since Congress established the current framework through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IRIIRA”), it has held that IRIIRA made its *Frentescu* analysis applicable to withholding of removal cases involving aggravated felony convictions with sentences of less than five years.⁸¹

In 2007, in *Matter of N-A-M-*, the BIA further refined its particularly serious crime analysis when it instructed adjudicators to first look at the elements of an offense to determine if the crime is clearly not particularly serious.⁸² If the crime could potentially be particularly serious based on the elements, then the Board authorized judges to look at the specific circumstances of the offense. Notably, the Board did not require immigration judges to analyze the mitigating circumstances if the threshold elements inquiry was satisfied. In fact, the Board discouraged such considerations, explaining that “offender characteristics” are irrelevant because they “may operate to reduce a sentence but do not diminish the gravity of a crime.”⁸³

Immigration judges were thus empowered to make Article 33(2) findings without consideration of mitigating circumstances. The BIA has since doubled down on this position in subsequent cases. In *Matter of R-A-M-*, for example, the Board held that “potential rehabilitation is not significant to the analysis.”⁸⁴ In *Matter of G-G-S-* (recently vacated by the Ninth Circuit), it held that immigration judges cannot consider mental health at the time of the offense independently of the criminal court, justifying this deference on the basis that trial court fact finders “have expertise in the applicable State and Federal criminal law, are informed by the evidence presented by the defendant and the prosecution, and have the benefit of weighing all the factors firsthand.”⁸⁵

79 See *Matter of Frentescu*, 18 I. & N. Dec. 244, 247 (BIA 1982).

80 See *id.*

81 See *Matter of L-S-*, 22 I. & N. Dec. 645, 649 (BIA 1999) (en banc); *Matter of S-S-*, 22 I. & N. Dec. 458, 463–65, (BIA 1999) (en banc).

82 See 24 I. & N. Dec. at 342.

83 *Id.* at 343.

84 25 I. & N. Dec. 657, 662 (BIA 2012).

85 *Matter of G-G-S-*, 26 I. & N. Dec. 339, 339, 345 (BIA 2014), *vacated by Gomez-Sanchez v. Sessions*, 887 F.3d 893, 896 (9th Cir. 2018).

The Board has also determined that a separate assessment of dangerousness is not required to apply the particularly serious crime bar, finding that the conviction for a particularly serious crime itself demonstrates the noncitizen's dangerousness.⁸⁶ Explaining that the "essential key" to this inquiry is the nature of the crime as determined from the elements of the offense, the Board applied this rationale to hold that offenses are particularly serious based on the offenses' elements alone.⁸⁷ The Board subsequently classified additional offenses as *per se* particularly serious crimes, categorically including offenses such as drug trafficking, regardless of whether the circumstances indicate future dangerousness.⁸⁸ This *per se* analysis is an explicit deviation from the two-pronged test under Article 33(2), which has always required an independent finding of dangerousness beyond the seriousness of the conviction itself.

While the Board's past designation of certain offenses as *per se* particularly serious crimes may now be supplanted by the statutory *per se* particularly serious crime designation of any aggravated felony for which the individual has been sentenced to an aggregate term of imprisonment of at least five years, the Attorney General has more recently created a new near *per se* bar for any drug trafficking aggravated felony even if the offense does not fall within the statutory *per se* bar.⁸⁹

Finally, the BIA has refused to apply the principle of proportionality,⁹⁰ noting that "the statutory exclusionary clause for a 'particularly serious crime' relates only to the nature of the crime itself and . . . does not vary with the nature of the evidence of persecution."⁹¹ The Supreme Court affirmed the BIA's decision not to apply proportionality in *INS v. Aguirre-Aguirre*.⁹²

The BIA's particularly serious crime analysis has moved so far away from the bar's intended purpose in the Refugee Convention and Protocol that individuals with relatively minor offenses have been rendered ineligible for asylum or withholding of removal.⁹³ For example, in *Tunis v. Gonzales*, the Seventh Circuit affirmed a BIA determination that a woman from Sierra Leone who had been subjected to female genital mutilation and feared returning to her home country where she would again be subjected to the torturous procedure was ineligible for

86 Matter of Carballe, 19 I. & N. Dec. at 360 (BIA 1986) ("those aliens who have been finally convicted of particularly serious crimes are presumptively dangers to [the] community.").

87 *Id.*

88 See, e.g., Matter of U-M-, 20 I. & N. Dec. at 330-31 ("We find that the crime of trafficking in drugs is inherently a particularly serious crime . . . no further inquiry is required into the nature and circumstances of the respondent's convictions for sale or transportation of marihuana and sale of LSD."); Matter of Gonzalez, 19 I. & N. Dec. 682, 683-84 (BIA 1988) (indicating that drug trafficking is a particularly serious crime).

89 See Matter of Y-L-, 23 I. & N. Dec. 270, 274 (Att'y Gen. 2002) (holding that any aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute particularly serious crimes, and only under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible).

