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

UNHCR Observations on the Draft Law 472 SE amending the Act on Granting International Protection to Aliens

I. INTRODUCTION

1. The UNHCR Regional Representation for Northern Europe (hereinafter "UNHCR") has learned about the legislative initiative of the Legal Affairs Committee of the Estonian Parliament to amend the Act on Granting International Protection to Aliens[1] (hereinafter "AGIPA"). The appropriate Law Proposal was registered under number 472 SE on 31 May 2017 (*Välismaalasele rahvusvahelise kaitse andmise seaduse muutmise seadus 472 SE*, hereinafter "Draft Law").

2. As the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, seek permanent solutions to the problems of refugees,[2] UNHCR has a direct interest in law and policy proposals in the field of asylum. According to its Statute, UNHCR fulfils its mandate *inter alia* by "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]".[3] UNHCR's supervisory responsibility is reiterated in Article 35 of the 1951 Convention[4] and in Article II of the 1967 Protocol relating to the Status of Refugees[5] (hereinafter collectively referred to as the "1951 Refugee Convention").[6]

3. UNHCR's supervisory responsibility has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78 (1) of the Treaty on the Functioning of the European Union (hereinafter – TFEU)[7], as well as in Declaration 17 to the Treaty of Amsterdam, which provides that *"consultations shall be established with the United Nations High Commissioner for Refugees … on matters relating to asylum policy"*. Secondary EU legislation also emphasizes the role of UNHCR. For instance, Article 29 of the recast Asylum Procedures Directive[8] states that Member States shall allow UNHCR *"to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure"*.

4. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter "UNHCR Handbook") and subsequent Guidelines on International Protection. [9] UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the

---

[1] *Välismaalasele rahvusvahelise kaitse andmise seadus* (Act on Granting International Protection to Aliens), adopted 14 December 2005, RT I 2006, 2, 3, available in English at: https://www.riigiteataja.ee/en/eli/516012017005/consolide.
[2] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V) (hereafter "UNHCR Statute"), available at: http://www.refworld.org/docid/3ae6b3628.html.
[3] *Ibid*., para. 8(a).
[4] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: http://www.refworld.org/docid/3be01b964.html.
[5] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: http://www.refworld.org/docid/3ae6b3ae4.html.
[6] According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the 1951 Convention".
[7] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, available at: http://www.refworld.org/docid/52303e8d4.html.
[8] European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, (hereinafter – "recast Asylum Procedures Directive"), available at: http://www.refworld.org/docid/51d29b224.html.
[9] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: http://www.refworld.org/docid/4f33c8d92.html.

protection and durable solutions of its persons of concern. UNHCR's interpretation of the provisions of the 1951 Refugee Convention 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. Bearing in mind the particular complexity of the international refugee law standards and considering the importance to ensure the full adherence of the Republic of Estonia to its international commitments as a party to the 1951 Refugee Convention as well as a member of the European Union, UNHCR stands ready to provide additional clarifications and would thus welcome an opportunity to discuss the below observations in a dialogue with the members of the Constitutional Committee of the *Riigikogu* as well as representatives of the Estonian Ministry of the Interior.

II. THE SCOPE OF THE DRAFT LAW

6. UNHCR understands that the Legal Affairs Committee has elaborated the Draft Law in order to incorporate into the AGIPA a possibility to revoke refugee status and to allow an exception to the *non-refoulement* principle to be made in respect of an alien who was granted refugee status and who was sentenced to imprisonment for an intentional offence against a natural person,[10] an offence against a child,[11] an offence relating to narcotics,[12] an offence dangerous to public,[13] extortion,[14] or a criminal offence in the first degree[15] and who is therefore considered a danger to the community.

7. More concretely, the Draft Law proposes two amendments, as follows:

Item 1): ***To amend Article 49 (3) AGIPA as follows:***

(3) The Police and Border Guard Board may revoke a refugee status if there is a reasonable ground to consider:

1) An alien as a danger to the security of the state;

2) An alien, who has been sentenced to imprisonment for an intentional offence against a natural person, an offence against a child, an offence relating to narcotics, extortion, an offence dangerous to public or a criminal offence in the first degree, as a danger to the community of Estonia.

