**No. 18-4075**

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

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Laith DALLO,
Petitioner, Appellant,

v.

William BARR, Attorney General,
Respondent, Appellee.

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**ON REVIEW FROM THE BOARD OF IMMIGRATION APPEALS**
**A030-261-821**

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# BRIEF OF *AMICI CURIAE* HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM AND THE IMMIGRANT DEFENSE PROJECT IN SUPPORT OF THE PETITIONER-APPELLANT

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, I, Philip L. Torrey as counsel for *amici curiae*, state that the Harvard Immigration and Refugee Clinical Program and the Immigrant Defense Project do not have a parent corporation, nor does either organization issue stock, and thus no publicly held corporation owns 10% or more of the organizations' stock.

DATED: February 28, 2019

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* are non-profit organizations that defend the legal and human rights of immigrants and refugees and have a direct interest in ensuring that the "particularly serious crime" bar to the withholding of removal statute at issue in this case is interpreted properly and in conformity with U.S. international treaty obligations as directed by the statute's text.[1]

The Harvard Immigration and Refugee Clinical Program ("Clinic") has been a leader in the field of refugee law for over thirty-five years. The Clinic's staff includes Harvard Law School faculty members who teach courses on refugee law, immigration policy, and the intersection of criminal law and immigration law. The Clinic's publications have been cited frequently by international and domestic tribunals, including the U.S. Supreme Court. The Clinic's Director authors the leading treatise on U.S. refugee law, *Law of Asylum in the United States*. Additionally, the Clinic has extensive experience directly representing noncitizens seeking refugee status and other forms of immigration protection in the United States, including those with criminal convictions.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* state that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and (3) no person other than *amici*, its members, and its counsel contributed money that was intended to fund preparing or submitting the brief.

The Immigrant Defense Project ("IDP") is a non-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws barring, based on past criminal charges, relief from removal to immigrants seeking refuge in this country from persecution abroad.

The Clinic and IDP have collaborated on extensive research regarding the particularly serious crime exception to *non-refoulement*, including the publication in 2018 of a comprehensive report entitled *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*. The report examines the implementation of the particularly serious crime exception in the United States and compares it with international legal norms and its implementation by other States Parties to the Refugee Convention.

## SUMMARY OF ARGUMENT

The Board of Immigration Appeals ("BIA" or "Board") erred by failing to properly interpret the particularly serious crime exception to withholding of removal. The withholding of removal statute, which codifies the United States' duty of *non-refoulement* by prohibiting the return of a refugee to her country of feared persecution, contains a narrow exception for any refugee who, "having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States" ("PSC Exception"). 8 U.S.C. § 1231(b)(3)(B)(ii).[2] The BIA's interpretation conflicts with the statute's text, renders the second clause concerning dangerousness superfluous, and diverges from clear congressional intent.

Recent precedential decisions from the U.S. Supreme Court and this Court require this Court to revisit the interpretation of the PSC Exception. This Court previously deferred to the agency's interpretation of the PSC Exception without completing a proper statutory interpretation analysis. *See Hamama v. INS,* 78 F.3d

[2] The PSC Exception was codified in the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (prior to 1994 amendment), which Congress enacted after the United States acceded to the United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 277 (hereinafter "Protocol"). The Protocol bound States Parties to comply with substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (hereinafter "Refugee Convention").

233 (6th Cir. 1996). In the more than twenty years since that case, courts—including this Court—have been repeatedly reminded that it is only in the narrowest circumstances that they should delegate their authority to interpret a statute to an administrative agency. *See, e.g.*, *Arangure v. Whitaker,* 911 F.3d 333, 366 (6th Cir. 2018) (noting that the judiciary is the "final authority on issues of statutory construction"). Instead, courts must faithfully apply canons of statutory interpretation before reflexively deeming a statute ambiguous and deferring to the agency's interpretation. *Id.* at 338.

