

---

**PRINCIPLE OF NON-REFOULEMENT (ARTICLE 33):**

**AN AUSTRALIAN PERSPECTIVE**

**A PAPER PREPARED  
AS A CONTRIBUTION TO  
THE UNHCR'S EXPERT ROUNDTABLE SERIES**



**REFUGEE AND HUMANITARIAN DIVISION  
DEPARTMENT OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS  
CANBERRA, AUSTRALIA**

---

## CONTENTS

<b>1.</b>	<b>INTRODUCTION</b>	<b>43</b>
<b>2.</b>	<b>THE NATURE AND INTENT OF ARTICLE 33</b>	<b>43</b>
2.1	THE INTENTIONS OF THE CONVENTION'S FOUNDERS	43
<b>3.</b>	<b>THE PRINCIPLE OF NON-REFOULEMENT: THE AMBIT AND OPERATION OF ARTICLE 33(1)</b>	<b>44</b>
3.1	'IN ANY MANNER WHATSOEVER'	44
3.1.1	Non-refoulement and admittance at the frontier	44
3.1.2	Non-refoulement and extradition	47
3.2	'WHERE HIS LIFE OR FREEDOM WOULD BE THREATENED'	49
3.2.1	Standard of proof	49
3.2.2	Extent of threat	50
<b>4.</b>	<b>EXCEPTIONS TO THE PRINCIPLE OF NON-REFOULEMENT: THE AMBIT AND OPERATION OF ARTICLE 33(2)</b>	<b>52</b>
4.1	EXCLUSION OF PERSONS WHO ARE A DANGER TO SECURITY	52
4.2	EXCLUSION OF PERSONS WHO, HAVING BEEN CONVICTED OF A PARTICULARLY SERIOUS CRIME, CONSTITUTE A DANGER TO THE COMMUNITY	53
4.2.1	'particularly serious crime'	54
4.2.2	Sufficiency of conviction to demonstrate 'danger to the community'	56
4.2.3	Proportionality test	59
<b>5.</b>	<b>CONCLUDING COMMENTS</b>	<b>60</b>

---

# PRINCIPLE OF NON-REFOULEMENT (ARTICLE 33)

## 1. INTRODUCTION

This paper considers the interpretation and application of Article 33 (the principle of non-refoulement) of the 1951 Convention relating to the Status of Refugees from the perspective primarily of Australian policy and case law.

After briefly considering the nature and intent of Article 33, discussion centres on the ambit and operation of the non-refoulement principle in Article 33(1), and its two exceptions in Article 33(2).

The paper concludes with a summary of the main themes and conclusions.

## 2. THE NATURE AND INTENT OF ARTICLE 33

Article 33 provides that:

1. No 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. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

### 2.1 THE INTENTIONS OF THE CONVENTION'S FOUNDERS

Article 33 was designed to protect refugees from being returned either to their country of origin or to other countries in which they would be at risk of persecution. As such it is a cornerstone of the Refugees Convention, and establishes the most important obligation of States in respect of refugees.<sup>1</sup> The significance of Article 33 within the context of the Refugees Convention as a whole is reflected by it being one of the few Convention articles that is not to be subject to reservations.<sup>2</sup>

However, the Convention's founders were not prepared to adopt an unconditional obligation relating to non-refoulement.<sup>3</sup> Thus, in recognition of a State's sovereign right to determine who may enter and remain within its territory, Article 33(2) permits the return of certain categories of refugees to the country of risk for reasons of State security or public safety.

Indeed, Article 33(2) is one of several provisions which appear to have been adopted by the founders to provide for more balance in the Convention between the rights and obligations of

---

<sup>1</sup> Australian courts have described Article 33 as 'the engine room of the Convention' (*MIMA v Al-Sallal* (1999) 94 FCR 549), and, along with Article 32, as containing 'important obligations' (*Chan v MIEA* (1989) 169 CLR 379), and as setting out 'the primary obligations' under the Convention (*Thiyagarajah v MIMA* (1997) 80 FCR 543).

<sup>2</sup> For a complete list, see Article 42, Refugees Convention.

<sup>3</sup> Parties to the 1951 Conference of Plenipotentiaries had concerns regarding the absoluteness of the non-refoulement provision in initial drafts and tempered this no-derogation approach by the addition of the second paragraph in the final text. See Goodwin-Gill 1996, p 120.

---

---

States on the one hand, and individual asylum applicants and refugees on the other, particularly in regard to situations in which individuals may be considered to have placed themselves outside the help and protection offered by the country of refuge for strictly humanitarian purposes.<sup>4</sup>

For example, under Article 1F, a person for whom there are serious reasons for considering that he or she has committed a specified crime is excluded from the protection afforded by the Convention. Under Article 2, every refugee is obliged to conform to the laws, regulations and measures taken to maintain public order in the country of refuge.<sup>5</sup> Under Article 32, refugees may be expelled from the country of refuge on grounds of national security or public order. In the context of these other provisions, Article 33(2) extends the focus on States' rights to address circumstances in which the country of refuge may expel or return a refugee even to a place where he or she risks persecution for a Convention ground.

### **3. THE PRINCIPLE OF NON-REFOULEMENT: THE AMBIT AND OPERATION OF ARTICLE 33(1)**

Under Article 33(1), States undertake not to expel or return a refugee to the frontiers of a country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group, or political opinion. The drafters considered that:

The turning back of a refugee to the frontiers of a country where his life or freedom would be threatened on account of his race, religion, nationality or political opinion would be tantamount to delivering him into the hands of his persecutors.<sup>6</sup>

The discussion below on the ambit and scope of Article 33(1) is structured around the interpretation of the following phrases:

- *'in any manner whatsoever'*
  - Does Article 33(1) apply to admittance at the frontier?
  - Does Article 33(1) apply to extradition?
- *'where his life or freedom would be threatened'*
  - What is the standard of proof for determining threats to life and freedom?
  - What is the extent of the threat contemplated in Article 33(1)?

#### **3.1 'IN ANY MANNER WHATSOEVER'**

##### **3.1.1 Non-refoulement and admittance at the frontier<sup>7</sup>**

The issue here is whether Article 33(1), which prohibits the return of refugees 'in any manner whatsoever', applies only to refugees who have already entered a State's territory, or if it also includes within its ambit the right to be admitted at the frontier.

Article 33(1) clearly applies to formally recognised refugees who are already present in the territory of a State, regardless of mode of entry or migration status. It is equally applicable to

---

<sup>4</sup> UNHCR has stated that, 'it is not the task of the High Commissioner to help or protect those who, as a result of their activities contrary to the aims and principles of the United Nations, have placed themselves outside an action for strictly humanitarian purposes': quoted in Weis 1995 p 39.

<sup>5</sup> According to the Convention's drafters, 'Article 2 states the obligation upon a refugee to comply with laws and regulations of the country in which he [or she] is. ...[I]t was considered useful to include such a provision in order to produce a more balanced document as well as for its psychological effect on refugees and/or countries considering admitting refugees': quoted in Weis 1995 p 36.

<sup>6</sup> E/1618, at 61, cited in Weis 1995 p 325

<sup>7</sup> It is noted that the issue of non-refoulement in the context of interception measures is being considered in Track 3 of the Global Consultations.