Item 2): ***To amend Article 50 (2) AGIPA as follows:***

(2) The Police and Border Guard Board may expel or return an alien without applying the specifications of section (1) of this article if there is a reasonable ground to consider:

1) An alien as a danger to the security of the state;

2) An alien, who has been sentenced to imprisonment for an intentional offence against a natural person, an offence against a child, an offence relating to narcotics, extortion, an offence

[10] See the list of such offences in Chapter 9 of the Estonian Penal Code (*Karistusseadustik*), adopted 06 June 2001, RT I 2001, 61, 364, available in English at: https://www.riigiteataja.ee/en/eli/519012017002/consolide.
[11] See the list of such offences in Division 2 of Chapter 11 of the Estonian Penal Code.
[12] See the list of such offences in Division 1 of Chapter 12 of the Estonian Penal Code.
[13] See the list of such offences in Chapter 22 of the Estonian Penal Code.
[14] See Article 214 of the Estonian Penal Code.
[15] Pursuant to Section 2 of Article 4 of the Estonian Penal Code, a criminal offence in the first degree is an offence the maximum punishment prescribed for it in the Penal Code for a natural person is imprisonment for a term of more than five years or life imprisonment.

dangerous to public or a criminal offence in the first degree, as a danger to the community of Estonia.

8. The Explanatory Note to the Draft Law provides that neither Item 2 of Article 49 (3) AGIPA, which establishes grounds for revocation of refugee status, nor Item 2 of Article 50 (2) AGIPA, which stipulates exceptions to the principle of *non-refoulement*, are in line with Item 2 of Article 14 (4) of the recast Qualification Directive [16] and Article 33 (2) of the 1951 Refugee Convention. According to the Explanatory Note, both provisions of the AGIPA lack an additional safeguard requiring that a refugee, who was sentenced to imprisonment for a first degree criminal offence, shall continue to constitute a danger to the community. Currently, the mere fact of being sentenced to imprisonment for a first degree criminal offence is considered to be sufficient to trigger the revocation of refugee status or expulsion of a refugee under the AGIPA.

9. Additionally, the Explanatory Note provides that Article 33 (2) of the 1951 Refugee Convention operates with a term "particularly serious crime" when defining the conditions for application of the exceptions to the principle of *non-refoulement*. The term itself is not further elaborated in the 1951 Refugee Convention. According to the authors of the Draft Law, the definition of what is a "particularly serious crime" could be found in the UNHCR Guidelines on International Protection No 5,[17] which provides interpretative legal guidance on the application of the exclusion clauses under Article 1F of the 1951 Refugee Convention. With reference to the interpretation of Article 1F(b),[18] the Explanatory Note concludes that "particularly serious crime" should include rape, murder and robbery. Some of these crimes are not, however, considered as first degree criminal offences under the Estonian Penal Code. Additionally, other serious offences like physical abuse, sexual enticement of children, drug-related crime, blackmail and offences dangerous to the public constitute second degree criminal offences in Estonia.

III. UNHCR OBSERVATIONS

- ***Revocation of refugee status***

10. UNHCR notes that unlike the AGIPA, the official English translation of the Estonian Administrative Procedure Act [19] refers to the term 'repeal' instead of 'revocation' when it discusses the invalidation (*kehtetuks tunnistamine*) of administrative acts both proactively (*edasiulatuvalt or ex nunc*) and retroactively (*tagasiulatuvalt* or *ex tunc*)[20]. Pursuant to Item 1 of Section 2 of Article 66 of the Administrative Procedure Act, an administrative act ***which is lawful at the moment of issue*** may be proactively repealed/ revoked to the detriment of a person if this is permitted by law. [emphasis added]

11. UNHCR concludes that the proposed amendment to Article 49 (3) AGIPA (Item 1 of the Draft Law) seeks to establish a ground for terminating a lawfully granted refugee status with future effect (*ex nunc*) in line with Item 1 of Article 66 (2) of the Administrative Procedure Act.