Here, the PSC Exception's text must be analyzed pursuant to well-established canons of statutory interpretation such as the canon against surplusage, which requires courts to avoid rendering any part of a statute superfluous, and the *Charming Betsy* canon, which requires statutes to be interpreted in conformity with U.S. international obligations, including the U.S. treaty obligations at issue here. *See infra* Section I. The statute's proper interpretation requires a separate current dangerousness test, as argued by the petitioner, in addition to an individualized analysis to determine whether the conviction at issue was exceptionally grave. Such an interpretation is not only clear from the statute's text, but also clear from the text and drafting and implementation history of the statute's sister language in the Refugee Convention, which Congress intended to codify when creating the PSC Exception. *See infra* Section II.

## ARGUMENT

### I. THE PARTICULARLY SERIOUS CRIME EXCEPTION TO THE WITHHOLDING OF REMOVAL STATUTE, WHEN PROPERLY ANALYZED USING ACCEPTED TOOLS OF STATUTORY INTERPRETATION, IS UNAMBIGUOUS.

To determine whether an agency's interpretation of a statute is permissible, courts must first decide whether the statute's congressional intent is clear. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Only if that analysis reveals an ambiguous statute may courts then defer to an agency's reasonable interpretation of the statute. *Id*. If a court's statutory analysis reveals an unambiguous statute, then it must fulfill its responsibility as "the final authority on issues of statutory construction and . . . reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

When a court rushes to find a statute ambiguous without first conducting a thorough statutory interpretation analysis it "abdicat[es] [its] judicial duty." *Arangure*, 911 F.3d at 338; *see also Pereira v. Sessions*, 138 S.Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (noting that the lower court's cursory analysis of the statute "suggests an abdication of the Judiciary's proper role in interpreting federal statutes"). In such cases, "the Supreme Court has not hesitated to reverse" the court's decision. *Arangure*, 911 F.3d at 338; *see also Wis. Cent. Ltd. v. United States,* 138 S.Ct. 2067, 2074 (2018) (denying *Chevron* deference to an agency

decision because the statute, "in light of all the textual and structural clues," was unambiguous); *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562, 1572 (2017) (reversing this Court's decision to grant deference to the BIA's interpretation of an unambiguous statute). Indeed, this Court has recently declined to defer to an agency's interpretation of an unambiguous immigration statute. *See Keeley v. Whitaker*, 910 F.3d 878, 883–84 (6th Cir. 2018) (applying canons of statutory interpretation to hold that the BIA's definition of rape in the aggravated felony context was foreclosed by the unambiguous meaning of the statutory text).

Here, the PSC Exception's text is unambiguous, which requires this Court to interpret the statute in accordance with clear congressional intent without deferring to the BIA's flawed interpretation. Indeed, this Court's recent precedent has emphasized the need for courts to conduct a proper statutory interpretation analysis, including the application of well-established canons of statutory interpretation, before turning to the permissibility of the agency's interpretation. *See Arangure,* 911 F.3d at 338. If such an analysis reveals the statute's clear meaning, then the court may not defer to the agency's conflicting interpretation.

### A. Recent Precedent from this Court and the U.S. Supreme Court Requires this Court to Conduct a Thorough Statutory Analysis of the Particularly Serious Crime Exception.

The interpretation of a statutory provision must begin with its text. *See Chevron*, 467 U.S. at 842 ("First, always, is the question whether Congress has

directly spoken to the precise question at issue."); *see also Esquivel-Quintana*, 137 S.Ct. at 1568 ("We begin, as always, with the text."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987) (emphasizing the "strong presumption that Congress expresses its intent through the language it chooses"). Often, the text of a statutory provision supplies a clear, definitive answer to the interpretive question and the inquiry ends there. *See, e.g.*, *Pereira*, 138 S.Ct. at 2113 ("[T]he Court need not resort to *Chevron* deference, as some lower courts have done, for Congress has supplied a clear and unambiguous answer to the interpretive question at hand."); *Lopez v. Gonzales*, 549 U.S. 47, 53–54 (2006) (using plain reading of the statute to hold the Government's reading of the Controlled Substances Act impermissible). If the statute's text is clear, then the inquiry ends and the court must give full effect to Congress's expressed intent. *Chevron*, 467 U.S. at 842–43.