---

asylum seekers who are already present pending a determination of refugee status, on the grounds that those with a prima facie claim to refugee status are entitled to protection for otherwise there would be no effective protection.<sup>8</sup> UNHCR's Executive Committee (ExCom) has emphasised, 'the principle [of non-refoulement] applies irrespective of whether or not the person concerned has been formally recognised as a refugee'.<sup>9</sup>

Beyond these two groups, there appears scope for differences in interpretation on the ambit of Article 33(1). Importantly, it was stated at the 1951 Conference of Plenipotentiaries that the Convention does not deal with the admission of refugees into countries of asylum,<sup>10</sup> and concerns were specifically expressed by delegates that Article 33(1) should not apply to mass migrations.<sup>11</sup>

The views of commentators are varied. According to Robinson, Article 33(1) 'concerns refugees who have gained entry into the territory of the Contracting State, legally or illegally, but not refugees who seek entrance into this territory'.<sup>12</sup> Similarly, Grahl-Madsen states that the Article:

... may only be invoked in respect of persons who are already present—lawfully or unlawfully—in the territory of a Contracting State. Article 33 only prohibits the expulsion or return (refoulement) of refugees to territories where they are likely to suffer persecution; it does not obligate the Contracting States to admit any person who has not already set foot on their respective territories.<sup>13</sup>

Weis, however, considers that the Article:

... leads the way to the adoption of the principle that a State shall not refuse admission to a refugee, i.e. it shall grant him at least temporary asylum ... if non-admission is tantamount to surrender to the country of persecution.<sup>14</sup>

According to Weis, the words 'in any manner whatsoever' support the principle of non-rejection at the frontier.<sup>15</sup> Without such extension of the principle of non-refoulement, protection becomes dependent on the fortuitous circumstance that the refugee has successfully entered State territory.<sup>16</sup> However, Weis draws a distinction between admittance and asylum, stressing that admittance does not entail a right to asylum:<sup>17</sup> 'The State admitting the refugee is not obliged to grant him asylum, and may even expel him, [pursuant to Article 31], to another country willing to admit him.'<sup>18</sup>

---

<sup>8</sup> Goodwin-Gill 1996 p 137

<sup>9</sup> UNHCR Executive Committee, Conclusion No. 6 (XXVIII) 1977. There is however recognition that 'where a special procedure for the determination of refugee status under the 1951 Convention and the 1967 Protocol exists, the applicant is almost invariably protected against return to his country of origin pending a determination of his refugee status'.

<sup>10</sup> See Weis 1995 p 325. The drafters specifically stated that Article 33(1) did not 'imply that a refugee must in all cases be admitted to the country where he seeks entry': Ad Hoc Committee, E/1618, Comments to Article 28, cited in Robinson 1953 p 162.

<sup>11</sup> For example, the Swiss and Dutch delegates wished to restrict the application of non-refoulement only to those already within State territory, expressing concern that States would be otherwise required to grant entry in the case of a mass migration: For the Swiss and Dutch delegates' comments, see A/Conf.2/SR.16 at 6 and A/Conf.2/SR.35 at 21 respectively, cited in Goodwin-Gill 1996 p 122. This concern resulted in a ruling by the President of the 1951 Conference that the Article does not apply to mass migrations: A/Conf.2/SR.35, at 21, cited in Weis 1995 p 342. Goodwin-Gill reads the President's ruling as simply putting on record the interpretation given by the Netherlands representative that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by Article 33: See Goodwin-Gill 1996 p 122 fn 22.

<sup>12</sup> Robinson 1953 p 163

<sup>13</sup> Grahl-Madsen 1972 p 94

<sup>14</sup> Weis 1953 p 482-3; In 1965, the then High Commissioner for Refugees believed that the principles of non-rejection and temporary asylum were becoming increasingly recognised (see Schnyder 1965 p 381), but some ten years later his successor was conceding that States do not accept the rule of non-rejection (Sadarudin Aga Khan 1976 p 318-322): cited in Goodwin-Gill 1996 p 122, fn 23.

<sup>15</sup> Weis 1995 p 341

<sup>16</sup> Weis 1966 p 183

<sup>17</sup> This view is supported by the comments of the IRO delegate during the 1951 Conference, who considered that the Article 'imposed a negative duty forbidding the expulsion of any refugee to certain territories but did not impose the obligation to allow the refugee to take up residence': cited in Weis 1995 p 327. In the same period that the Refugees Convention was being drafted, States had also resisted the inclusion of a right to be granted asylum in the 1948 Universal Declaration of Human Rights.

<sup>18</sup> Weis 1995 p 342

---

---

According to Goodwin-Gill, 'probably the most accurate assessment of States' views in 1951 is that there was no unanimity' on the issue of non-rejection at the frontier.<sup>19</sup> He argues that even if in 1951 the principle of non-refoulement did not encompass non-rejection at the frontier, State practice over the years has established the broader interpretation of non-refoulement,<sup>20</sup> and the concept now encompasses both non-return and non-rejection.<sup>21</sup> Non-refoulement however clearly does not contemplate a corresponding right to be granted asylum.

### ***The approach in Australia***

Australia's position is that while the Refugees Convention provides a definition of the term 'refugee', it does not give to a person who falls within the definition any right to enter or remain in the territory of a Contracting State.<sup>22</sup> In the case of *SZ*,<sup>23</sup> the Full Federal Court specifically stated:

The contentions of the applicant were unequivocally based on the assumption that if he is a person to whom Australia has protection obligations under the Refugees Convention he has a right of asylum in Australia. This assumption is not well founded. The Refugees Convention provides a definition of the term "refugee" in Article 1, but does not create any general right in a refugee to enter and remain in the territory of a Contracting State. This was recognised by Lord Mustill in *T v Immigration Officer* [1996] AC 742 at 754 where his Lordship observed:

... although it is easy to assume that the appellant invokes a 'right of asylum', no such right exists. Neither under international law nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge. Subject only to qualifications created by statute this country is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries.

The position is the same in Australia under both international law and municipal law. The position under the Refugees Convention is mentioned above. As is explained below, the Act does not give to a person who falls within the definition of 'refugee' in the Refugees Convention any right to enter or remain in Australia.<sup>24</sup>

This position has been reiterated by the High Court in both *Applicant A*<sup>25</sup> and *Ibrahim*.<sup>26</sup> Gummow J in each of these High Court cases noted that the Convention does not confer a right to asylum.

---

<sup>19</sup> Goodwin-Gill 1996 p 122

<sup>20</sup> Goodwin-Gill 1996 p 123

<sup>21</sup> Goodwin-Gill 1996 p 124

<sup>22</sup> See also discussion on the concept of 'effective protection' in 3.2.2 below.

<sup>23</sup> *SZ v MIMA* [2000] FCA 836. See also *Patto v MIMA* [2000] FCA 1554 (French J) at para 27: 'There is no right of asylum conferred by the Refugees Convention. *MIMA v Thiagarajah* (1997) 80 FCR 543; *Rajendran v MIMA* (1998) 166 ALR 619; *SZ v MIMA* (2000) 173 ALR 353 at 356. Nevertheless it has been argued by reference to other international instruments, that a right of asylum exists at international law: Plender and Mole 1999 pp 81–105. While the judgment of Branson J in *SZ* at p 356 propounds the absence of a right of asylum at international law, that proposition, in context, is directed only to rights and obligations arising under the Refugees Convention. Whatever the true position at international law generally, the relevant municipal law of Australia gives effect only to protection obligations assumed by Australia as a contracting party to the Refugee Convention. The primary obligation arises out of the prohibition against refoulement in Article 33.'

<sup>24</sup> *SZ v MIMA* [2000] FCA 836 at 14

<sup>25</sup> *Applicant A v MIMA* (1997) 142 ALR 331 at 366

<sup>26</sup> *MIMA v Ibrahim* [2000] HCA 5 at para.137; see also the Full Federal Court decision in *MIMA v Baker* (1997) 73 FCR 187

---

### 3.1.2 Non-refoulement and extradition

Generally speaking, the two traditional safeguards built into the institution of extradition are that a person will not be extradited:

- for political offences;<sup>27</sup> and
- where the extradition has been requested with persecutory intent or will result in prejudice to the individual due to his or her race, religion or nationality.<sup>28</sup>

The issue here, therefore, is whether Article 33(1), which prohibits the return of refugees 'in any manner whatsoever', extends to a bar on the extradition of a refugee for a non-political offence and where the requested person is in fear of persecution.