90 Matter of Rodriguez-Coto, 19 I. & N. Dec. 208, 209 (BIA 1985).

91 Matter of Garcia-Garrocho, 19 I. & N. Dec. 423, 424-25 (BIA 1986).

92 See 526 U.S. 415, 425-27 (1999).

93 See Mary Holper, *Redefining "Particularly Serious Crimes" in Refugee Law*, 69 FLA. L. REV. 1093, 1117-20 (2017) (explaining the growing trend of the particularly serious crime bar including more nonviolent offenses as a growing trend of immigration authorities no longer relying on the length of a criminal sentence as an indication of a crime's severity).

asylum and withholding of removal because of two offenses for selling less than a gram of cocaine.⁹⁴ A BIA determination that reckless endangerment was a particularly serious crime was similarly upheld by the Second Circuit.⁹⁵ In that case the court reasoned that the offense was particularly serious, despite the defendant receiving less than a year of jail time, because the reckless act—shooting a pistol into the air—had a potential for injury.⁹⁶ In yet other cases reviewed by federal courts, the BIA found resisting arrest and prostitution offenses to be particularly serious crimes.⁹⁷ The offenses involved in these cases are not the type of grave crimes that jeopardize the national security of a nation as originally required by the Refugee Convention’s particularly serious crime bar.

The BIA’s interpretation of the particularly serious crime bar has likewise resulted in barring individuals with significant mitigating circumstances from asylum or withholding of removal eligibility. In a recent Ninth Circuit case, the BIA’s refusal to consider mitigating circumstances in its particularly serious crime analysis was called into question by the Ninth Circuit.⁹⁸ In that case, the BIA held that a lawful permanent resident, who suffered from chronic paranoid schizophrenia and had been found mentally incompetent for the purposes of his removal proceedings, was barred from asylum and withholding of removal due to a finding that his conviction for assault was a particularly serious crime.⁹⁹ The Ninth Circuit reversed and remanded that case with instructions that the agency consider the individual’s mental health as well as all other “reliable, relevant information . . . when making its [particularly serious crime] determination.”¹⁰⁰ Nevertheless, the BIA will continue to apply its interpretation outside the Ninth Circuit.

V. Requirements of the Particularly Serious Crime Bar as Implemented by Other State Parties to the Refugee Convention

Outside the United States, the enforcement of Article 33(2) of the Refugee Convention varies widely depending on other treaty obligations, domestic incorporation of Article 33(2) via statute or regulation, and adjudicatory structure. This section, nonetheless, highlights some of the consistencies with Article 33(2)’s interpretation and implementation across the globe. Specifically, the tables included below highlight some of the ways other signatories

94 447 F.3d 547, 552 (7th Cir. 2006).

95 *Nethagani v. Mukasey*, 532 F.3d 150, 157 (2d Cir. 2008)

96 *See id.* at 155.

97 *See* *Alphonsus v. Holder*, 705 F.3d 1031, 1036 (9th Cir. 2013) (holding that the BIA provided no “operative rationale” for its determination that resisting arrest was a particularly serious crime); *Yuan v. U.S. Att’y Gen.*, 487 F. App’x 511, 514 (11th Cir. 2012) (vacating on other grounds a BIA determination that prostitution was a particularly serious crime).

98 *See* *Gomez-Sanchez*, 887 F.3d at 896.

99 *Matter of G-G-S-*, 26 I. & N. Dec. 339, 339, 346 (BIA 2014).

100 *Gomez-Sanchez*, 887 F.3d at 905. Notably, the Ninth Circuit did not include instructions concerning *how* the agency should consider the individual’s mental health—only that it must not be wholly ignored.

to the Refugee Convention have interpreted (i) the threshold for ‘particular seriousness’; (ii) the requirement for individualized analysis and the consideration of mitigating factors; (iii) the requirement of a distinct finding of dangerousness; and (iv) the application of the proportionality principle. These tables seek to reveal the extent of this divergence through a comparison with the particularly serious crime bar’s application in the United States.¹⁰¹

There are also entire regions in which even an Article 33(2) designation is insufficient to overcome the norm of *non-refoulement*. In Europe, for example, the 47 member states of the Council of Europe and signatories to the European Convention on Human Rights are bound by Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which creates an absolute prohibition on torture and inhuman or degrading treatment or punishment.¹⁰² That prohibition has been interpreted as creating an obligation of *non-refoulement* that cannot be circumvented by Article 33(2) of the Refugee Convention.¹⁰³ In *Ahmad v. Austria*, the European Court of Human Rights indicated that this absolute, categorical prohibition on *refoulement* is “one of the fundamental values of democratic societies.”¹⁰⁴ In *M.A. v. France*, the Court further clarified that France committed a violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms when it deported a man back to Algeria—despite his convictions for terrorism-related offenses—because he was likely to be tortured back in Algeria.¹⁰⁵

A. Minimum Gravity of the Offense Threshold

As stated above in Section II, the Refugee Convention’s particularly serious crime bar was to be reserved for only the gravest offenses. Similarly, UNHCR has explicitly noted that ordinary or common crimes do not meet this “threshold of seriousness.”¹⁰⁶ In fact, “the offence must normally be a capital crime (murder, arson, rape, armed robbery, etc.).”¹⁰⁷ Specifically, UNHCR instructs adjudicators to consider “the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, and whether most jurisdictions would consider the act in question as a serious crime” before determining whether an offense rises to the level of “particularly serious.”¹⁰⁸ Although the test remains somewhat subjective, the table below demonstrates that other Refugee Convention signatories interpret the Article 33(2) bar to require a minimum threshold of seriousness.

101 The authors of this report were unable to develop a comprehensive review of all signatory countries for a variety of reasons, including but not limited to the ad hoc application of the bar in some countries, the lack of a developed common law interpreting the bar in other countries, and the inability to locate an expert who could describe the bar’s interpretation and application in each signatory country. However, efforts were made to collect data on the bar’s interpretation from a diverse range of signatories, including some of the countries with the largest refugee populations. See U.N. HIGH COMM’R FOR REFUGEES (UNHCR), GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016 15, Figure 4 (2017) (reporting that Turkey, Pakistan, Lebanon, Iran, Uganda, Ethiopia, Jordan, Germany, Democratic Republic of Congo, and Kenya are currently the top 10 refugee-hosting countries).