Notably, the lack of explicit statutory text "does not necessarily connote ambiguity" allowing a court to defer to an agency's reasonable interpretation of the statute. *Arangure*, 911 F.3d at 338 (citing *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc)). Only "where we can plausibly infer [that] Congress intentionally left a statutory gap for the agency to fill" can statutory silence signal ambiguity. *Id.* at 337 n.2 (quoting *Chevron*, 467 U.S. at 843–44). As this Court has recently recognized, "'legal interpretation [is] more than just a linguistic exercise'—it includes the canons." *Id.* at 338–39

(quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* xxvii (2012)).

The canon against surplusage is a particularly important tool for statutory analysis. That canon directs courts to avoid interpreting a statute in a way that renders any part of it superfluous, and to "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); *see also Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing the canon as a "cardinal principle of statutory construction").

The *Charming Betsy* canon is another important tool of statutory interpretation, which requires courts to refrain from construing congressional acts in violation of international law "if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); *see also F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) ("[The *Charming Betsy* canon] cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws."). The *Charming Betsy* canon has been regularly been applied by courts to interpret statutory provisions. *See, e.g.*, *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 143–44 (2005) (Ginsberg, J., concurring) (interpreting statute to conform

to principles of international law); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (2004) (Breyer, J. concurring) (same).

Here, the Court must not shirk its duty to interpret the PSC Exception's text by applying such relevant canons of statutory construction. In 1996, this Court started that task but failed to complete it. In *Hamama v. INS*, the Court acknowledged that, in applying *Chevron*, the "threshold inquiry" is examining the statute's text to determine congressional intent. 78 F.3d 233, 239 (6th Cir. 1996). But after only a cursory analysis it deemed the provision ambiguous and deferred to the BIA's flawed interpretation of the statute. *See id.* at 239–40. Notably, the Court recognized that the PSC Exception represented Congress's intent to codify existing United States' international treaty obligations of *non-refoulement*. *Id.* at 39. The Court then prematurely ended its statutory analysis determining that without a clear definition in the statute or the international instruments codified by the statute the PSC Exception was ambiguous and deference to the agency's interpretation was warranted.[3] *Id.*

[3] When interpreting the PSC Exception, other circuits have similarly found the PSC Exception to be unclear and thus granted agency deference without first conducting a through statutory analysis. *See, e.g.*, *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987) (forgoing *Chevron* analysis of the statute and upholding the agency's interpretation in *Matter of Carballe* that a current dangerousness analysis is not required); *Garcia v. INS,* 7 F.3d 1320, 1322 (7th Cir. 1993) (same). Other circuit courts have relied on the improper statutory analyses from sister circuits nearly wholesale and thus neglected to engage in a proper *Chevron* analysis. *See. e.g.*, *Kofa v. INS*, 60 F.3d 1084, 1088–89 (4th Cir. 1995) (applying

In light of this Court's recent decision in *Arangure* and recent Supreme Court precedent, this Court should complete the analysis it began in *Hamama*. Specifically, this Court must analyze the PSC Exception using tools of statutory interpretation such as the canon against surplusage and the *Charming Betsy* canon. Only after a complete analysis will this Court meet its judicial obligation to interpret acts of Congress—delegating that duty to an administrative agency at the outset is improper.

### B. This Court Must Interpret the Particularly Serious Crime Exception in Accordance with Clear Congressional Intent Because the Statute's Text is Clear.

As noted above, when interpreting a statute a court must begin with its text.

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two canons of statutory construction, "plain English" and "common sense" in a cursory manner and relying on the fact that other circuits have upheld *Matter of Carballe* to accord agency deference); *Martins v. INS*, 972 F.2d 657, 660–61 (5th Cir. 1992) (failing to engage in its own *Chevron* analysis and instead relying on jurisprudence from the Ninth and Eleventh Circuits). In the Second Circuit, the Court applied the canon against statutory surplusage to the statute to find that the statute seemed to suggest a separate finding of dangerousness to the community contrary to the agency's interpretation, yet still somehow granted deference to the BIA's interpretation. *See Ahmetovic v. INS*, 62 F.3d 48, 52–53 (2d Cir. 1995). The Tenth and First Circuits have applied limited canons of statutory interpretation to analyze the PSC Exception, but neither have considered the *Charming Betsy* canon. *See Al-Salehi v. INS*, 47 F.3d 390, 393–95 (10th Cir. 1995) (finding that Congress did not express intention to codify U.S. treaty obligations into law through the PSC Exception, without considering the *Charming Betsy* canon or canon against statutory surplusage); *Mosquera-Perez v. INS*, 3 F.3d 553, 555–59 (1st Cir. 1993) (analyzing plain language of statute and legislative history to declare the PSC Exception ambiguous and grant *Chevron* deference).