While the text of the Convention is silent about the extradition of refugees, the *travaux préparatoires* indicate that several delegates at the 1951 Conference of Plenipotentiaries were of the view that non-refoulement did not prejudice extradition.<sup>29</sup>

However, ExCom, having repeatedly stressed the fundamental importance of the principle of non-refoulement, has stated that 'refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution on the grounds enumerated in Article 1A(2) of the 1951 Convention'.<sup>30</sup> ExCom has also emphasised that 'protection in regard to extradition applies to persons who fulfil the criteria of the refugee definition and who are not excluded from refugee status by virtue of Article 1F(b) of the 1951 Convention'.<sup>31</sup>

Commentators generally agree with ExCom and UNHCR that the principle of non-refoulement should be applied to protecting refugees from extradition.<sup>32</sup> Goodwin-Gill, for example, points to the principle of *aut dedere aut judicare*<sup>33</sup> in instruments aimed at suppressing certain crimes as

further acknowledgment that even the most serious criminal may deserve protection against persecution or prejudice, while not escaping trial or punishment ... and no less should be required for the non-serious criminal who would otherwise fall within the exception.<sup>34</sup>

Moreover, as noted above, many modern extradition treaties and arrangements specifically preclude extradition for political offences and where questions of persecution arise. Arguably,

---

<sup>27</sup> UNHCR has expressed concern over 'a developing trend ... to qualify existing protection in a manner potentially prejudicial to refugee interests ... [I]n particular, certain States have been including in extradition treaties an exemption from extradition for political offenders which is discretionary rather than absolute; a list of offences not to be regarded as political which is lengthy and very broad in its potential application; and the possibility (through the use of discretionary language) of responding positively to an extradition request made for a purpose amounting to discrimination on account of race, religion, colour or ethnic origin.'; UNHCR, A/AC.96/728, Note on International Protection, 2 August 1989, para 28. Some commentators have also noted that this safeguard is being increasingly eroded by the inclusion of deeming provisions in extradition treaties, which oblige the parties to treat specified offences as non-political and therefore extraditable. They are concerned that this practice will be imported into the interpretation of the Refugees Convention, in particular the exclusion clauses (Article 1F(b)), resulting in reduced protection afforded to the political offender/activist: See for example Landgren 2000. Other commentators, on the other hand, have called for the interpretation of the exclusion clauses in the Refugees Convention to be directed by developments in international criminal law: See for example, Van Krieken 1999 p 171.

<sup>28</sup> Landgren 2000. Landgren notes that these safeguards parallel provisions of refugee law whereby protection is not normally refused for perpetrators of political crimes (Article 1F(b)), and to persons who fear persecution if returned (Article 33(1)).

<sup>29</sup> The French delegate suggested that Article 33 was without prejudice to the right of extradition: A/Conf.2/SR.35, at 21. The UK delegate believed that the matter of extradition was outside the scope of the Convention: A/Conf.2/SR.24, at 10; cited in Weis 1995 p 342

<sup>30</sup> UNHCR ExCom Conclusion No. 17 (XXXI) 1980 on the Problems of Extradition Affecting Refugees. See also UNHCR, EC/SCP/14, Note on Problems of Extradition Affecting Refugees, 27 August 1980, para 16: 'The protection of a refugee cannot be regarded as complete unless he is also protected against extradition to a country where he has reason to fear persecution.'

<sup>31</sup> UNHCR ExCom Conclusion No. 17 (XXXI) 1980 on the Problems of Extradition Affecting Refugees

<sup>32</sup> See Goodwin-Gill 1996 p 147–150, Weis 1995 p 342.

<sup>33</sup> The obligation *aut dedere aut judicare* (that is, where countries are under obligation either to extradite perpetrators of international offences or to prosecute them themselves) is derived from international Conventions. See, for example, Article 146 of the Fourth Geneva Convention and Article 5 of Convention against Torture.

<sup>34</sup> Goodwin-Gill 1996 p 149

---

---

such practice is evidence of a widespread opinion that extradition in these cases would be inconsistent with States' obligations as parties to the Convention.<sup>35</sup>

On the basis of ExCom's views mentioned above, Landgren has argued that where a relevant extradition treaty makes no exception for 'political offences' or specifies that no crime might be regarded as political, if a person is recognised as a refugee after committing political crimes within the meaning of Article 1F(b), he or she ought not to be liable to extradition to a State where he or she would suffer persecution.<sup>36</sup> Certainly, to allow extradition for political and minor offences would tend to undermine the effectiveness of the non-refoulement norm embodied in Article 33(1). However, it would be going too far to assert that, as a matter of international law, non-refoulement would in every case override the contrary terms of an extradition treaty between parties to the Convention.

### *The approach in Australia*

In Australia a clear distinction is drawn between deportation and extradition and it is considered important that use of each of these procedures should be restricted to its proper purpose. Historically, the primary focus of this concern to distinguish the two has been the risk that deportation might be used as a form of disguised extradition.<sup>37</sup> Accordingly, it is the practice to accord priority to extradition proceedings over deportation proceedings in the event that an extradition request is received in relation to a non-citizen who is in Australia unlawfully.

However, the provisions of Australian extradition law, which are reflected in our treaties and other extradition arrangements, are designed to ensure that considerations relevant to the non-refoulement obligation are taken into account in the course of extradition proceedings. Under section 7 of the *Extradition Act 1988* (Cth) there is an 'extradition objection' in relation to an offence for which a person's extradition has been requested by a country if:

- a) the offence for which the person's extradition has been sought is a political offence in relation to the requesting State;
- b) the person's surrender has in fact been sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions or for a political offence not specified in the extradition request; or
- c) on surrender, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions.

'Political offence' is defined as excluding offences constituted by conduct of a kind amounting to genocide, torture or various forms of terrorist action.<sup>38</sup> The treaties which require that most of these types of conduct not be regarded as 'political offences' for extradition purposes do not clearly indicate how they relate to the Refugees Convention. However, compliance with the non-refoulement obligation under Article 33(1) of the Refugees Convention is generally ensured by the separate operation of extradition objections b) and c) above, and their inclusion of all Convention grounds except membership of a particular social group.

The extradition objections are formally relevant at two points in the extradition process. First, at the hearing before a magistrate under section 19 of the Extradition Act to determine whether a person whose extradition has been requested is eligible for extradition, the person may seek to

---

<sup>35</sup>Although other international human rights norms would also be relevant to these provisions.

<sup>36</sup> Landgren 2000.

<sup>37</sup> *Barton v The Commonwealth* (1974) 131 CLR 477, at 483-84 per Barwick CJ

<sup>38</sup> Section 5, *Extradition Act 1988* (Cth)

---

---

satisfy the magistrate that there is an extradition objection in relation to the offence for which the person's extradition has been requested. If so satisfied, the magistrate must find the person ineligible for extradition and order the person's release. Second, before determining under section 22 of the Extradition Act that a person found eligible for extradition is to be surrendered to a requesting country, the Minister must be satisfied that there is no extradition objection.

However, where a person can clearly establish the existence of an extradition objection in representations made to the Minister before the section 19 hearing is conducted, the Minister may terminate extradition proceedings forthwith.

It should be noted that the position in Australian extradition law goes beyond the protection offered by the Refugees Convention, in that extradition objections b) and c) constitute an absolute bar to extradition, even where a person has been excluded from Convention protection under Article 1F(b) for having committed a serious non-political crime.