102 See Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, Nov. 4, 1950.

103 *Ahmed v. Austria*, App No 25964/94, 17 December 1996, §§ 41; *BM (Eritrea) v. Minister for Justice and Equality* [2013] IEHC 324, McDermott J, 16 July 2013.

104 *Id.*

105 *Affaire M.A. c. France*, European Court of Human Rights, no. 9373/15, 1 February 2018.

106 BRIEFING FOR HOUSE OF COMMONS, *supra* note 26, ¶ 10

107 See 1963 COMMENTARY ON CONVENTION, *supra* note 32.

108 BRIEFING FOR HOUSE OF COMMONS, *supra* note 26, ¶ 10.

Country	Minimum Threshold of Gravity
Austria	Includes offenses that violate particularly important legal interests, such as homicides, child maltreatment, drug trafficking, or armed robbery. ¹⁰⁹
Cameroon	Includes offenses that affect national security interests and usually carry maximum penalties of death or life imprisonment, such as fomenting revolution, propagation of false information, and insurrection. ¹¹⁰
Canada	Includes generally serious criminality, national security, human rights violations, and organized criminality. ¹¹¹
France	Includes only relatively severe crimes, and the government must find that the individual is a “serious threat to the public order.” ¹¹²
Germany	May include any conviction carrying a prison sentence of at least one year if the crime was committed intentionally and using force, threat, guile, or concrete threats to life or limb. Can also include crimes carrying a sentence of more than three years in prison. ¹¹³ Examples of the latter include terrorism offenses, aggravated rioting, and sexual assault. ¹¹⁴
Kenya	Usually includes crimes that carry an imprisonment term of more than 5 years, but this threshold is not provided by law. ¹¹⁵

109 Email from Anny Knapp, Chair-woman of Asylkoordination Österreich, to Collin P. Poirot, Law Student at Harvard Law School, Apr. 13, 2018 (on file with author).

110 Email from Justice Mukete Tahle Itoe, President at Menchum High Court, to Collin P. Poirot, Law Student at Harvard Law School, Apr. 15, 2018 (on file with author).

111 Immigration and Refugee Act of 2001, Section 115(2).

112 Ordonnance n° 2004-1248 du 24 novembre 2004 relative à la partie législative du code de l'entrée et du séjour des étrangers et du droit d'asile (Fr.), at Art. L. 513-2 (hereinafter “CESEDA”).

113 Residence Act in the version promulgated on 25 February 2008 (Federal Law Gazette I p. 162), last amended by Article 1 of the Act of 11 March 2016 (Federal Law Gazette I p. 394).

114 See German Federal Administrative Court, judgment as of 30 March 1999 – 9 C 23-98; German Federal Administrative Court, judgment as of 5 May 1998 – 1 C 17-97; Munich Administrative Court, judgment as of 22 May 2017 – M 4 S 17.31858; Mannheim Higher Administrative Court, judgment as of 29 January 2015 – A 9 S 314/12.

115 Email from Leila Murithia Simiyu, Senior Programmes Officer & Programme Officer Legal and Social Justice Programme, Refugee Consortium of Kenya, to Collin P. Poirot, Law Student at Harvard Law School, Apr. 1, 2018 (on file with author).

New Zealand	There is no statutory threshold, but ‘particularly serious crimes’ have been found where an individual was sentenced to seven years imprisonment for wounding with intent to cause grievous bodily harm, ¹¹⁶ and where an individual was sentenced to eleven years imprisonment for two counts of rape and one count of sexual violation by unlawful sexual contact. ¹¹⁷
Norway	Norwegian Immigration Act allows for an expulsion decision against a Convention refugee where: “The foreign national is on reasonable grounds deemed to be a danger to national security or has received an unappealable judgment for a particularly serious crime and for that reason represents a danger to Norwegian society.” ¹¹⁸ However, there is no discussion or explication of the term “particularly serious crime” in the act itself, official circulars, preparatory documents, or immigration regulations, and experts opine that the section may be seldom invoked. ¹¹⁹
Sweden	Swedish removal cases under the ‘particularly serious crime’ exception are adjudicated on a case-by-case basis. ¹²⁰ Nonetheless, the Swedish Prosecution Authority has released a memorandum interpreting the exception to cover individuals who have been convicted of a crime that carries a mandatory minimum sentence of at least two years of imprisonment, such as murder, manslaughter, kidnapping, trafficking, rape, aggravated robbery, and arson. ¹²¹
Uganda	The threshold for finding a ‘particularly serious crime’ is not found in statute and is seldom invoked in practice. ¹²²
United Kingdom	May include a sentence of more than 2 years in prison, which creates a rebuttable presumption of particular seriousness. There is no statutory definition of a particularly serious crime. ¹²³

116 *BY (Sri Lanka)* [2014] NZIPT 800634.

117 *A v. Chief Executive of the Department of Labour*, High Court, Wellington CIV-2008-485-668, 5 September 2008 at paras [5], [31].

118 Act of 15 May 2008 on the entry of foreign nationals into the kingdom of Norway and their stay in the realm (Immigration Act), Section 73(1)(b).

119 See Email from Marek Linha, Legal Advisor to the Norwegian Organization for Asylum Seekers, to Collin P. Poirot, Law Student at Harvard Law School, Mar. 27, 2018 (on file with author).