*See Esquivel-Quintana*, 137 S.Ct. at 1568. Here, the PSC Exception permits the United States to violate its statutory and international duty of *non-refoulement*—the return of a refugee to her country of feared persecution—in very limited circumstances when the refugee "having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." *See* 8 U.S.C. § 1231(b)(3)(B)(ii).

In particular, as correctly argued by the petitioner, *see* Petitioner's Brief at 22, the plain-meaning of the PSC Exception's second clause clearly requires a current dangerousness analysis in addition to the aforementioned conviction of a particularly serious crime. But the BIA's interpretation of that provision renders it wholly meaningless by ruling that the PSC Exception does not require a separate dangerousness determination. *See Matter of Carballe*, 19 I. & N. Dec. 357, 360 (BIA 1986) ("If it is determined that the crime was a 'particularly serious' one, the question of whether the alien is a danger to the community of the United States is answered in the affirmative."); *see also* 8 C.F.R. §1208.16(d)(2) (codifying *Matter of Carballe*). Applying the canon against surplusage, courts must interpret the statute in a way that does not render any part of it superfluous. *See Menasche*, 348 U.S. at 538–39.

The only plausible interpretation of the PSC Exception that gives meaning to each word in the text requires the PSC Exception to be triggered only after a

conviction for a particularly serious crime *and* a determination that the refugee constitutes a danger to the community. Merging the "danger to the community" inquiry with the "particularly serious" offense inquiry renders the second clause meaningless. *See Ahmetovic*, 62 F.3d at 52–53 (noting that the canon against statutory surplusage compels a separate dangerousness inquiry, but then holding otherwise in deference to the agency); *see also N-A-M- v. Holder*, 587 F.3d 1052, 1061 (10th Cir. 2009) (Henry, J., concurring) ("The statute mentions both a 'danger to the community' inquiry and a 'particularly serious' offense inquiry; ignoring one of those inquiries does not give full effect to the meaning to the statute.").

Furthermore, the PSC Exception's text should be interpreted in light of Congress's intent to codify our international treaty obligations under the Refugee Convention and the Protocol in that statute. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (holding that congressional intent of an asylum provision was clear in light of the statute's plain language and "its symmetry" with the Protocol); *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."). When Congress passed the Refugee Act of 1980 codifying our international obligation of *non-refoulement*, including the PSC

Exception, it clearly intended the Act to be interpreted in accordance with international refugee law norms. *See Cardoza-Fonseca*, 480 U.S. at 449.

Indeed, the PSC Exception's text is nearly identical to its predecessor in the Refugee Convention, which the United States acceded to when signing the Protocol. *Compare* 8 U.S.C. § 1231(b)(3)(B)(ii) *with* Refugee Convention art. 33(2). The Refugee Convention's exception allows for *refoulement* when a refugee "who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community." Refugee Convention art. 33(2).

Congress's intent to incorporate the United States' *non-refoulement* obligation underscores the need to apply the *Charming Betsy* canon of statutory interpretation when analyzing the PSC Exception. The *Charming Betsy* canon instructs courts to read a statute in conformity with U.S. international obligations. *Charming Betsy*, 6 U.S. at 118. In this case, the relevant international obligation is obviously the Refugee Convention's corresponding particularly serious crime exception ("Refugee Convention's PSC Exception"), which Congress copied nearly verbatim in the Refugee Act of 1980.

The United Nations High Commissioner for Refugees ("UNHCR")[4] and State Parties to the Convention have interpreted the Refugee Convention's PSC

[4] The United Nations General Assembly mandated UNHCR to supervise the implementation of the Refugee Convention and Protocol. *See* Refugee Convention, Preamble ¶ 6.