### 3.2 'WHERE HIS LIFE OR FREEDOM WOULD BE THREATENED'

#### 3.2.1 Standard of proof

The words 'where his life or freedom would be threatened', which appear in Articles 33(1) and 31(1), have been the subject of some discussion, in particular whether they comprise a different standard to the words a 'well-founded fear of persecution' in Article 1A(2).

The *travaux préparatoires* provide little insight as to why different wording was chosen in these formulations for non-refoulement and refugee status respectively.<sup>39</sup>

However, it is generally accepted in both national and international practice that the two phrases have the same meaning and must be interpreted by reference to the same standard. Support for this interpretation is found in the interchangeable use of the words 'country of origin', 'territories where their life or freedom was threatened' and 'country in which he is persecuted' during the course of drafting the Convention.<sup>40</sup>

According to UNHCR, the different wording was introduced, not to lay down a stricter standard than the words 'well founded fear of persecution' in Article 1A(2), but to make it clear that the principle of non-refoulement applies not only in respect of the country of origin but to any country where a person has reason to fear persecution.<sup>41</sup>

Commentators also generally agree that the two phrases should be interpreted similarly.<sup>42</sup> According to Robinson, for example,

Although [Article 33(1)] makes no reference to Article 1, insofar as the meaning of the threat is concerned (as does Article 31) it must be assumed that it uses this word in the same sense as Article 31.<sup>43</sup>

Similarly, Goodwin-Gill says:

The legal, and to some extent logical, relationship between article 33(1) and article 1 of the 1951 Convention/1967 Protocol is evident in the correlation established in State

---

<sup>39</sup> Goodwin-Gill 1996 p 138. Goodwin-Gill adds that there is equally little indication in *the travaux préparatoires* that a different standard of proof was intended to apply to each.

<sup>40</sup> A/Conf.2/SR.35, at 20, cited in Weis 1995 p 303

<sup>41</sup> UNHCR Sub-Committee of the Whole on International Protection (23 August 1977) EC/SCP/2, para 4

<sup>42</sup> Goodwin-Gill 1996 p 138; Weis 1995 p 341; Robinson 1953 p 161; Grahl-Madsen 1966 Vol. 1 p 196; cf. Zink, cited in Grahl-Madsen 1966 Vol. 1 p 196.

<sup>43</sup> Robinson, 1953 p 161-2

---

---

practice, where entitlement to the protection of non-refoulement is conditioned simply upon satisfying the well-founded fear criterion.<sup>44</sup>

### *The approach in Australia*

The Full Federal Court in Australia has held that the standard for threatened harm in Articles 1 and 33 is the same.<sup>45</sup>

#### **3.2.2 Extent of threat**

Article 33(1) clearly stipulates that the territories to which refoulement is prohibited are not only those from which the refugee fled but any territory in which a threat to his or her life or freedom exists;<sup>46</sup> that is, where he or she has a well-founded fear of persecution. The issue here is whether the Article also prohibits returning a refugee to any country where there is no risk of persecution, but where he or she is exposed to a risk of being returned to the country where persecution is feared.

The *travaux préparatoires* indicate that there was no unanimity by the drafters on the extent of the threat contemplated.<sup>47</sup> The President of the 1951 Conference of Plenipotentiaries considered that no refoulement to a country could be permitted if it constituted a threat of subsequent forcible return to the country of origin.<sup>48</sup> However he recognised that the relative importance of the various considerations involved was a matter which would have to be decided by the government concerned.<sup>49</sup>

State practice over the years has developed the concept of safe country/safe country of first asylum, which addresses this issue to some extent. In UNHCR's Sub-Committee of the Whole on International Protection in 1991, several delegations considered that 'the fundamental criterion when considering resort to the [safe country/safe country of first asylum] notion, was protection against refoulement'.<sup>50</sup>

UNHCR accepts that a refugee may be returned to a safe country/country of first asylum if the person:<sup>51</sup>

- can enter and remain there,
- is protected there against refoulement and is treated in accordance with basic human standards,
- will not be subject there to persecution or threats to safety and liberty, and
- has access to a durable solution.

---

<sup>44</sup> Goodwin-Gill 1996 p 138

<sup>45</sup> *MIMA v Thiyagarajah* (1998) 80 FCR 543

<sup>46</sup> Robinson 1953 p 161

<sup>47</sup> Robinson 1953 p 161

<sup>48</sup> Weis 1995 p 330. This comment was in response to a request from the Swedish delegate for clarification on the precise implications of Article 33(1), including whether it would cover situations where a refugee 'would be exposed to the risk of being sent to a territory where his life or freedom would be endangered': Weis 1995 p 330. Sweden had initially proposed an amendment to Article 33(1) to this effect, but subsequently withdrew it. It appears that the primary concern of the other delegates regarding such an amendment revolved around its implications as an unconditional obligation in times of mass influx (see the views of Netherlands, Italy, and Switzerland: Weis 1995 p 328–31). France and UK also expressed misgivings as to the subjective nature necessarily involved in such a decision: Weis 1995 p 328. In withdrawing the amendment, the Swedish delegate stressed however that the text of Article 33(1) should be interpreted as covering at least some of the situations envisaged in the amendment, as was recognised by the President of the Conference; for a detailed discussion see Weis 1995 p 328–34.

<sup>49</sup> Weis 1995 p 328–34

<sup>50</sup> Report of UNHCR Sub-Committee of the Whole on International Protection: A/AC.96/781, 9 Oct. 1991, para 34

<sup>51</sup> UNHCR, Background note on the safe country concept and refugee status

---

---

### *The approach in Australia*

Reflecting the accepted principle that international protection is protection of last resort, Australia's common law, based on the statutory concept of 'protection obligations',<sup>52</sup> has endorsed the proposition that national protection or other 'effective protection' takes precedence over international protection provided by Australia.<sup>53</sup>

The effective protection principle turns on the fact that the core obligation under the Convention is not to refoule a refugee to a country where he or she has a well-founded fear of persecution for a Convention reason, or of refoulement to such a country. The principle, as developed in the common law, establishes that:

- Australia does not owe protection obligations to a protection visa applicant if he or she can be removed to a third country in circumstances where Article 33 of the Convention will not be breached;
- Australia will not breach Article 33 if effective protection is available from the third country; that is, if the person will not face a real chance of being persecuted in the third country or returned to a country where his or her life or freedom would be threatened for a Convention reason;<sup>54</sup>
- effective protection includes the right to reside, enter and re-enter the other country in question, but this is not conclusive of the criteria that make out effective protection, or definitive in the circumstances or criteria in which a person may have effective protection—that is, even informal temporary residence may afford a sufficient foundation for the application of the principle;
- it is the capacity of the person as a matter of practical reality and fact to avail himself or herself of protection in another country that is critical, not whether he or she has a legal right to do so;<sup>55</sup>
- it is not necessary for a country to be a signatory to the Convention in order to be able to provide effective protection;<sup>56</sup>
- where Australia does not owe a person protection obligations in these circumstances, the protection visa can be refused without considering the claim to refugee status.<sup>57</sup>

In considering another State's capacity to provide effective protection, Australian common law goes no further than requiring that the third country provide the applicant with protection in practice against any breach of Article 33.

---

<sup>52</sup> The statutory concept of protection obligations is founded on s36(2) of Australia's *Migration Act 1958* (Cth), which provides that, 'A criterion for a protection visa is that the applicant for the visa is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'.