120 Email from Arido Degavro, Partner at September Advokatbyra, to Collin P. Poirot, Law Student at Harvard Law School, Apr. 12, 2018 (on file with author).

121 Aklagarmyndigheten, Utvisning på grund av brott, December 2013 (hereinafter “Swedish Prosecutorial Memo”).

122 Email from Salima Namusobya, Executive Director of Initiative for Social and Economic Rights (ISER) Uganda, to Collin P. Poirot, Apr. 8, 2018 (on file with author).

123 *EN (Serbia) v. SSHD & Anot* [2009] EWCA Civ 630; [2010] QB 633.

B. Mitigating Factors (No Per Se Bars)

UNHCR has noted that the Article 33(2) exception should not be interpreted as creating a category of convictions which are *per se* particularly serious, and has called on signatories to take into account “the overall context of the offence, including its nature, effects and surrounding circumstances, the offender’s motives and state of mind” as well as any aggravating or extenuating circumstances.¹²⁴ Of the countries surveyed, the majority have rejected the idea of *per se* particularly serious crimes, and require a consideration of the individual circumstances of the offense.

Country	Mitigating Factors (No Per Se Bars)
Austria	There are no <i>per se</i> bars. Rather “the act must prove to be objectively and subjectively particularly serious in a concrete individual case . . . mitigation reasons have to be considered.” ¹²⁵
Cameroon	Specific offenses may be considered a <i>per se</i> ‘particularly serious crime,’ such as national security offenses. ¹²⁶
Canada	There are no <i>per se</i> bars. Applying the Art. 33(2) exception “requires a serious criminal offense, although conviction of a serious criminal offense is not, alone, sufficient to conclude that the individual is a danger to the public . . . the [adjudicator] needs to turn his mind to the actual circumstances of the offense.” ¹²⁷
Germany	There are no <i>per se</i> bars. Individualized analysis is always required, and factors that must be considered include the specific facts and circumstances of the case, as well as the consequences of the conduct and the sentencing. ¹²⁸
Kenya	There are no <i>per se</i> bars. Cases of criminal removal are generally determined on their own merit using individualized analysis. ¹²⁹

124 COMMENTS ON NATIONALITY, IMMIGRATION & ASYLUM ACT, *supra* note 36, at 4.

125 Knapp email, *supra* note 109.

126 Mukete Tahle Itoe email, *supra* note 110.

127 *Ramanathan v. Canada (Minister of Immigration, Refugees and Citizenship)*, 2017 FC 834 (para. 40).

128 German Federal Administrative Court, judgment as of 31 January 2013 – 10 C 17/12.

129 Murithia Simiyu email, *supra* note 115.

New Zealand	The discussion over whether a conviction alone is enough to sustain an Art. 33(2) determination has yet to be resolved: “One side of the [legal and academic] debate suggests that nothing further than the conviction is required to establish danger to the community. Others take the view that the State has to establish both the serious crime and a danger to the community. In this case it does not seem to me to matter which interpretation is correct... a moderate risk of offending taking into account the very serious rape and abduction committed by [the refugee] was sufficient to constitute a danger to the community.” ¹³⁰
Norway	There are no <i>per se</i> bars. The consideration of individual circumstances is required in all expulsion decisions. ¹³¹
Sweden	There are no <i>per se</i> bars. Swedish removal cases under the ‘particularly serious crime’ exception are adjudicated on a case-by-case basis. ¹³²
Uganda	The analysis required for finding a ‘particularly serious crime’ is not found in statute and the exception is seldom invoked in practice. ¹³³
United Kingdom	There are no <i>per se</i> bars. The Asylum and Immigration Tribunal has held that “Art 33(2) can only be applied in a fact-sensitive way taking account of all the circumstances of the offense including its nature, gravity and consequences and of the offender including any aggravating or mitigating factors.” ¹³⁴ The Court of Appeal in England and Wales has also struck down attempts to create <i>per se</i> particularly serious crimes “irrespective of the sentence imposed.” ¹³⁵

C. Distinct Dangerousness Requirement

UNHCR has consistently stated that the existence of a conviction, by itself, is inadequate to render a refugee exempt from the protection against *refoulement* since the refugee may have “since become rehabilitated or disabled.”¹³⁶ In this sense, adjudicators are required to make a distinct and independent finding of ongoing dangerousness before applying Article 33(2). As shown below, the majority of countries surveyed have incorporated this requirement into their domestic implementation of Article 33(2).

130 *A v. Chief Executive of the Department of Labour*, ¶¶. 30–31.

131 Linha email, *supra* note 119.

132 Degavro email, *supra* note 120.

133 Namusobya email, *supra* note 122.

134 *IH (s.72; ‘Particularly Serious Crime’) Eritrea* [2009] UKAIT 00012.

135 *EN (Serbia) v. SSHD & Anot* [2009] EWCA Civ 630; [2010] QB 633.

136 1963 COMMENTARY ON CONVENTION, *supra* note 30, at 142 ¶ 9.