12. In this regard, UNHCR notes that under the 1951 Refugee Convention the termination of refugee status with future effect (*ex nunc*) is possible only in two sets of circumstances[21]:

(i) Where one of its cessation clauses applies (Article 1C of the 1951 Convention), and

[16] European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* (recast), 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, available at: http://www.refworld.org/docid/4f197df02.html.
[17] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at: http://www.refworld.org/docid/3f5857684.html.
[18] *Ibid.*, Item 14, p. 5.
[19] *Haldusmenetluse seadus* (Administrative Procedure Act), adopted 06 June 2001, RT I 2001, 58, 354, available in English at: https://www.riigiteataja.ee/en/eli/531102016002/consolide.
[20] See Division 4 (*Amendment and Repeal of Administrative Act*) of the Administrative Procedure Act, including Section 1 of Article 65.
[21] UN High Commissioner for Refugees (UNHCR), *Cancellation of Refugee Status*, March 2003, PPLA/2003/02, paras 5 and120, available at: http://www.refworld.org/docid/3f4de8a74.html.

(ii) Where a refugee engages in a conduct which brings him or her within the scope of Articles 1F(a) or 1F(c) of the 1951 Convention.

13. Under Article 1C (1-6), the 1951 Refugee Convention allows for the **cessation** of refugee status either on the basis of certain voluntary acts of the individual concerned, or because of a fundamental change of circumstances in the country of origin. Therefore, cessation applies where the basis on which refugee status was granted no longer exists and protection is therefore no longer necessary or justified.

14. In the only other circumstance in which refugee status may be ended *ex nunc* in line with the 1951 Refugee Convention i.e. **revocation,** the exclusion clauses of Article 1F(a) or 1F(c) apply to the conduct of a refugee. Based on the clear wording of Article 1F(b), which provides for exclusion in cases where there are "*serious reasons for considering that a person has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee*", revocation of refugee status for acts committed after recognition, **plainly contradicts** the 1951 Refugee Convention. This was confirmed, for example, by the US Board of Immigration Appeals, which held that an applicant's conviction for burglary in the United States of America after having been admitted as a refugee does not provide a basis for terminating his refugee status under § 207 of the Immigration and Nationality Act.[22] In France, the decision *Rajkumar* of the Conseil d'Etat also made it clear that crimes committed on the territory of the host State could not justify denial of refugee status on the basis of Article 1F(b).[23] Also, the Court of Justice of the European Union (hereinafter – CJEU) has concluded that the ground for exclusion under Article 1F(b) of the 1951 Refugee Convention is intended **as a penalty for acts committed in the past**.[24] [emphasis added] Furthermore, the CJEU has also underlined that "in the event that a Member State … revokes … the refugee status granted to a person, that person is entitled … to rights set out inter alia in Articles 32 and 33 of the Geneva Convention".[25]

15. UNHCR understands that both the present Article 49 (3) AGIPA as well as the proposed modification under the Draft Law depart from the framework of Article 14 (4) of the recast Qualification Directive. Further, these measures omit an essential component of Article 14(4)(b) of this Directive; namely the requirement that the individual concerned must have been convicted following **a final judgement**. The current proposed wording of Article 49 (3) AGIPA does not include reference to the final nature of the conviction, which could give rise to a situation where individuals are subject to revocation of status before the exhaustion of appeal rights within the criminal procedure. Furthermore, UNHCR would like to reiterate that Article 14(4) of the recast Qualification Directive gives rise to the withdrawal of international refugee protection in a manner that is not consistent with the 1951 Refugee Convention.[26] Article 14 (4) expands the grounds of exclusion far beyond the exhaustive clauses enshrined in Article 1 (F) of the 1951 Convention.[27]