<sup>53</sup> The focus of Australia's protection obligations regime, including the notion of effective protection, is sourced in Article 33 and reflects State practice in relation to 'country of first asylum' principles and burden sharing between States. The same broad subject matter (protection 'forum shopping') has recently been addressed by the legislature, albeit in a specific way by amendments to s36. Under s36(3), 'Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national'. S36(4)–(7) circumscribe the circumstances in which it is possible to find that s36(3) applies to the non-citizen—s36(4) and (5) provide that s36(3) does not apply to countries that do not provide protection of a specified standard, and s36(6) defines 'nationality' for the purposes of s36(3).

<sup>54</sup> There are various ways in which effective protection may be provided. Assuming that the person will in practice be permitted to enter and live in a country of putative protection, that country's protection may in particular circumstances be effective if the applicant has been recognised there as a refugee (*Thiyagarajah v MIMA* (1997) 80 FCR 543), has a right to reside there permanently (*Rajendran v MIMA* (1998) 86 FCR 526), or has a right to reside there temporarily in the case of a country that is signatory to the Convention and likely to abide by its obligations as a signatory (*MIMA v Gnanapiragasam* (1998) 88 FCR 1), or even where a country is not a signatory (*MIMA v Al-Sallal* (1999) 94 FCR 549).

<sup>55</sup> *Al-Zafiry v MIMA* (1999) 58 ALD 663

<sup>56</sup> *MIMA v Al-Sallal* (1999) 94 FCR 549

<sup>57</sup> *Thiyagarajah v MIMA* (1997) 80 FCR 543. If such protection does not exist, then it will be necessary for the decision maker to determine whether the applicant is a refugee within the meaning of Article 1 in order to resolve the question whether Australia has protection obligations to that person.

---

---

## 4. EXCEPTIONS TO THE PRINCIPLE OF NON-REFOULEMENT: THE AMBIT AND OPERATION OF ARTICLE 33(2)

Article 33(2) sets out the two exceptions to the non-refoulement obligation in Article 33(1). The first exception applies where there are reasonable grounds for regarding the refugee concerned as a danger to the security of the country of refuge. The second exception applies where the refugee concerned, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of the country of refuge.

In cases where such an exception applies, the non-refoulement obligation enshrined in Article 33(1) does not apply, and the refugee may be refouled without contravening the Convention. That is, in these circumstances the State does not owe the refugee concerned a protection obligation and he or she may, in accordance with the terms of the Convention, be returned to his or her country of origin or another place where he or she would be at risk of persecution.<sup>58</sup>

Since Article 33(2) is an exception to the central obligation of non-refoulement, the UNHCR Handbook refers to its application in 'extreme cases'.<sup>59</sup> Elsewhere UNHCR has stressed that:

In view of the serious consequences to a refugee of being returned to a country where he is in danger of persecution, the exception provided for in Article 33(2) should be applied with the greatest caution.<sup>60</sup>

### *The approach in Australia*

The current statutory scheme for the grant of a protection visa in Australia requires that Australia must owe the applicant protection obligations. In accordance with the terms of the Convention, Australia does not owe protection obligations to a person who falls within Article 33(2).

As will be discussed further below, Australia's *Migration Act 1958* was recently amended to provide guidance on the meaning of the phrase 'particularly serious crime' in Article 33(2).<sup>61</sup>

Consideration of Article 33(2) can arise during the process of making decisions on protection visas and on deportation and visa cancellation. For the purposes of criminal deportation, the operation of Article 33(2) may be invoked where a refugee has committed a particularly serious offence within the first ten years of lawful permanent residence in Australia.<sup>62</sup>

#### 4.1 EXCLUSION OF PERSONS WHO ARE A DANGER TO SECURITY

The first exception to non-refoulement concerns a refugee 'in respect of whom there are reasonable grounds for regarding as a danger to the security of the country in which he is ... [present]'.

The Convention's drafters considered that it was a matter for the country of refuge to determine whether a person is considered a security risk. The UK delegate, who proposed the inclusion of Article 33(2), explained the phrase 'reasonable grounds' as:

---

<sup>58</sup> However, the freedom of the State to refoule a person may still be subject to other international non-refoulement obligations, under the Convention against Torture (CAT) for example.

<sup>59</sup> UNHCR Handbook, para 154.

<sup>60</sup> UNHCR Sub-Committee of the Whole on International Protection (23 August 1977) EC/SCP/2

<sup>61</sup> See *Migration Legislation Amendment Act (No 6) 2001*, s91U

<sup>62</sup> Australia's Criminal Deportation Policy (CDP), Section 499 Ministerial Direction No 9 (21 December 1998)

---

---

... leaving it to the States to determine whether there were sufficient grounds for regarding any refugee as a danger to the security of the country and whether the danger entailed to refugees by expulsion outweighed the menace to public security that would arise if they were permitted to stay.<sup>63</sup>

Goodwin-Gill notes that internationally there are few defined parameters for how judgements concerning dangers to security are to be exercised, but agrees that it is a matter for the individual State to determine the appropriate approach:

The exceptions to non-refoulement are thus framed in terms of the individual, but whether he or she may be considered a security risk appears to be left very much to the judgement of the State authorities ... and such an approach to security cases is supported both by Article 33(2) of the Convention and by immigration law and practice generally.

As Robinson indicates, ‘“reasonable grounds” are sufficient in the case of “security risks” because of the political nature of the risk and the impossibility of having it stated in more definite terms’.<sup>64</sup>

Weis nevertheless cautions that Article 33(2), like all exceptions, has to be interpreted restrictively: ‘Not every reason of national security may be invoked, the refugee must constitute a danger to the national security of the country’.<sup>65</sup>

### ***The approach in Australia***

Consistent with the view of the Convention’s drafters that security issues are a matter for the country of refuge, the relevant Australian security and intelligence agency is considered to be an appropriate body for assessing danger to the security of Australia for the purposes of Article 33(2).<sup>66</sup> Australian jurisprudence on the application of the provision is very limited.

## **4.2 EXCLUSION OF PERSONS WHO, HAVING BEEN CONVICTED OF A PARTICULARLY SERIOUS CRIME, CONSTITUTE A DANGER TO THE COMMUNITY**

The second exception to non-refoulement relates to a refugee who, ‘having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country’.<sup>67</sup>

To invoke this exception the conviction must be by final judgement, thereby requiring all avenues of criminal appeal to have been exhausted.

Several issues arise about how the exception is to be applied, in particular:

- What constitutes a ‘particularly serious crime’?
- Is the relevant conviction a sufficient basis in its own right to support the application of the exception, or must there be a further and separate demonstration of ‘danger to the community’?

---

<sup>63</sup> A/Conf.SR.16, at 8, cited in Robinson 1953 p 164

<sup>64</sup> Robinson 1953 p 164

<sup>65</sup> Weis 1995 p 342. By way of example, Weis suggests, ‘If he engages in espionage for his country of origin, he will rarely be a bona fide refugee; if he spies for another country, it is difficult to see why he should, on this ground, be returned to his country of origin’.

<sup>66</sup> In *Director General Security v Sultan* (1998) 90 FCR 334 the Australian Federal Court specifically dealt with the question of the Administrative Appeals Tribunal’s review jurisdiction where a protection visa decision was refused on the basis that the applicant came within the security exception in Article 33(2). In resolving the matter, the Court indicated that one of the Australian Security Intelligence Organisation’s (ASIO) functions under the *Australian Security Intelligence Organisation Act 1979* (Cth) is to provide security assessments to Commonwealth agencies relevant to their functions. The assumption is that ASIO would be an appropriate assessing body for the purposes of Article 33(2).

<sup>67</sup> This exception complements Article 1F(b), which operates to exclude persons with respect to whom there are serious reasons for considering that they have committed a serious non-political crime before entry to the country of refuge.