Country	Distinct Dangerousness Requirement
Austria	An independent finding of dangerousness is required. The finding will be based on such factors as “repeated delinquency over a period of several years and repeated imposition of conditional and unconditional prison sentences.” ¹³⁷
Cameroon	It is unclear whether expulsion requires a distinct finding of dangerousness, but a balancing test is performed that takes into account state security interests.
Canada	An independent finding of dangerousness is required. Canadian domestic law incorporates 33(2) in Section 115(2) of the Immigration and Refugee Protection Act of 2001, which requires an independent determination of dangerousness and individualized analysis. ¹³⁸
France	Since France lacks domestic legislation directly implementing Art. 33(2), it is unclear whether such a case would require a distinct finding of dangerousness.
Germany	An independent finding of dangerousness is required. In any removal case based on a ‘particularly serious crime’ under the Residence Act of 2008, the court must engage in an individualized analysis of the case and make an independent finding of dangerousness. ¹³⁹
Kenya	Since there is no domestic law in Kenya directly referencing ‘particularly serious crimes,’ the criminal removal grounds do not reference a distinct finding of dangerousness, but of ‘undesirability.’ ¹⁴⁰
New Zealand	The discussion over whether a conviction alone is enough to sustain an Art. 33(2) determination has yet to be resolved: “One side of the [legal and academic] debate suggests that nothing further than the conviction is required to establish danger to the community. Others take the view that the State has to establish both the serious crime and a danger to the community. In this case it does not seem to me to matter which interpretation is correct . . . a moderate risk of offending taking into account the very serious rape and abduction committed by [the refugee] was sufficient to constitute a danger to the community.” ¹⁴¹

137 Knapp email, *supra* note 109.

138 Immigration and Refugee Protection Act of 2001, § 115(2).

139 German Federal Administrative Court, judgment as of 31 January 2013 – 10 C 17/12.

140 Immigration Act of 1967, Chapter 172, Art. 3.

141 *A v. Chief Executive of the Department of Labour*, para. 30-31.

Norway	Section 73(1)(b) of the Norwegian Immigration Act requires the non-citizen to have received an unappealable conviction for a particularly serious crime, “and for that reason [to] represents a danger to Norwegian society.” Given this phrasing, experts opine that a conviction by itself is insufficient without a further determination of dangerousness. ¹⁴²
Sweden	The prosecutorial memorandum referenced in section (ii) opines that a sentence of two years of imprisonment suffices to create a ‘particularly serious crime’ for the purposes of adjudicating an expulsion case. ¹⁴³
Uganda	The Art. 33(2) exception is seldom invoked so its elements are uncertain. ¹⁴⁴
United Kingdom	An independent finding of dangerousness is required. The Asylum and Immigration Tribunal has clarified that “the requirement that the individual is a ‘danger to the community’ is a distinct issue when applying Art 33(2).” ¹⁴⁵ Expert practitioners in the United Kingdom have further indicated that a dangerousness determination “necessarily involves consideration of individual circumstances” and cannot be deemed solely “from the fact of conviction.” ¹⁴⁶

D. Consideration of the Proportionality Principle

As discussed above, UNHCR requires Refugee Convention signatories to apply the proportionality principle in evaluating Article 33(2) exceptions.¹⁴⁷ In practice, this means that the risk of persecution in the refugee’s home country should always factor into an Article 33(2) analysis, and must be balanced against the threat the refugee poses to the host country. The majority of countries surveyed apply this principle, and where proportionality is not explicitly considered during Article 33(2) determinations, the existence of a significant risk of persecution often creates a separate bar to removal.

142 See Linha email, *supra* note 119.

143 Swedish Prosecutorial Memo, *supra* note 121.

144 Namosoby email, *supra* note 122.

145 *IH (s.72; ‘Particularly Serious Crime’) Eritrea* [2009] UKAIT 00012.

146 Email from Eric Fripp, Lawyer with Lamb Building Temple EC4, to Collin P. Poirot, Law Student at Harvard Law School, Apr. 12, 2018 (on file with author).

147 See COMMENTS ON NATIONALITY, IMMIGRATION & ASYLUM ACT, *supra* note 36, at 4.

Country	Consideration of the Proportionality Principle
Austria	Proportionality is required. When there is a risk of persecution in one's home country, the courts must grant a 'tolerated stay' where <i>refoulement</i> risks cannot be excluded. This way, the Austrian courts have not used Art. 33(2) to avoid the prohibition on <i>refoulement</i> . ¹⁴⁸
Cameroon	Proportionality is required. Nonetheless, national security interests often weigh "heavily in disfavor of the applicants." ¹⁴⁹
Canada	Proportionality is required. The adjudicator must "assess whether the individual, if removed to his country of origin, will personally face a risk to life, security or liberty, on a balance of probabilities. This assessment must be made contemporaneously... [the adjudicator] must balance the danger to the public in Canada against the degree of risk, as well as any other humanitarian and compassionate considerations." ¹⁵⁰
France	Proportionality is required. The French domestic law incorporating Art. 33(2) is the Code of Entry and Stay of Aliens and the Right to Asylum (CESEDA), which provides that "no alien may be sent to a country if he/she proves that his/her life or freedom would be in danger there or that he/she would be at risk there of treatment contrary to article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms." ¹⁵¹
Germany	Proportionality is required. Under the German Constitutional requirement of proportionality, an exception to the principle of <i>non-refoulement</i> can only be considered in the most extreme cases, and as a last resort. ¹⁵²
Kenya	Since the 'particularly serious crime' exception is seldom invoked, it is unclear whether any individuals have been removed under this exception, and if so, whether proportionality was considered.

148 Knapp email, *supra* note 109.

149 Mukete Tahle Itoe email, *supra* note 110.

150 *Ramanathan v. Canada (Minister of Immigration, Refugees and Citizenship)*, 2017 FC 834 (para. 39).