Exception in a narrow manner. *See, e.g.*, United Nations High Comm'r for Refugees, *Guidelines on the Application of the Exclusion Clauses (Article 1(F) of the 1951 Convention)* ¶ 2 (Sept. 4, 2003) (stating that due to the serious consequences of returning a refugee to persecution, the Convention's exclusion clauses exclusion clauses are to be applied with "great caution and only after a full assessment of the individual circumstances of the case"); Philip L. Torrey, *et al.*, *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*, 17– 26 (Immigrant Defense Project & Harvard Immigration and Refugee Clinical Program, 2018) (hereinafter "PSC Report") (discussing the various ways that the drafters, implementing agency, and how other signatories to the Refugee Convention interpret its PSC Exception more narrowly than the United States) (attached hereto at App. A).

UNHCR restricts the application of the Refugee Convention's PSC Exception to "extreme cases" that necessarily meet several strict criteria. *See* United Nations 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* ¶ 154 (1979, rev. 1992) (hereinafter "UNHCR Handbook").[5] First, only the gravest offenses, such as capital offenses, may qualify

[5] *Cardoza-Fonseca,* 480 U.S. at 439 n.22 (noting that "the Handbook provides

as particularly serious. *See* PSC Report at 18. Furthermore, if the crime at issue meets a threshold determination of seriousness, an adjudicator must examine the circumstances of the offense, including any mitigating factors, before qualifying it as a particularly serious crime. *Id.* at 21. Such an analysis necessarily precludes the categorization of offenses as *per se* particularly serious. *Id.* Finally, if the offense is determined to be exceptionally grave after an individualized analysis, then the adjudicator must make a distinct determination about whether the refugee is currently dangerous.[6] *Id.* at 22.

## II. LIKE ITS REFUGEE CONVENTION COUNTERPART, THE PARTICULARLY SERIOUS CRIME EXCEPTION REQUIRES (1) AN EXCEPTIONALLY GRAVE OFFENSE, (2) AN INDIVIDUALIZED ANALYSIS TAKING INTO ACCOUNT MITIGATING FACTORS, AND (3) A SEPARATE CURRENT DANGEROUSNESS FINDING.

The PSC Exception's text, which is nearly identical to its antecedent in the Refugee Convention, should be interpreted using traditional tools of statutory

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significant guidance in construing the Protocol, to which Congress sought to conform [and] has been widely considered useful in giving content to the obligations that the Protocol establishes.").

[6] UNHCR and several States Parties to the Refugee Convention also require application of the proportionality principle in evaluating the Refugee Convention's PSC Exception—the danger that the refugee poses to the host country must be balanced against the refugee's risk of persecution in her home country. *See* PSC Report at 24–26.

interpretation, including the canon against statutory surplusage and the *Charming Betsy* canon. Interpreting the statutory provision to conform to U.S. obligations under the Refugee Convention, as intended by Congress when passing the Refugee Act, reveals three distinct requirements not met here. This limited exception to the United States' obligation of *non-refoulement* is only triggered when all three requirements are met.

### A. Exceptionally Grave Offense

By mirroring the Refugee Convention's use of a double qualification, "particularly serious," to modify the term "crime," Congress intended the PSC exception to include only those refugees who were convicted of an especially grave crime. Such a reading conforms to the intent of the drafters of the Refugee Convention and matches the interpretation of the Refugee Convention's PSC Exception by the implementing agency as well as by other States Parties. *See* PSC Report, Section II ("Drafting History of Article 33(2) of the 1951 Refugee Convention"), Section III ("Interpretation of Article 33(2) by the United Nations High Commissioner for Refugees") and Section V(A) ("Requirements of the Particularly Serious Crime Bar as Implemented by Other State Parties to the Refugee Convention—Minimum Gravity of the Offense Threshold").

The term "particular" is commonly understood to mean "distinctive among other examples or cases of the same general category." *Webster's Collegiate*

*Dictionary* 847 (10th ed. 1993). The term "serious" as used in the separate "serious non-political crime" exception to *non-refoulement* in the Refugee Convention, requires "a capital crime or a very grave punishable act." UNHCR Handbook at ¶ 154. Combining these definitions, the term "particularly serious crime" refers only to a restricted category of crimes that are especially severe.