---

- 
- If there is a need to separately demonstrate a ‘danger to the community’, how is the potential for such a danger to be assessed and does it need to be ongoing?
  - Does a proportionality test need to be applied before a refugee may be refouled relying on Article 33(2)?
    - That is, is there a need to balance the likely consequences of returning the person against the seriousness of the criminal conduct and/or danger to the community before Article 33(2) can be applied to exclude a person from Convention protection?

#### 4.2.1 ‘particularly serious crime’

The Convention does not define the phrase ‘a particularly serious crime’ and relevant jurisprudence is sparse.<sup>68</sup> A comparison is sometimes made with the phrase ‘a serious non-political crime’ in Article 1F(b), which in itself would appear to have been intended to include the most serious offences to the exclusion of lesser offences.<sup>69</sup>

In advice developed with regard to a specific application of Article 1F(b),<sup>70</sup> UNHCR has proposed that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery. According to UNHCR, this presumption could be rebutted by mitigating factors such as minority of the offender, parole, elapse of five years since conviction or completion of sentence, general good character (for example, one offence only), the offender was merely an accomplice, and other surrounding circumstances of the offence (for example, provocation and self-defence).

However, the Article 33(2) exception imposes a more stringent test than Article 1F(b) in that it requires ‘a particularly serious crime’ rather than simply ‘a serious ... crime’. The term ‘particularly’ infers that something more than a serious crime is intended.

In relation to Article 33(2), and consistent with its views about applying Article 1F(b), UNHCR has proposed that,

... it is necessary to take fully into account all the circumstances of the case and, where the refugee has been convicted of a serious criminal offence, to any mitigating factors and the possibilities of rehabilitation and reintegration within society.<sup>71</sup>

Commentators provide various yardsticks as to the kinds of offences that may be regarded as ‘serious’ (for Article 1F(b) purposes) or ‘particularly serious’ (for Article 33(2) purposes), and disagree as to the proper approach. By way of example, Goodwin-Gill says that serious crimes are those against physical integrity, life and liberty.<sup>72</sup> Grahl-Madsen says that a serious crime is one that would attract a penalty of more than five years imprisonment or death in most countries in Western Europe and North America.<sup>73</sup> According to Weis, the word ‘crimes’ is not to be understood in the technical sense of any criminal code but simply signifies a serious criminal offence, which would include murder, rape, armed robbery and arson.<sup>74</sup> To Robinson, the

---

<sup>68</sup> Goodwin-Gill 1996 p 140

<sup>69</sup> Grahl-Madsen 1966 Vol. 1 p 292

<sup>70</sup> This list was proposed by UNHCR following a request by the United States in 1980 for advice on asylum applications which were likely to be refused on account of the applicants’ criminal background. See Goodwin-Gill 1996 p 107 for a description of these events.

<sup>71</sup> UNHCR Sub-Committee of the Whole on International Protection (23 August 1977) EC/SCP/2

<sup>72</sup> Goodwin-Gill 1996 p 105

<sup>73</sup> Grahl-Madsen 1966 Vol. 1 p 294

<sup>74</sup> Weis 1995 p 342

---

---

meaning of ‘a particularly serious crime’ will depend on the interpretation of those words by the various States in accordance with their criminal codes.<sup>75</sup>

### *The approach in Australia*

As noted previously, to provide clearer parameters for the interpretation of Article 33(2) by decision makers and the courts and tribunals, the Australian Parliament has recently amended the *Migration Act 1958* to clarify what constitutes a ‘particularly serious crime’.<sup>76</sup>

Under the new legislation, a ‘particularly serious crime’ can be either a ‘serious Australian offence’ or a ‘serious foreign offence’.<sup>77</sup> A ‘serious Australian offence’ includes—but is not limited to—violent, drug or property offences or offences relating to immigration detention that are subject to imprisonment for life, imprisonment for a fixed term of not less than three years or imprisonment for a maximum term of not less than three years. A ‘serious foreign offence’ is a violent, drug or property offence that, were it to have been committed in the Australian Capital Territory, would have been punishable by imprisonment for life, imprisonment for a fixed term of not less than three years or imprisonment for a maximum term of not less than three years.<sup>78</sup>

The legislation does not define the second limb of the test, whether a person is ‘a danger to the community’. This assessment will continue to be undertaken on a case-by-case basis.

Although Australian jurisprudence had not provided an explicit set of standards for what qualifies as a ‘particularly serious crime’ before the new legislation, it had provided indicative guidance as to what types of crimes could amount to particularly serious crimes in the context of the circumstances of their commission and the particular case. Relevant case law is described below; however it may be noted that, at this stage it is difficult to state authoritatively how these common law principles will interact with the new legislative provisions.<sup>79</sup>

With this qualification in mind, crimes which the Administrative Appeals Tribunal and the courts have to date recognised as ‘particularly serious’ are those of considerable gravity, being of a reasonably extreme nature and/or including an element of outrage. They include aggravated burglary and threat to kill;<sup>80</sup> arson and rape;<sup>81</sup> malicious wounding with a knife;<sup>82</sup> the importation, supply or possession (for trafficking) of heroin;<sup>83</sup> and intentionally causing injury and rape.<sup>84</sup>

In considering these cases, the Courts have taken into consideration the surrounding circumstances of the offences. The length of the sentence imposed has been a relevant

---

<sup>75</sup> Robinson 1953 p 164

<sup>76</sup> See *Migration Legislation Amendment Act (No. 6) 2001*, s91U.

<sup>77</sup> See s91U(2) and (3) respectively. Before the insertion of s91U, it was generally accepted that this exclusion of persons who constitute a danger to the community operated in respect of convictions within the receiving State.

<sup>78</sup> The list of crimes under s91U is not exclusive and individual assessments may be made of any additional crimes.

<sup>79</sup> In general terms, for the purposes of interpretation in Australia, the terms of domestic law are determinative. However, in keeping with general rules of interpretation, Australian domestic law that embodies or incorporates or refers to Australia’s international obligations will be interpreted wherever possible in a manner that is consistent with those international obligations.

<sup>80</sup> *MIMA v Belkoshabeh* [1999] FCA 980

<sup>81</sup> *Vabaza v MIMA* [1997] 148 FCA

<sup>82</sup> *Tamayo v DIMA* (1994) 37 ALD 788. It is worth noting that Purvis J equated the criteria used within the criminal deportation policy with those relevant to the application of Article 33(2): ‘The statement by the Minister as to the purpose of Australia’s criminal deportation policy points to the need to protect the safety and welfare of the Australian community. This echoes the exception to the prohibition on refoulement in Article 33(2). The criteria to be used in deportation decisions, outlined in the Minister’s Australia’s Criminal Deportation Policy, and Article 33(2) of the Convention should be considered in tandem. Ideally, both domestic policy and international commitments should work together to provide coherent guidelines for administrative decision-making.’

<sup>83</sup> *A v MIMA* [1999] FCA 227; *Todea v MIMA* (1994) 35 ALD 735; *Re: Nguyen and MIMA* (N99/16, DP Gerber, unreported, 7 July 1999); *Re: Dang and MIMA* (V/98/251, DP Forrest, unreported, 17 September 1998).

<sup>84</sup> *Re: Trigueros and MIMA* (V/96/425, DP Forrest, unreported, 15 August 1996)

---

---

consideration, but not a determinative one.<sup>85</sup> Mitigating circumstances that may be taken into account include the possible relevance of the diminished mental state of the offender, due, for example, to a psychiatric condition or intoxication.