151 CESEDA, *supra* note 111, art. L. 513-2,

152 German Federal Administrative Court, judgment as of 5 May 1998 – 1 C 17-97.

New Zealand	Proportionality is not required. As held in <i>Attorney-General v. Zaoui (No. 2)</i> , “the judgment . . . to be made under article 33.2 is to be made in its own terms . . . and without any balancing or weighing or proportional reference to the matter dealt with in article 33.1, the threat . . . to his life and freedom on the proscribed grounds or the more specific rights protected by the New Zealand Bill of Rights Act 1990.” ¹⁵³
Norway	Proportionality is required. Although concerns regarding the risk of persecution in the country of origin do not factor into expulsion decisions, risks of persecution may give rise to a separate barrier to <i>refoulement</i> such that even where an expulsion decision is issued the refugee will not be removed from the country until the risk of persecution ceases. ¹⁵⁴ Experts have indicated that “individual circumstances... will all be taken into account under analysis of proportionality. Proportionality must always be individually assessed in all expulsion decisions.” ¹⁵⁵
Sweden	Proportionality is not required. There appears to be no statutory requirement of proportionality, yet Swedish courts often decide against deporting individuals who have committed particularly serious crimes where the likelihood of persecution is prohibitively high. ¹⁵⁶
United Kingdom	Proportionality is required. The United Kingdom does not apply Art. 33(2) as an exception to <i>non-refoulement</i> where there is a risk of torture or persecution, since it considers itself prohibited from doing so by Art. 3 of the European Convention on Human Rights. ¹⁵⁷

VI. Avenues for Reform in the United States

While countries around the world have adopted UNHCR’s approach or at least components thereof, the United States has deviated substantially from this norm. Bona fide refugees can be deported for past minor offenses with no individualized assessment of the circumstances surrounding these offenses and whether such individuals pose a credible and current threat to national security. Additionally, adjudicators are not required to balance possible persecution in the country of origin against the gravity of the offence and threat to the national security. The United States’ misapplication of the particularly serious crime exception has resulted in the

153 *Attorney-General v. Zaoui (No. 2)* [2005] NZSC 38, [2006] 1 NZLR 289, para. 42.

154 See Linha email, *supra* note 119.

155 *Id.*

156 Degavro email, *supra* note 120.

157 E Fripp email, *supra* note 146.

deportation of individuals back to countries where they are at risk of serious physical harm or even death even when these individuals are often guilty of only minor offenses and pose no present danger to the United States. This contravention of the United States' treaty and moral obligations to protect refugees under the Refugee Convention and customary international law can be set right or at least reduced through legislative change, judicial reinterpretation, or executive intervention.

A. Legislative Avenues for Reform

Legislative overhaul is the most direct mechanism for addressing the United States' non-compliance with its obligations under the Refugee Convention and its divergent application of the particularly serious crime exception to *non-refoulement*. Congress could remedy the problem in a number of ways. It could address each of the discrepancies discussed above (i.e., gravity of the offense, separate dangerousness determination, etc.) by adding a provision to the INA to require the particularly serious crime bar to be interpreted in conformity with the Refugee Convention's drafting history and current usage by other signatory states. The first approach could, for example, involve abolishing or significantly limiting the class of "aggravated felonies" that constitute *per se* particularly serious crimes. It could also involve amending the statute to make clear that a separate dangerousness finding is required. Congress has made similar amendments to the INA in the past. For example, in 1996, Congress amended the withholding of deportation provision of the Refugee Act and directed immigration adjudicators to refrain from denying a refugee withholding of deportation based on the particularly serious crime exception when "necessary to ensure compliance with the [1967 Protocol]." ¹⁵⁸ Finally, the United States could directly incorporate the Refugee Convention provisions into its domestic law in full, as countries like Germany have done. ¹⁵⁹

B. Judicial Avenues for Reform

Federal court judges have limited authority to review discretionary decisions by the Attorney General, ¹⁶⁰ but the Supreme Court has held that the preclusion of review applies only to decisions designated discretionary by *statute*—the Attorney General cannot unilaterally designate decisions discretionary and thereby evade review. ¹⁶¹ In other words, where discretionary authority is provided by regulation, and not by statute, courts still have the power of judicial review.

Federal circuit courts of appeals have followed the Supreme Court's holding in *Kucana v. Holder* to find the particularly serious crime designation discretionary, but within the bounds of judicial review because the discretion follows from federal regulations rather than statutes. ¹⁶² The INA provides that a noncitizen is barred from withholding of removal if "the Attorney

158 AEDPA, Pub. L. 104-132, § 413(f), 110 Stat. 1214, (Apr. 24, 1996) (repealed Apr. 1, 1997).

159 Gesetz betreffend das Abkommen vom 28. Juli 1951 über die Rechtsstellung der Flüchtlinge [Act on the Convention of July 28, 1951 Relating to the Status of Refugees], Sept. 1, 1953, BUNDESGESETZBLATT [BGBl.] at 559 1951 II (Ger.).

160 See 8 U.S.C. § 1252(a)(2)(B).

161 See *Kucana*, 558 U.S. at 836–38.

162 See *Delgado v. Holder*, 648 F.3d 1095, 1100, 1106 (9th Cir. 2011); *Nethagani v. Mukasey*, 532 F.3d 150, 153–55 (2d Cir. 2008).

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.”¹⁶³ Because the statute only uses the word “decides” without explicit reference to discretion, the statute does not “explicitly vest discretion in the Attorney General.”¹⁶⁴ Circuit courts (and the Supreme Court) therefore have the ability to review decisions concerning the particularly serious crime bar.

