



UNHCR

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

UNHCR

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BY FACSIMILE (212-230-8888) AND OVERNIGHT MAIL

Paul Engelmayer, Esq.
WilmerHale
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Re: Request for Advisory Opinion

Dear Mr. Engelmayer,

I am writing in response to your law firm's request for an advisory opinion from the United Nations High Commissioner for Refugees (UNHCR) "regarding the scope of the national security exception under Article 33(2) of the 1951 Convention" relating to the Status of Refugees.

As discussed in more detail below, the principle of *non-refoulement*, codified at article 33(1) of the 1951 Convention relating to the Status of Refugees [1951 Convention],¹ is of central importance to the international refugee protection regime. It is a fundamental obligation of States Parties to the 1951 Convention and/or its 1967 Protocol,² to which no reservation is allowed. Article 33(2) allows for an exception to this obligation in two limited circumstances, one of which is related to refugees who pose "a danger to the security of the country in which [they are]," that is, the country of refuge; while the other relates to refugees who, having been convicted by a final judgement of a particularly serious crime, constitute a danger to the community of that country.

The threat to security exception to States' *non-refoulement* obligations, like any exception to human rights guarantees, must be interpreted restrictively and with full respect to the principle of proportionality. It must therefore be shown that the danger posed by the refugee is sufficient to justify *refoulement*. The danger posed must be to the country of refuge itself; the danger must be very serious; and the finding of dangerousness must be based on reasonable grounds and therefore supported by credible and reliable evidence. The act of *refoulement* should also be a proportionate response to the perceived

¹ The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, *entered into force* 22 April 1954 [hereafter "1951 Convention"].

² The 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, *entered into force* 4 October 1967 [hereafter "1967 Protocol"].

danger. There must be a rational connection between the removal of the refugee and the elimination of the danger; *refoulement* must be the last possible resort to eliminate or alleviate the danger; and, the danger to the country of refuge must outweigh the risk to the refugee upon *refoulement*.

The Office of the United Nations High Commissioner for Refugees

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

The views of UNHCR are informed by over 50 years of experience supervising international refugee instruments. UNHCR is represented in 116 countries. UNHCR provides guidance in connection with the establishment and implementation of national procedures for refugee status determinations and also conducts such determinations under its mandate. UNHCR's interpretation of the provisions of the 1951 Convention and 1967 Protocol is an authoritative view which would need to be taken into account by States when deciding questions of refugee law, given the Office's supervisory role under its Statute in connection with Article 35 of the 1951 Convention and Article II of the 1967 Protocol and the ensuing obligation of States to cooperate with UNHCR in the exercise of this function.⁵

Analysis

A. Obligation of *Non-Refoulement* under Article 33(1)

The purpose of the 1951 Convention, as stated expressly in its Preamble, is to protect the fundamental rights and freedoms of refugees. Article 33 is considered the

³ See *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), Annex, U.N. Doc. A/1775, paras. 1, 6 (1950).

⁴ *Id.*, para. 8(a).

⁵ Professor Walter Kälin has asserted that States Parties have a duty to take into account the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* ["UNHCR Handbook"], guidelines and other positions when applying the 1951 Convention and 1967 Protocol. "'Taking into account' does not mean that these documents are legally binding. Rather, it means that they must not be dismissed as irrelevant but regarded as authoritative statements whose disregard requires justification." See W. Kälin, "Supervising the 1951 Convention relating to the Status of Refugees: Article 35 and beyond," in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (ed. Erika Feller, Volker Türk and Frances Nicholson), at 627 (Cambridge University Press, 2003). See also, Volker Türk, "UNHCR's Supervisory Responsibility," *Revue québécoise de droit internationale*, Vol. 14.1 (2001), at 135-158. The US Supreme Court has found that, while not legally binding on US officials, the UNHCR *Handbook* provides "significant guidance" in construing the 1967 Protocol and in giving content to the obligations established therein. See, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 439, n. 22 (1987).

cornerstone of the 1951 Convention, codifying the principle of *non-refoulement* of refugees. Under article 33(1), Contracting States may not “expel or return...a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁶ Reservations to article 33 are specifically prohibited under both the Convention⁷ and Protocol.⁸ The principle of *non-refoulement* is a “fundamental humanitarian principle”⁹ that has attained the status of customary international law.¹⁰

The prohibition of return to a danger of persecution under international refugee law is also fully applicable in the context of extradition. This is clear from the wording of article 33(1), which refers to expulsion or return “in any manner whatsoever.” Thus, article 33(1) of the 1951 Convention precludes the surrender of a wanted person if this would amount to *refoulement*.¹¹

Article 33(2) of the 1951 Convention provides for an exception to the obligation of *non-refoulement* in two situations: (1) where there are “reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he is”; and, (2) where the refugee, “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”¹² This opinion focuses on the first of these two exceptions.