The principal support for the view that mitigating circumstances are relevant is found in the judgement of the Federal Court in *Betkoshabeh*, which set aside the decision of the Administrative Appeals Tribunal on the basis that it had failed to consider the possibly mitigating circumstances of the offender's psychiatric condition.<sup>86</sup> On the other hand, in *Vabaza*, the Federal Court appeared to discount the importance of the surrounding circumstances in the context of possibly characterising certain crimes as 'particularly serious' per se.<sup>87</sup>

This difference in approach was noted but not resolved by the Full Federal Court in *Betkoshabeh*.<sup>88</sup> It may be argued that any mitigating circumstances would have been taken into account by the courts in convicting and sentencing a person and that the Convention does not require a decision maker to duplicate this process. However it may also be argued that to do so would parallel the practice of courts to consider aggravating circumstances when examining possibly 'outrageous' or 'extreme' crimes.

In summary, jurisprudence to date has indicated that:

- a 'particularly serious crime' is one of considerable gravity;
- the length of sentence is relevant, but not conclusive;
- aggravating and mitigating circumstances have formed part of past considerations of what is a 'particularly serious crime—such circumstances are in practice difficult to divorce from an evaluation of the nature and seriousness of the crime; and
- past examples of particularly serious crimes as drawn from cases are useful illustrations, but are not definitive.

#### 4.2.2 Sufficiency of conviction to demonstrate 'danger to the community'

The relevant language from Article 33(2) concerns a person 'who, having being convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.'

This text has proved open to different interpretations. One interpretation is that the conviction of such a crime is alone conclusive of a danger to the community. On the other hand, it could mean that there is a need to concurrently and specifically conclude that the person constitutes a present and ongoing danger to the community.

There does not appear to be any clear-cut indication of the intentions of the Convention drafters of this provision. Nor does UNHCR provide guidance on the matter in its Handbook.<sup>89</sup>

Commentators are generally equivocal. For example, according to Goodwin-Gill:

It is unclear to what extent, if at all, one convicted of a particularly serious crime must also be shown to constitute a danger to the community ... principles of natural justice

---

<sup>85</sup> The relevant sentences have tended to be several years in length. However, one of the crimes regarded as 'particularly serious' in *Vabaza v MIMA* [1997] 148 FCA carried a sentence of only six months. That crime however was part of a broader scheme of acts committed by the applicant, and it appears that consideration of the broader surrounding circumstances led to the crime being characterised as 'particularly serious'.

<sup>86</sup> *Betkoshabeh v MIMA* (1998) 51 ALD 328, Finkelstein J at 335

<sup>87</sup> *Vabaza v MIMA* [1997] 148 FCA, Goldberg J at 27

<sup>88</sup> *MIMA v Betkoshabeh* [1999] FCA 980 at 9

<sup>89</sup> Para 154 states: 'A refugee committing a serious crime in the country of refuge is subject to due process of law in that country. In extreme cases, Article 33(2) of the Convention permits a refugee's expulsion or return to his former home country if, having been convicted by a final judgement of a 'particularly serious' crime, he constitutes a danger to the community of his country of refuge.'

---

---

and due process of law require something more than mere mechanical application of the exception. An approach in terms of the penalty imposed alone will be somewhat arbitrary...<sup>90</sup>

Hathaway's analysis implies that in some circumstances a conviction alone may suffice for application of the exception. However, this would be the case only where the nature of the offence can sustain the conclusion that the person constitutes a present and ongoing danger to the community:

[Article 33(2)] ... requires the conviction by a final judgement of a particularly serious crime ... It is not enough that the crime committed has been 'serious', but it must rather be 'particularly serious' and sustain the conclusion that the offender constitutes a danger to the community.<sup>91</sup>

Weis maintains that two conditions must be met for application of the exception: 'The refugee must have been convicted of a final judgement for a particularly serious crime, *and* he must constitute a danger to the community of the country' (emphasis added).<sup>92</sup>

### ***The approach in Australia***

In the case of *A*,<sup>93</sup> the Full Federal Court considered the interpretation of this part of Article 33(2), after noting that addressing this point was not strictly necessary to determine the case before them. In the minority on this point, Katz J suggests a preference for the 'conclusive presumption' position:

If the [Administrative Appeal] Tribunal had considered the question of whether A's crime had been a particularly serious one within the meaning of Article 33(2) and concluded that it had been, then an issue would have arisen as to whether the Tribunal was required to consider separately the question of whether A constituted a danger to the Australian community or whether, alternatively, satisfaction as to his crime's having been a particularly serious one gave rise to a conclusive presumption that he constituted a danger to the Australian community. The issue was not one addressed directly by Finkelstein J in the *Betkoshabeh* case, although there may be a suggestion that his Honour favoured the conclusive presumption approach in his statement ... that the crime committed 'must be "particularly serious" as well as a crime that shows that the refugee is a danger to the community'. Certainly, the conclusive presumption approach has been taken by federal Courts of Appeals in numerous Circuits, when construing American domestic legislation both materially identical to and enacted to implement Article 33(2).<sup>94</sup>

Partly in response to the above views, Burchett and Lee JJ, after noting that addressing this point was 'not strictly necessary', rejected the 'conclusive presumption' approach, holding that:

The logic of the syntax of the provision moves in the opposite direction. The principal statement of exclusion is 'who constitutes a danger to the community'. The phrase 'having been convicted ... of a particularly serious crime' adds an additional element, but it is not expressed as if that additional element swallowed up the principal element. This aspect of the drafting is perhaps made clearer when attention is directed to the

---

<sup>90</sup> Goodwin-Gill 1996 p 140

<sup>91</sup> Hathaway 1991 p 226

<sup>92</sup> Weis 1995 p 342

<sup>93</sup> *A v MIMA* [1999] FCA 227

<sup>94</sup> *A v MIMA* [1999] FCA 227, Katz J at para 42

---

first alternative in the provision, that ‘there are reasonable grounds for regarding [the person] as a danger to the security of the country in which he is’. The whole provision is concerned with perils represented by the refugee, whether because of a threat to the security of the country, or because of a danger to its community.<sup>95</sup>

A number of arguments may be advanced both for and against the conclusive presumption approach.<sup>96</sup> However, there will be some circumstances where the nature of the ‘particularly serious crime’ and the surrounding circumstances of the commission of that crime will, of itself, clearly sustain a finding that the person constitutes a present and continuing danger to the community.

Ultimately, the appropriate manner for determining whether a person constitutes a danger to the community is a matter for the judgement of the country of refuge, to be determined according to the law, and consistent with a State’s sovereign right to determine who may enter and remain within its territory.

### ***‘danger to the community’***

There is very little Australian jurisprudence on the grounds on which a person may be regarded as constituting a ‘danger to the community’.

A common theme of the Federal Court in *Vabaza*,<sup>97</sup> and the Administrative Appeals Tribunal in *Betkoshabeh*,<sup>98</sup> was the potential for the deportee to have caused incidental or collateral harm to persons other than the specific target of the deportee’s criminal conduct. However, it may be argued that a potential danger to even one member of the community may be sufficient.

Issues relating to rehabilitation and risk of recidivism, as well as going to the seriousness of the crimes committed, are also relevant to considering ‘danger to the community’. Matters such as those listed in Australia’s Criminal Deportation Policy (CDP),<sup>99</sup> while not determinative, are highly relevant. These include:

- *the nature of the crime committed*. Drug trafficking crimes and crimes of violence are among those that may create a heightened level of apprehension concerning danger to the community;
- *whether there has been a single relevant conviction, or a series of convictions*. If there have been separate, later offences, confidence in the refugee’s capacity not to re-offend may be reduced; and

---

<sup>95</sup> *A v MIMA* [1999] FCA 227, Burchett and Lee JJ at para 3. At para 4, Burchett and Lee JJ also referred to the judgement of Finkelstein J in *Betkoshabeh v MIMA* (1998) 157 ALR 95 in support of their view that the surrounding circumstances of the matter should be relevant to both whether the crime is ‘particularly serious’ and whether there is a ‘danger to the community’. Their Honours disagreed with the reading of Katz J of the specific Finkelstein J statement cited above and appeared to draw a different inference from the relevant Hathaway comment also cited above.