In fact, UNHCR scholars had explained that the term "particularly serious crime" is limited to crimes like murder, rape and armed robbery before the U.S. had acceded to the Protocol in 1967. *See* Atle Grahl-Madsen, *Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees* (Articles 2–11, 13–37) at Article 33 ¶ 9 (1963) (hereinafter "Commentary on the Refugee Convention") ("Although the decision whether the crime is a particularly serious one would depend on the merits of the case, the offence must normally be a capital crime (murder, arson, rape, armed robbery, etc.).").

Examining the PSC Exception, the Ninth Circuit noted that the "particularly" and "serious" modifiers emphasize that a PSC "must be not just any crime, and not just any *serious* crime—already a subset of all crimes—but one that is *particularly* serious." *Alphonsus v. Holder*, 705 F.3d 1031, 1048 (9th Cir. 2013) (emphasis in original). That court observed that a particularly serious crime must

be more severe than a "serious non-political crime" and generally involve a "relatively grave" offense. *Id*. at 1049.

Clearly, a minor role in a non-violent controlled substances offense falls short of the exceptional gravity threshold that the PSC Exception requires.

### B. Individualized Analysis

When adopting language nearly identical to the Refugee Convention's PSC Exception in the Refugee Act of 1980, Congress clearly expressed its intent to codify U.S. international obligations under the Refugee Convention into statute. The PSC Exception must be understood in conformity with its counterpart in the Refugee Convention, which requires an individualized analysis of the circumstances surrounding an offense.

UNHCR and refugee law scholars agree that the Refugee Convention's PSC Exception requires an individualized determination in which both aggravating and mitigating circumstances are considered. *See, e.g.*, Grahl-Madsen, Commentary on the Refugee Convention, at Article 33 ¶ 9 (suggesting that, before a crime may be considered "particularly serious," an adjudicator must consider mitigating factors even with respect to crimes such as murder, rape or armed robbery); James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 Cornell Int'l L.J. 257, 292 (2001) (explaining that a particularly serious crime must be "committed with aggravating factors, or at least without

significant mitigating circumstances."); PSC Report, Section III ("Interpretation of Article 33(2) by the United Nations High Commissioner for Refugees").

As previously mentioned, UNHCR requires an individualized analysis of factors surrounding the offense in order to determine whether the offense is a particularly serious crime, including "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." United Nations High Comm'r for Refugees, *Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading* ¶ 10 (July 2007); *see also* Grahl-Madsen, Commentary on the Refugee Convention, at Article 33 ¶ 7 ("It must be emphasized that Article 33 (2) [of the Refugee Convention] clearly calls for deciding each individual case on its own merits").

It logically follows that the corresponding exception in U.S. law should not be interpreted as creating a category of convictions that are *per se* particularly serious, as it is inherently contrary to an individualized analysis. PSC report at 21 (citing UNHCR, the Nationality, Immigration and Asylum Act 2002: UNHCR Comments on Nationality, Immigration & Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 4 (2004)).

Other States Parties to the Refugee Convention agree that the particularly serious crime exception requires a review of the underlying aggravating and

mitigating circumstances of an offense before it can be considered exceptionally grave. *See* PSC Report at 21–24. States Parties such as Australia and the United Kingdom have adopted a multi-factor test balancing factors such as the offense's nature, the perpetrator's behavior, the context in which the offense was committed, the actual harm inflicted, the procedure used to prosecute the crime, the crime's imposed terms of punishment, and whether most jurisdictions would consider the crime to be exceptionally grave. *See, e.g., Betkoshabeh v. Minister for Immigration and Multicultural Affairs*, [1999] 92 FCR 504 ¶ 29 (Austl.) (observing that the Refugee Convention's PSC Exception inquiry is intensely fact-specific and applying multi-factor balancing test); *IH (s. 72 "Particularly Serious Crime") Eritrea*, [2009] UKAIT 00012 ¶ 74 (U.K.) ("[W]hether a crime is a 'particularly serious' one in a given case must be a struggle by the decision-maker (judicial or otherwise) with the facts and circumstances relating to the conviction and the offender.").

States Parties such as Austria, Canada, Kenya, Norway, Sweden, and the United Kingdom all similarly prescribe no categories of crimes as *per se* particularly serious crimes. *See* PSC Report at 21–24. Further, the Court of Appeal in England and Wales struck down statutory provisions that treated certain criminal offenses to carry a presumption of being particularly serious crimes. *EN (Serbia) v. Sec'y of State for the Home Dep't & Anot* [2009] EWCA Civ 630, ¶ 82; [2010] QB

633 (holding that the Secretary "misunderstood the extent and purpose of the statutory power" conferred on him in creating presumptions of particularly serious crimes for an impermissibly broad range of offenses).