B. The Exceptional Nature of Article 33(2) Calls for a Restrictive Interpretation

It is a general principle of law that exceptions to international human rights treaties must be interpreted restrictively.¹³ According to Paul Weis, a leading refugee law scholar who was a delegate for the International Refugee Organization during the drafting of the 1951 Convention, article 33(2) “constitutes an exception to the general principle embodied in paragraph 1 and has, like all exceptions, to be interpreted restrictively. Not every reason

⁶ 1951 Convention, *supra* note 1, article 33(1).

⁷ 1951 Convention, *supra* note 1, article 42(1).

⁸ 1967 Protocol, *supra* note 2, article VII(1).

⁹ UNHCR Executive Committee, Conclusion No. 6 (XXVIII), “*Non-Refoulement*,” at para. (a) (1977).

¹⁰ *See, e.g.*, “Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees,” UN doc. HCR/MMSP/2001/09 (16 January 2002), at para. 4 (“Acknowledging the continuing relevance 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.”); UNHCR Executive Committee Conclusion No. 25 (XXXII) (1982) (reaffirming “the importance of the basic principles of international protection and in particular the principle of *non-refoulement* which was progressively acquiring the character of a peremptory rule of international law”); Sir Elihu Lauterpacht and Daniel Bethlehem, “The scope and content of the principle of *non-refoulement*: Opinion,” in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (ed. Erika Feller, Volker Türk and Frances Nicholson), at 140-164 (paras. 193-253) (Cambridge University Press, 2003).

¹¹ *See* Lauterpacht and Bethlehem, *supra* note 10, at paras. 71-75. *See also* UNHCR Executive Committee Conclusion No. 17 (XXXI), “Problems of Extradition Affecting Refugees,” at para. (d) (1980).

¹² 1951 Convention, *supra* note 1, article 33(2).

¹³ Eur. Ct. H.R., *Klass v. Germany*, at para. 42 (1978); Eur. Ct. H.R., *Winterwerp v The Netherlands*, at para. 37 (1979).

of national security may be invoked...”¹⁴ Thus, while states clearly maintain a margin of discretion in applying the exceptions to article 33(1), this margin of appreciation is not unlimited.¹⁵

The exceptional nature of article 33(2) was recognized by the delegates to a Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons who introduced this clause when they met at the United Nations Office in Geneva in 1951.¹⁶ The *travaux préparatoires* make clear that the exceptions set out in article 33(2) were intended to be interpreted restrictively. There was initial reluctance by the drafters of the Convention to include any exception to the Convention’s non-refoulement obligation.¹⁷ While the threat to security exception was ultimately included, the drafters intended that its application be restrictive. The United Kingdom delegate, for example, stated that “the authors of [article 33(2)] ...sought to restrict its scope so as not to prejudice the efficiency of the article as a whole.”¹⁸

C. The Danger Must Be Sufficient to Justify *Refoulement*

A “danger” under article 33(2) must be: (1) a danger to the security of the country; and, (2) a danger to the country where the refugee is. There also must be reasonable grounds for considering that the individual concerned constitutes such a danger.

1. *Danger to the Security of the Country*

The use of the term “danger to the security of the country” implies that the seriousness of the danger must reach a sufficiently high threshold.

The *travaux préparatoires* makes clear that the drafters were concerned only with significant threats to the security of the country. The nature of the concerns that led to the inclusion of the threat to security provision is captured in the following statement by the United Kingdom representative:

Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign power against the country of

¹⁴ Paul Weis, *The Refugee Convention, 1951: The Travaux préparatoires Analyzed with a Commentary by Dr. Paul Weis*, at 342 (Cambridge University Press, 1995). See also, Lauterpacht and Bethlehem, *supra* note 10, at para. 159(iii).

¹⁵ See, Lauterpacht and Bethlehem, *supra* note 10, at paras. 167-68.