16. In this regard, it should be noted that Article 14 (4) of the recast Qualification Directive currently forms the basis of a reference for a preliminary ruling of the CJEU. In its request to the CJEU, the Czech Supreme Administrative Court asks, *inter alia*, **whether Article 14 (4) QD is invalid** because it infringes Article 18 of the Charter of Fundamental Rights of the European Union, Article 78 (1) of the TFEU and the general principles of EU law under Article 6 (3) of the Treaty on European Union.[28] Article 78 (1) of the TFEU states that EU asylum policy "must be in accordance with the Geneva Convention" (the 1951 Refugee Convention). Non-compliance creates grounds for the CJEU to invalidate the measure or provision in question. As has been previously pointed out by

[22] *García-Alzugaray*, 19 I & N Dec. 407 (BIA 1986), 25 August 1986.
[23] Conseil d'Etat, 28 September 1998, *Rajkumar*.
[24] CJEU, Cases C-57/09 and C-101/09, 09 November 2010, see para 103. Available at: http://www.refworld.org/cases,ECJ,4cda83852.html.
[25] CJEU, Case C-373/13, 24 June 2015. Available at: http://www.refworld.org/cases,ECJ,558bb4a04.html.
[26] UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)*, 29 July 2010, pp.13-14, available at: http://www.refworld.org/docid/4c503db52.html.
[27] Ibid.
[28] CJEU, *Case C-391-16 M*, reference for preliminary ruling by the Supreme Administrative Court of the Czech Republic.

the CJEU,[29] the Qualification Directive must be interpreted … in a manner consistent with the 1951 Refugee Convention and the other relevant treaties.

17. UNHCR notes that the proposed changes to Article 49 (3) AGIPA are linked to Article 33 (2) of the 1951 Refugee Convention, which provides for exceptions to the principle of *non-refoulement*. UNHCR finds it necessary to clarify that the **exclusion clauses** provided for in Article 1F of the 1951 Refugee Convention and the **exceptions to the principle of *non-refoulement*** as set out in Article 33 (2) serve **different purposes**. The rationale of Article 1F, which exhaustively enumerates the grounds for exclusion based on criminal conduct of the applicant, is twofold. First, certain acts are considered to be so grave that they render the perpetrator(s) undeserving of international protection. Secondly, the refugee protection framework should not stand in the way of prosecution of criminals. By contrast, Article 33 (2) deals with the treatment of refugees and defines the circumstances under which they may exceptionally lose their entitlement to protection against *refoulement* under international refugee law. The provision aims at protecting the safety of the country of refuge or of the community. Its application hinges on the assessment that the refugee in question is a danger to the national security of the country or, having been convicted following a final judgment for a particularly serious crime, poses a danger to the community. Article 33 (2) **was not, however, conceived as a ground for terminating refugee status**. In France, this was recognised by the Conseil d'Etat in its decision *Pham*, which ended the practice whereby the French authorities had applied Article 33 (2) of the 1951 Refugee Convention as the basis for withdrawing refugee status from refugees who had committed a crime on French territory.[30]

18. Assimilating the exceptions to the *non-refoulement* principle permitted under Article 33 (2) to the exclusion clauses of Article 1F would therefore be incompatible with the 1951 Refugee Convention. Moreover, it may lead to an incorrect interpretation of both provisions of the 1951 Refugee Convention.[31]

19. The 1951 Refugee Convention does not, thus, envisage the revocation of refugee status where a recognized refugee falls within the scope of Article 33 (2). Therefore, it is not possible to revoke refugee status where a recognized refugee poses a danger to the security or to the community of the host State, including in cases if s/he is convicted of a criminal offence committed in the country of asylum. Refugee protection which was validly granted can be lawfully terminated only under the conditions enumerated in the cessation clauses of Article 1C, or on the basis of Article 1F(a) or (c) of the 1951 Refugee Convention.

20. In light of the foregoing, the proposed changes to Article 49 (3) AGIPA under the Draft Law as well as the current text of this article are incompatible with the 1951 Refugee Convention.

Recommendation: UNHCR recommends that Item 1 of the Draft Law on revocation of refugee status be amended to bring Article 49 (3) AGIPA into conformity with the 1951 Refugee Convention. This could be achieved by deleting Article 49 (3).