Most federal circuits review the BIA’s decisions for abuse of discretion, which is a standard very deferential to the agency.¹⁶⁵ Those circuit courts consider the particularly serious crime decision to be a discretionary, factual one that is within the purview of the BIA. But other circuit courts view the decision as the application of law (a particularly serious crime standard) to fact (the individual circumstances of the case), and so grant *de novo* review with *Chevron* or other appropriate deference.¹⁶⁶

This distinction between the legal standard and the facts to which it is applied creates room for a reevaluation of the BIA’s standards. Both the Ninth and the Seventh Circuits have explicitly recognized this distinction: although they will not “re-weigh” the discretionary determination, they will review *de novo* a legal issue like applying the correct standard to the facts.¹⁶⁷ Consequently, if the statutory interpretation of the particularly serious crime bar by the BIA is demonstrably wrong, federal judges may correct the standard by reinterpreting it to accord with the Refugee Convention.

In evaluating the BIA’s interpretation of the INA, courts have recourse to several, helpful doctrines. Courts may reject a BIA interpretation that contravenes the Refugee Convention and customary international law’s *non-refoulement* obligation under *Chevron*’s first step, which requires courts to determine whether the statutory meaning with respect to the precise issue before the court is clear.¹⁶⁸ According to *Chevron*, “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”¹⁶⁹ Given that Congress expressed clear intent that INA asylum provisions be interpreted consistently with international obligations, including the Refugee Convention, it left no gap for the agency to fill.¹⁷⁰ Under that approach, “courts

163 8 U.S.C. § 1231(b)(3)(B) (2012) (emphasis added). The parallel provision regarding asylum uses the word “determines” instead of “decides.” 8 U.S.C. § 1158(b)(2)(A).

164 Delgado, 648 F.3d 1095, 1100 (9th Cir. 2011); Nethagani, 532 F.3d at 154–55; Alaka, 456 F.3d at 96–100.

165 See *Arbid v. Holder*, 700 F.3d 379 (9th Cir. 2012); *Lozano-Bolanos v. Holder*, 588 Fed. App’x 272, 272 (4th Cir. 2014); *Hassan v. Holder*, 446 Fed. App’x. 822, 823 (8th Cir. 2012); *Solorzano-Moreno v. Mukasey*, 296 Fed. App’x. 391, 394 (5th Cir. 2008); *Akrami v. Chertoff*, 186 Fed. App’x. 47, 50 (2d Cir. 2006).

166 See *Infante v. Att’y Gen. of the United States*, 574 Fed. App’x 142 (3d Cir. 2014); *Hamama v. INS*, 78 F.3d 233 (6th Cir. 1996); see also *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). While immigration judges are free to look at the entire factual record in making their determination, BIA guidance focuses on the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and whether the type and circumstances of the crime indicate that the individual will be a danger to the community. See *Matter of Frentescu*, 18 I. & N. Dec. 244 (BIA 1983).

167 See *Konou v. Holder*, 750 F.3d 1120 (9th Cir. 2014); *Petrov v. Gonzales*, 464 F.3d 800 (7th Cir. 2006).

168 See *Chevron*, 467 U.S. at 842–43.

169 *Id.* at n.9.

170 See, e.g., H.R. REP. NO. 96-608, at 1–5, 17–18 (1979) (“although [United States law] has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention. . . . The Committee wishes to insure a fair and workable asylum policy which is consistent with this country’s tradition of welcoming the

may treat many apparent textual ambiguities in the Refugee Act as pure issues of statutory construction that may be resolved by reference to the Convention instead of by delegation to the BIA.”¹⁷¹

In so doing, courts may rely on the “Charming Betsy” canon of statutory interpretation, which provides that “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.”¹⁷² The Ninth Circuit has noted that [u]nder Charming Betsy, we should interpret the INA in such a way as to avoid any conflict with the Protocol if possible.”¹⁷³ Courts can consequently employ this rule of statutory construction to bring the United States’ implementation of the particularly serious crime exception into greater conformity with the country’s international obligations under the Refugee Convention.¹⁷⁴

Courts reviewing the BIA’s construction of the INA could also invoke the rule of lenity—which requires judges to “construe any lingering ambiguities in deportation statutes in favor of the alien”¹⁷⁵—or the principle of constitutional avoidance, reading ambiguities in the INA to avoid conflict with the Constitution.¹⁷⁶ Courts have expressly found that the latter canon takes precedence over *Chevron* deference.¹⁷⁷

Finally, should a court find that the INA’s particularly serious crime provisions are ambiguous even after applying these rules of statutory construction, it may still find the BIA’s interpretation unreasonable under step two of *Chevron* and therefore impermissible.¹⁷⁸

Federal circuit courts have reversed some BIA particular serious crime findings. The Ninth Circuit and Eleventh Circuits, for example, have both vacated particularly serious crime

oppressed of other nations and with our obligations under international law); see also *Cardoza-Fonseca*, 480 U.S. at 432–33 (1987) (noting “abundant evidence of an intent to conform the definition of “refugee” and our asylum law to the United Nation’s Protocol to which the United States has been bound since 1968”).

171 Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1097 (2011) (citing *Cardoza-Fonseca*, 480 U.S. at 432 & n.12, 433; *Negusie v. Holder*, 129 S. Ct. 1159, 1170–72 (2009) (Stevens, J., concurring in part and dissenting in part)).

172 *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

173 *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009).