¹⁶ Nehemiah Robinson, *Convention Relating to the Status of Refugees - Its History, Contents and Interpretation: A Commentary*, at 136-137 (Institute of Jewish Affairs, World Jewish Congress, 1953, reprinted by UNHCR, 1997).

¹⁷ The Report of the *ad hoc* Committee stated that “[w]hile some question was raised as to the possibility of exceptions to article 28 [later article 33(1)] the Committee felt strongly that the principle here expressed was fundamental and should not be impaired.” UN doc. E/AC.32/8, at 13 (25 August 1950). The United States delegate stated that “it would be highly undesirable to suggest in the text of [article 33] that there might be cases, even highly exceptional cases, where a man might be sent to death persecution.” UN doc. E/AC.32/SR.40, at 31 (22 August 1950).

¹⁸ UN doc. A/CONF.2/SR.16, at 8 (23 November 1951).

their asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency.¹⁹

Indeed, during the drafting process, the Danish delegate raised a question as to whether the “danger to the security” test would be met by the creation of political tension in inter-state relations when the country of origin demanded the return of a refugee from the country of refuge. There was general agreement among the drafters that article 33(2) was not intended to have this effect.²⁰

UNHCR concurs with the opinion of noted international law scholars Sir Elihu Lauterpacht and Daniel Bethlehem that “the fundamental character of the prohibition against *refoulement*, and the humanitarian character of the 1951 Convention more generally, must be taken as establishing a high threshold for the operation of exceptions to the Convention.”²¹ As a result, “the danger to the security of the country in contemplation in article 33(2) must...be taken to be very serious danger rather than danger of some lesser order.”²² The provision also “hinges on an appreciation of a *future* threat from the person concerned rather than on the commission of some act in the past.”²³

Other leading refugee law scholars have concluded the same. Professor Atle Grahl-Madsen, a leading international refugee law scholar, has stated with respect to article 33(2) that

...the security of the country is invoked against acts of a rather serious nature endangering directly or indirectly the constitution, government, the territorial integrity, the independence, or the external peace of the country concerned.²⁴

Similarly, Professor Walter Kälin, a European expert in international refugee law, has noted that article 33(2) covers conduct such as “attempts to overthrow the government of the host State through violence or otherwise illegal means, activities against another State which may result in reprisals against the host State, acts of terror and espionage,” and that the requirement of a danger to the security of the country “can only mean that the refugee must pose a serious danger to the foundations or the very existence of the State, for his or her return to the country of persecution to be permissible.”²⁵

¹⁹ UN doc. A/CONF.2/SR.16, at 8 (23 November 1951).

²⁰ Weis, *supra* note 14, at 331, 332.

²¹ Lauterpacht and Bethlehem, *supra* note 10, at para. 169.

²² *Id.*

²³ Lauterpacht and Bethlehem, *supra* note 10, at para. 147.

²⁴ Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951: Article 2-11, 13-37*, at 236 (manuscript, 1963, published by UNHCR, 1997).

²⁵ Walter Kälin, *Das Prinzip des Non-refoulement*, Europäische Hochschulschriften Bd./Vol. 298, at 131 (Bern, Frankfurt am Main: Peter Lang, 1982) (unofficial translation from the German original).

2. *Danger to the Security of the “Country in Which He Is”*

The phrase “country in which he is” in article 33(2) refers to the country of refuge. Article 31(1) of the Vienna Convention provides that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purposes.”²⁶ On a plain reading, article 33(2) requires that the refugee must be “a danger to the security of *the country in which he is*” (emphasis added). Article 33(2) makes no references to the security of other countries. To justify *refoulement* under article 33(2), the danger must therefore be a danger to the security of the country of refuge.

3. “Reasonable grounds”

There must be reasonable grounds for considering that the individual concerned constitutes a serious danger to the security of the host country.