- ***Exceptions to the principle of non-refoulement***

21. UNHCR notes that Item 2 of the Draft Law aims to modify Article 50 (2) AGIPA, which stipulates exceptions to the principle of *non-refoulement*. According to the proposed amendment, the Estonian Police and Border Guard Board may expel or return a refugee to a state where his or her life or freedom would be threatened on account of race, nationality or religion or membership of

[29] CJEU, Cases C-57/09 and C-101/09, 09 November 2010, see para 86.
[30] CE, SSR, 21 May 1997, 148997, Pham, 148997, France: Conseil d'Etat, 21 May 1997, available at: http://www.refworld.org/cases,FRA_CDE,3ae6b67214.html.
[31] Among other things, there is a risk that decisions on whether a person poses a danger to the security or community of a Member State may be taken in proceedings where the concerned persons are not entitled to see all the evidence against them or to respond effectively, which increases the possibility of incorrect application of these provisions. That these concerns are justified has been confirmed by a 2007 review of national implementing legislation and state practice. See UNHCR, *Asylum in the European Union, A study on the implementation of the Qualification Directive*, November 2007, available at: http://www.unhcr.org/refworld/docid/473050632.html.

a particular social group or political opinions, if s/he is a danger to the security or the community of Estonia.

22. UNHCR further notes that a principal difference between the current version of Article 50 (2) and the proposed amendment is to extend the grounds for non-application of the *non-refoulement* principle with regard to those refugees who have been sentenced to imprisonment for committing second degree criminal offences like an intentional offence against a person or against a child, drug-related or an offence dangerous to the public, or blackmailing.

23. At the outset, UNHCR would like to point out that the principle of *non-refoulement*, provided under Article 33 (1) of the 1951 Refugee Convention, is a cornerstone of the international refugee protection regime. It is a fundamental obligation of States Parties to the 1951 Refugee Convention and/or its 1967 Protocol, to which no reservation is allowed and which has acquired customary nature.[32]

24. Article 33 (2) of the 1951 Refugee Convention provides for an exception to the obligation of *non-refoulement* in two situations: (i) where there are "reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he is"; and, (ii) where the refugee, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

(i) Where there are "reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he is"

25. It is a general principle of law that exceptions to international human rights treaties must be interpreted restrictively.[33] Thus, while states clearly maintain a margin of discretion in applying the exceptions to Article 33 (1), this margin of appreciation is not unlimited.[34]

26. The exceptional nature of Article 33 (2) was recognized by the delegates at the 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.[35] 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.[36] While the threat to security exception was ultimately included, the drafters intended that its application be restrictive.

27. 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.[37]

28. 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.[38] Indeed,

---

[32] UN High Commissioner for Refugees (UNHCR), Ministerial Communiqué, 8 December 2011, HCR/MINCOMMS/2011/6, available at: http://www.refworld.org/docid/4ee99bf42.html.
[33] Eur. Ct. H.R., *Klass v. Germany*, at para. 42 (1978); Eur. Ct. H.R., *Winterwerp v The Netherlands*, at para. 37 (1979).
[34] 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. 167-168) (Cambridge University Press, 2003).
[35] 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).
[36] 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).
[37] On the "danger to the security" exception, see also UN High Commissioner for Refugees (UNHCR), UNHCR intervention before the Supreme Court of Canada in the case of Manickavasagam Suresh (Appellant) and the Minister of Citizenship and Immigration, the Attorney General of Canada (Respondents), 8 March 2001, available at: http://www.refworld.org/docid/3e71bbe24.html.
[38] UN doc. A/CONF.2/SR.16, at 8 (23 November 1951).

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.[39]

29. UNHCR concurs[40] 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 Refugee Convention more generally, must be taken as establishing a high threshold for the operation of exceptions to the Convention."[41] 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."[42] 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."[43]

30. 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.[44] 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."[45]

31. 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."[46]

32. 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."[47]

33. 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 law and international humanitarian law.