The analysis adopted by the BIA is far-removed from congressional intent behind the PSC Exception. The agency's analysis is devoid of both mitigating circumstances and allows for the categorization of criminal offenses as *per se* particularly serious. *See Matter of Frentescu*, 18 I. & N. Dec. 244, 247 (BIA 1982) ("[T]here are crimes which, *on their face*, are 'particularly serious crimes'") (emphasis added); PSC Report at 15. In *Matter of Y-L-*, for example, the Attorney General ruled that aggravated felonies involving drug trafficking are *presumptively* particularly serious crimes. 23 I&N Dec. 270, 274 (A.G. 2002). That presumption may be rebutted under "the most extenuating circumstances that are both extraordinary and compelling." *Id.* at 270; *id.* at 276–77 (listing six criteria, which must *all* be met to overcome the presumption). Such a presumption, when offset only by an exceptionally difficult-to-meet standard that requires the person seeking refuge to meet *all* of the six identified factors without consideration of any other relevant factors, operates as a *per se* rule in practice and flies in the face of the individualized analysis required of the PSC Exception.

### C. Separate Dangerousness Finding

The Refugee Convention's drafting history clearly demonstrates that the Refugee Convention's PSC Exception requires a separate analysis of dangerousness. UNHCR's first Protection Director, Paul Weis, mentioned in his commentary on the Refugee Convention that "[t]wo conditions must be fulfilled: 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." *See* Paul Weis, *The Refugee Convention, 1951: The Travaux Preparatoires Analysed with a Commentary* (1995); *see also* PSC Report, Section II ("Drafting History of Article 33(2) of the 1951 Refugee Convention"), Section III ("Interpretation of Article 33(2) by the United Nations High Commissioner for Refugees") (outlining the drafting history of the Refugee Convention's PSC Exception and its implementation).

Other signatories to the Refugee Convention such as Canada and the United Kingdom have similarly interpreted the Refugee Convention's PSC Exception to require both a "particularly serious crime" determination and a distinct dangerousness determination. *See Pushpanathan v. Minister of Citizenship and Immigration,* [1998] 1 S.C.R. 982, ¶ 12 (Can.); *EN (Serbia) v. Secretary of State of the Home Department*, EWCA Civ 630, ¶ 39, Q.B. 633 (U.K.) [2010] ("[I]t is clear that art 33(2) imposes two requirements on a state wishing to refoule a refugee . . .

his conviction by a final judgment of a particularly serious crime and his constituting a danger to the community); *see also* PSC Report at 23–24 (noting that Germany and Norway also require a distinct dangerousness test).

Furthermore, when Congress passed the Immigration Act of 1990, which introduced the aggravated felony bar to withholding of removal, Senator Edward Kennedy, a cosponsor of the Act, wrote to immigration officials that Congress "contemplated that a showing of dangerousness to the community would be necessary in addition to proof of conviction of an aggravated felony." PSC Report at 14 (quoting *Mosquera-Perez v. INS*, 3 F.3d 553, 556 (1st Cir. 1993)). Senator Kennedy's comments echo international norms that a criminal conviction without a separate dangerousness analysis should not excuse a country's duty of *non-refoulement*.

Several factors must be examined to determine whether a refugee who has previously been convicted of a "particularly serious crime" is currently dangerous. Notably, an adjudicator must consider mitigating factors related to the prior offense, such as the refugee's emotional state when the crime was committed, and other factors that diminish or eliminate the refugee's prospective danger, such as the passage of time without further serious criminal behavior. *See* Gunnel Stenberg, *Non-Expulsion and Non-Refoulement: The Prohibition Against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Refugee*