<sup>96</sup> One may argue, for example, that grammatically the principal part of the requirement can be viewed as the conviction, with the reference to danger to the community being a clause that flows from it, in the sense that it merely describes the consequences of the presence of a person convicted of such a crime. If the intent had been to divide the requirement into two separate parts, and require satisfaction of both, the conjunctive ‘and’ would arguably have been used. In addition, in the context of interpreting Article 1F(b), Australian courts have confirmed that the object of that Article is the protection of the order and safety of the receiving state, and that the provision should not be construed so narrowly as to undercut its policy intention (*Dhayakpa v MIEA* (1995) 62 FCR 556; *Ovcharuk v MIMA* (1998) 88 FCR 173; and *Daljit Singh v MIMA* [1999] FCA 1599). There is arguably no reason in principle why this reasoning should not inform interpretation of Article 33(2), particularly because the language of Article 33(2) expressly refers to a danger to the community in circumstances where the refugee has been subject to a full and complete judicial process which resulted in his or her conviction of a particularly serious offence, unlike Article 1F(b), where the operative words are ‘serious reasons for considering’. That is, it gives credence to the integrity and finality of the criminal law process in the receiving state. On the other hand, the conclusive presumption approach may be viewed as straining the logic of the syntax, and takes insufficient account of the fact that Article 33(2) is an exception to the primary obligation of non-refoulement.

<sup>97</sup> *Vabaza v MIMA* [1997] FCA 148, per Goldberg J.

<sup>98</sup> *Betkoshabeh and MIMA* [1998] AATA 839, per DP Forgie. This was the second of the applicant’s AAT appeals.

<sup>99</sup> Section 499 Ministerial Direction No.9 (21 December 1998)

---

- 
- *whether rehabilitation has occurred and will continue to occur.* This will involve consideration of the relevant treatment, support services and counselling that the offender has and will make use of, and the social and employment opportunities he/she may take up, as well as consideration of his/her own statements and those of his/her advisers and/or experts and consultants.

#### 4.2.3 Proportionality test

Although not required by the Convention text, at least some of the drafters appear to have envisaged the application of a proportionality or balancing test to the exception in Article 33(2). As noted previously, the UK delegate considered that it must be left to the State to decide whether the danger entailed to refugees by expulsion outweighed the menace to public society if they were permitted to stay.<sup>100</sup>

UNHCR has taken the view that a balancing test should be applied:

To consider invoking Article 33(2) requires a careful balancing of risks posed to the community, including the nature of the crime committed, mitigating or aggravating factors and an evaluation of the risk to the refugee or persecution upon return.<sup>101</sup>

However, among commentators, there is a range of views. For example, Goodwin-Gill argues that:

... the application of article 33(2) ought always to involve the question of proportionality, with account taken of the nature of the consequences likely to befall the refugee on return. The offence in question and the perceived threat to the community would need to be extremely grave if danger to the life of the refugee were to be disregarded, although a lesser threat might justify the return of an individual likely to face only some harassment or discrimination.<sup>102</sup>

By contrast, Hathaway notes that:

Article 33(2) ... is the original and more broadly applicable criminality provision. It provides the means for states to expel or return refugees who, for example, commit crimes in a state of refuge ... even if they may face extremely serious forms of persecution.<sup>103</sup>

In brief, there is no requirement in the text of Article 33(2) to apply a proportionality test in its application, nor consensus amongst commentators on this point. However, in the case of a refugee, the consequences of return to the country of feared persecution may clearly be extremely grave. It is open for a State to choose, for administrative purposes, to consider such consequences in making a determination under Article 33(2). The implications of return may alternatively be taken into account when considering non-refoulement obligations under other human rights treaties, for example, those under the Convention against Torture (CAT).

---

<sup>100</sup> A/Conf.2/SR.16, cited in Weis 1995 p 329

<sup>101</sup> Quoted in DIMA Protection Visa Procedures Manual, para 6.3.6

<sup>102</sup> Goodwin-Gill 1996 p 140

<sup>103</sup> Hathaway 1991. p 226

---

---

### *The approach in Australia*

Most of the relevant jurisprudence relating to the principle of proportionality concerns Article 1F of the Convention, although the Full Federal Court in *Ovcharuk*<sup>104</sup> had regard to the terms of Article 33(2) in determining the ambit of the operation of Article 1F(b).<sup>105</sup>

The judgements in *Dhayakpa*,<sup>106</sup> *Ovcharuk*,<sup>107</sup> and *Arquita*<sup>108</sup> in relation to Article 1F(b), confirm that once the crime committed outside the country of refuge is properly characterised as an Article 1F crime, the provisions of the Convention do not apply. There is no obligation to go further and weigh the degree of seriousness of the crime against the possible harm to the applicant if returned to his or her state of origin.<sup>109</sup>

## 5. CONCLUDING COMMENTS

- Article 33 sets out one of the primary obligations under the Refugees Convention, that is the prohibition of refoulement. However, the provision of exceptions, which permit the return of certain categories of refugees to the country of risk for reasons of state security or public safety, together with the absence in the Convention of a right to be granted asylum, indicate an intention by the Convention's founders to preserve the sovereign right of States to determine who may enter and remain within their territory.

Article 33 is one of several provisions which appear to have been included in the Convention to balance the rights and obligations of States on the one hand, and individual asylum applicants and refugees on the other, particularly in regard to situations in which individuals may be considered to have placed themselves outside the help and protection offered by the country of refuge for strictly humanitarian purposes.

- The standard for threatened harm in Article 33 is the same as that in Article 1, that is, a 'well-founded fear of persecution'.
- Article 33(1) applies to the refugee's country of origin and any other country where he or she also has a well-founded fear of persecution or risks being sent to such a country.
- In considering the exceptions to the principle of non-refoulement, the appropriate approach and considerations for determining whether a person is a danger to a country's security are a matter for the judgement of that country.

What constitutes a 'particularly serious crime' is similarly a matter for each State to determine.

- There is no strict requirement for a separate demonstration of 'danger to the community' where a person has been convicted of a 'particularly serious crime'.

Nevertheless, the language of Article 33(2) suggests that its primary purpose is protection of the community and the ultimate test is whether the person concerned constitutes such a danger.

---

<sup>104</sup> *Ovcharuk v MIMA* (1998) 88 FCR 173

<sup>105</sup> *Ovcharuk v MIMA* (1998) 88 FCR 173 at 179

<sup>106</sup> *Dhayakpa v MIEA* (1995) 62 FCR 556

<sup>107</sup> *Ovcharuk v MIMA* (1998) 88 FCR 173

<sup>108</sup> *Arquita v MIMA* [2000] FCA 1889 at para 53

<sup>109</sup> These judgements do not rule out the possibility that the consequences of returning a person to his or her country of origin may be required to be taken into account in characterising a crime as an Article 1F crime. However, as a matter of logic, tying the consequences of return into the characterisation of a crime as serious does not make sense. Equally illogical is tying the consequences of return into determining whether a person constitutes a danger to the community.

---

---

The appropriate approach and considerations for determining whether a person is a danger to the community are ultimately a matter for the judgement of the country of refuge, consistent with a State's sovereign right to determine who may enter and remain within its territory.

- There is no requirement to apply a proportionality test when assessing Article 33(2) cases. However, in the case of a refugee, the consequences of return to the country of feared persecution would by definition be extremely grave. A State may choose to consider such consequences in making a determination under Article 33(2).

The implications of return may alternatively be taken into account when considering non-refoulement obligations under other human rights treaties, for example, those under the Convention against Torture (CAT).