174 Several courts have already used the *Charming Betsy* canon to interpret asylum provisions consistently with the Refugee Convention. See, e.g., *Ali v. Ashcroft*, 213 F.R.D. 390, 405 (W.D. Wash.) (“Courts generally construe Congressional legislation to avoid violating international law, in accordance with the rule of statutory interpretation announced in *Murray v. The Schooner Charming Betsy* 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), opinion withdrawn, 421 F.3d 795 (9th Cir. 2005); see also *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 & n.30 (9th Cir. 2001) (“In the present case, construing the statute to authorize the indefinite detention of removable aliens might violate international law Given the strength of the rule of international law, our construction of the statute renders it consistent with the *Charming Betsy* rule.”).

175 *Cardoza-Fonseca*, 480 U.S. at 449 (citing *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

176 See, e.g., *Zadydas v. Davis*, 533 U.S. 678, 689–90, 697 (2001) (interpreting a statute to require a reasonable limit on the amount of time a noncitizen can be detained to avoid the constitutional issue implicated by indefinite detention).

177 See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574–75 (1988).

178 See *Chevron*, 467 U.S. at 843.

determinations by the BIA that involved offenses falling well below the threshold of gravity set by the Refugee Convention’s drafters.¹⁷⁹ The Ninth Circuit has gone still further to hold that it is impermissible for an adjudicator to classify a crime as *per se* particularly serious.¹⁸⁰ Most recently, the Ninth Circuit vacated *Matter of G-G-S*, holding that “the Agency must take all reliable, relevant information into consideration when making [a particularly serious crime] determination, including the defendant’s mental condition at the time of the crime, whether it was considered during the criminal proceedings or not.”¹⁸¹ These decisions demonstrate that courts can use their power to overrule the BIA to better align United States law with the country’s international obligations.¹⁸²

C. Executive Avenues for Reform

The Attorney General can promulgate regulations or otherwise issue guidance to direct how immigration adjudicators make particularly serious crime determinations and thereby bring U.S. adjudications more in line with accepted Refugee Convention standards and procedures.¹⁸³ For example, 8 C.F.R § 208.16(b)(4)(d)(2) instructs adjudicators that “an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community,” rejecting the need for distinct showing of dangerousness, as required by UNHCR. The Attorney General could withdraw this provision and promulgate regulations that bring the BIA’s approach into conformity with UNHCR’s and other countries’ standards and practices.

179 See *Alphonsus v. Holder*, 705 F.3d 1031, 1036 (9th Cir. 2013) (holding that the BIA provided no “operative rationale” for its determination that resisting arrest was a particularly serious crime); *Yuan v. U.S. Att’y Gen.*, 487 F. App’x 511, 514 (11th Cir. 2012) (vacating on other grounds a BIA determination that prostitution was a particularly serious crime).

180 See *Blandino-Medina v. Holder*, 712 F.3d 1338, 1343–47 (9th Cir. 2013) (reasoning that the structure of the INA compels the conclusion that Congress intended to create only one category of *per se* particularly serious crimes for withholding of removal (aggravated felonies with a sentence of at least five years), consequently requiring the BIA to conduct a case-by-case analysis for all convictions outside that category).

181 *Gomez-Sanchez*, 887 F.3d at 896 (“This ensures that the Agency will in fact examine the circumstances of each conviction individually, taking into account all of the circumstances, as required under the case-by-case approach.”).

182 Immigration law scholar Mary Holper has suggested that courts interpret the particularly serious crime bar to include only violent offenses in which a “significant sentence” has been set. See *generally* Holper, *supra* note 93 (analyzing the particularly serious crime jurisprudence and why it has covered offenses that are not traditionally considered to be severe). Others have indicated that such a solution would bring the United States more in line with its *non-refoulement* obligation, but that more would be needed. See Allison Crennen-Dunlap & César Cuauhtémoc García Hernández, *Pragmatics and Problems*, 69 FLA. L. REV. FORUM 3 (2017) (noting further that while the solution is an important step, it does not account for rehabilitation or create a more individualized analysis in which mitigating circumstances are considered in the particularly serious crime analysis).

183 See 8 U.S.C. § 1103(G)(2); 8 CFR 1003.1(d)(1)(i). In addition, the Attorney General has the power certify to himself or herself to review *de novo* and potentially modify or overrule prior BIA decisions. See 8 U.S.C. § 1103(G)(2); 8 C.F.R. § 1003.1(h).

VII. Conclusion

The United States' misapplication of the particularly serious crime bar to *non-refoulement* has resulted in the deportation of individuals back to countries where they are at risk of serious physical harm or even death. These individuals are often guilty of only minor offenses and pose no present danger to the United States. The United States' obligation to protect refugees under the Refugee Convention and customary international law should be honored by fixing the interpretation and application of the particularly serious crime bar either through legislative action, judicial review, or executive intervention. In these times where many refugees in the United States face serious threats to their life or freedom if returned to their countries of origin, the United States must take all appropriate actions to end its non-compliance with the Refugee Convention and its violation of the fundamental human rights principle of *non-refoulement*.

APPENDIX 3

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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In The Supreme Court of the United States

No. 06-1346

AHMED ALI, PETITIONER

v.

DEBORAH ACHIM, MICHAEL CHERTOFF, SECRETARY OF
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MUKASEY, UNITED STATES ATTORNEY GENERAL

*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

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

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 Programme⁵ 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

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

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

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

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

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 to 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

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-

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

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

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.

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

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-

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 hyper-vigilance 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

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.

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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NOVEMBER 2007