*Convention Relating to the Status of Refugees*, 228 (1989). Additional mitigating factors include the possibility of rehabilitation and reintegration into society. *See* United Nations High Comm'r for Refugees, *Note on Non-Refoulement submitted by the High Commissioner for Refugees to the Executive Committee of the High Commissioner's Programme*, ¶ 14 (Aug. 23, 1977); *see also* Grahl-Madsen, Commentary on the Refugee Convention, at art. 33 ¶ 7 (explaining that "authorities in many ways ought to give a refugee fair warning and a chance to amend his ways . . . before expulsion"). Prior criminal behavior is therefore only one factor in a more robust assessment of an individual's current risk to public safety. *See id.*

Indeed, a prior criminal conviction may not even be the most relevant factor in determining whether an individual is currently a danger to the community. Dr. Kiminori Nakamura, a criminologist whose field of expertise involves redemption and recidivism risk for individuals with criminal records, explains that "there is no empirical support for the wide-spread but scientifically unfounded perception that those who committed certain types of crimes in the past continue indefinitely (or at least for very long periods of time) to have a heightened risk of reoffending." Declaration of Dr. Kiminori Nakamura, A.R. at 165. He further states that "there is no empirical data or research to support an assumption that these individuals' past criminal offenses automatically make them a danger to the community at the present time." *Id.*, A.R. at 166. The fact that a person's past criminal history cannot

be equated with present dangerousness helps explain why Congress, in adopting the PSC Exception, drafted it to require not just a particularly serious crime, but also a separate dangerousness inquiry.

Unfortunately, the BIA's flawed interpretation of the PSC Exception in *Matter of Carballe*, 19 I. & N. Dec. at 360 (BIA 1986), not only renders the statute's "danger to the community" text superfluous, *see supra* Section I.B., but it also violates international norms. Dangerousness is the *sine qua non* of the PSC Exception—especially when interpreted in light of the Refugee Convention. But the BIA continues to undermine that PSC Exception founding principle. Indeed, the agency eviscerated any dangerousness inquiry by holding that an adjudicator need not examine whether the underlying criminal offense demonstrated an individual's dangerousness when determining whether the conviction was particularly serious. *See Matter of N-A-M-*, 24 I. & N. Dec. 336, 342 (BIA 2007).

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In this case, the BIA failed to meaningfully apply the PSC Exception's three relevant requirements of (1) an exceptionally grave offense, (2) an individualized analysis, and (3) a separate dangerousness finding. Instead, without any real consideration of any of these requirements, the agency summarily determined that Mr. Dallo had been convicted of a particularly serious offense warranting an exception to the United States' duty of *non-refoulement*. The agency's

interpretation of the PSC Exception violates both the requirements of the statutory text and corresponding U.S. obligations under the Refugee Convention and should not be affirmed by this Court.

## CONCLUSION

For the foregoing reasons, this Court should vacate and remand the BIA's decision with a directive to properly apply the PSC Exception.

DATED: February 28, 2019

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) as it contains 5,872 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32 (b). Additionally, this brief complies with the typeface requirements of Federal Rule of Appellate Procedure (a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Microsoft Word, using Times New Roman in 14 point font.

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## CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2019, I electronically filed the foregoing, Brief of *Amici Curiae* in Support of Petitioner-Appellant, with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that counsel of record for Petitioner and Respondent in this case are registered CM/ECF users and will therefore be served by the appellate CM/ECF system.

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# App. A

IMMIGRANT DEFENSE PROJECT

HIRC
HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM

**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


## The Immigrant Defense Project & The Harvard Immigration and Refugee Clinical Program

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## 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]

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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]

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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]

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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

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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 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

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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 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-refoulment* 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]

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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" conviction[69] 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.

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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 specific 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.

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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 *per se* 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 *per se* 'particularly serious crime,' such as national security offenses.[126] |
| Canada | There are no *per se* 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 *per se* 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 *per se* 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 *per se* bars. The consideration of individual circumstances is required in all expulsion decisions.[131] |
| Sweden | There are no *per se* 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 *per se* 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 *per se* 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 Namusobya 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 *refoulement* risks cannot be excluded. This way, the Austrian courts have not used Art. 33(2) to avoid the prohibition on *refoulement*.[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 *non-refoulement* 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 *Attorney-General v. Zaoui (No. 2)*, "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 *refoulement* such that even where an expulsion decision is issued the r efugee 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 *non-refoulement* 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 Rechtstellung 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

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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.*, Zadvydas 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*.