Under article 33(2), States Parties must demonstrate that there exist “reasonable grounds” for regarding a refugee as a danger to the security of the country of refuge. A finding of dangerousness can only be “reasonable” if it is adequately supported by reliable and credible evidence. “The relevant authorities must specifically address the question of whether there is a future risk; and their conclusion on the matter must be supported by evidence.”²⁷

The New Zealand Court of Appeal has held that the requirement of “reasonable grounds” under article 33(2) means “that the State concerned cannot act arbitrarily or capriciously and that it must specifically address the question of whether there is a future risk and the conclusion on the matter must be supported by evidence.”²⁸

D. Refoulement Must be Proportionate to the Danger Presented

As with any exception to a human rights guarantee, the exception to *non-refoulement* protection must be applied in a manner proportionate to its objective. Consideration of proportionality is an important safeguard in the application of article 33(2). It represents a fundamental principle of international human rights law²⁹ and international humanitarian law.³⁰

²⁶ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, *entered into force* 27 January 1980.

²⁷ Lauterpacht and Bethlehem, *supra* note 10, at para. 168.

²⁸ *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, 30 September 2004), at para. 133.

²⁹ *See, e.g.*, Eur. Ct. H.R., *Silver v. United Kingdom* (1983) (summarizing principles to determine whether an interference to a right under the European Convention on Human Rights was “necessary in a democratic society,” including a requirement that the interference be “proportionate to the legitimate aim pursued”); UN Human Rights Committee, *Guerrero v. Colombia*, UN doc. CCPR/C/15/D/45/1979, at para. 13.3 (31 March 1982) (finding a breach of article 6(1)(right to life) of the International Covenant on Civil and Political Rights on the basis that use of force by police was disproportionate to the law enforcement requirements of the situation, resulting in the arbitrary death of the individual concerned).

³⁰ *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, *entered into force* 7 December

To justify proportionality in the context of article 33(2) of the 1951 Convention: (1) there must be a rational connection between the removal of the refugee and the elimination of the danger; (2) *refoulement* must be the last possible resort to eliminate the danger; and, (3) the danger to the country of refuge must outweigh the risk to the refugee upon *refoulement*.

1. *Rational Connection*

In order to justify *refoulement* under article 33(2), there must be a rational connection between the means – *refoulement* – and the ends – elimination or alleviation of the danger to security. As Professor Grahl-Madsen has stated, the removal of a refugee must “have a salutary effect on those public goods.”³¹ If *refoulement* will not have this “salutary effect,” then it cannot be justified under article 33(2).

To demonstrate this rational connection, a state must show that the refugee’s presence or activities in the state is causing the danger to the security of the country of refuge and that the removal of the individual would eliminate or alleviate the danger. “[T]here must be a real connection between the individual in question, the prospective danger to the security of the country of refuge and the significant alleviation of the danger consequent upon the *refoulement* of that individual. If the removal of the individual would not achieve this end, the *refoulement* would not be justifiable.”³²

2. *Last Resort*

Refoulement must also be the last possible resort for eliminating the danger to the security of the country of refuge. To send the refugee back into the hands of his or her persecutors must be the only available means to eliminate the danger to the security of the country. If there are less restrictive and equally effective means available, such as prosecution in the country of refuge, restrictions on freedom of movement, or removal to a third country, then *refoulement* cannot be justified under article 33(2).³³

3. *Danger Must Outweigh Risks of Refoulement*

In reaching a decision on the application of article 33(2), it is necessary to weigh the gravity of the danger which the individual presents against the possible consequences

1978, article 51(5)(b) (prohibiting indiscriminate attacks, including attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”).

³¹ Grahl-Madsen, *supra* note 24, at 200.

³² Lauterpacht and Bethlehem, *supra* note 10, at para. 176.

³³ See, e.g., Walter Kälin, *Grundriss des Asylverfahrens* (Guide to the Asylum Procedure), at 226-227 (1990) (“[R]efoulement to the country of persecution is in any case not permissible, if a less serious measure such as expulsion to a third country, prosecution, imprisonment, etc., would suffice to remove the threat to state security. State practice confirms this, since *refoulement* because of activities endangering the state is exceptionally rare.”) (unofficial translation from the German original).

of *refoulement*, including the degree of persecution feared. If the applicant is likely to face severe persecution, the danger to the security of the country must be very serious to justify return.³⁴

Conclusion

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

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas Albrecht", with a long horizontal flourish extending to the right.

Thomas Albrecht
Deputy Regional Representative

³⁴ See, *Lauterpacht and Bethlehem*, *supra* note 10, at para. 176 (“In the light of the limitations on the application of the exceptions to article 33(2), the State proposing to remove a refugee or asylum-seeker to his or her country of origin must give specific consideration to the nature of the risk faced by the individual concerned.”)