34. To justify proportionality in the context of Article 33 (2) of the 1951 Refugee Convention: (1) there must be a rational connection between the removal of the refugee and the elimination of

[39] UN High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, pages 237-238, available at: http://www.refworld.org/docid/53e1dd114.html.
[40] See UN High Commissioner for Refugees (UNHCR), *Advisory Opinion from the Office of the United Nations High Commissioner for Refugees (UNHCR) on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees*, 6 January 2006, available at: http://www.refworld.org/docid/43de2da94.html.
[41] Lauterpacht and Bethlehem, *supra* note 34, at para. 169.
[42] Ibid.
[43] Lauterpacht and Bethlehem, *supra* note 34, at para. 147.
[44] UN High Commissioner for Refugees (UNHCR), *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, October 1997, hereinafter – "Grahl-Madsen", at page 140, comments (8), available at: http://www.refworld.org/docid/4785ee9d2.html.
[45] 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).
[46] Lauterpacht and Bethlehem, *supra* note 34, at para. 168.
[47] *Attorney General* v. *Zaoui*, Dec. No. CA20/04 (NZ CA, 30 September 2004), at para. 133.

the danger: (2) *refoulement* must be the last possible resort[48] to eliminate the danger; and, (3) the danger to the country of refuge must outweigh the risk to the refugee upon *refoulement*.

(ii) Where the refugee, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

35. A second exception to the prohibition on refoulement referred to in Article 33 (2) of the 1951 Refugee Convention arises when the refugee constitutes a danger to the community of the country of refuge. The word 'community' refers to the population in general and not the larger interests of the State.[49]

36. Although the 1951 Refugee Convention does not specifically list the crimes that come within the ambit of Article 33 (2), it is noteworthy that the term "crime" is doubly qualified by the terms "particularly" and "serious," thereby underscoring the high degree of gravity required for the crime to meet this prong of the exception. By comparison, Article 1F(b) of the 1951 Refugee Convention excludes from refugee protection anyone who "has committed a serious nonpolitical crime outside the country of refuge prior to his admission to that country as a refugee." The "serious non-political crime" ground was intended to apply to persons who had committed an act so grave and unconscionable – a "capital crime or a very grave punishable act" – as to render them undeserving of international protection. Consistent with the drafters' view that Article 33 (2) be applied narrowly, the addition of the second qualifier "particularly" must be construed to require an even higher threshold and an even more restrictive application than the "serious non-political crime" ground of exclusion. Logically, *refoulement* under Article 33 (2) should be considered only where the crimes usually defined as 'serious'—for example, rape, homicide, armed robbery, and arson—**are committed with aggravating factors**, or at least without significant mitigating circumstances".[50]

37. Therefore, a determination whether a crime is "particularly serious" for purposes of Article 33 (2), hinges not merely on whether the crime is "grave" but instead on whether it is "exceptionally grave". The factors to be considered must include, for example, the nature of the act, the actual harm inflicted, the intention of the perpetrator and the circumstances of the crime, the form of procedure used to prosecute the crime, the nature of the penalty imposed, and whether most jurisdictions would consider it a particularly serious crime.[51]

38. In other words, only egregious crimes warrant an exception to the non-refoulement principle. Additionally, conviction for a particularly serious crime in and of itself **is not sufficient**. The person concerned must, in view of this crime, also present a danger to the community. This would require an assessment of the future danger posed by the wrong-doer. A conviction is, therefore, an essential precondition, but it is the danger the refugee poses which is decisive. The fact that a person has been convicted of a particularly serious crime does not in and of itself entail that he/she also meets the "danger to the community" requirement. Whether a person constitutes a "danger to the community" must be established in each individual case, and will depend on the nature and circumstances of the particular crime and other relevant factors (i.e. evidence or likelihood of recidivism).[52] It necessarily follows that a refugee who has been convicted of a particularly serious crime but does not pose a danger to the community shall not be *refouled*.

---

[48] 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 means available, such as prosecution in the country of refuge or removal to a third country, then refoulement cannot be justified under Article 33 (2). See also case C-373/13, para 43.

[49] Lauterpacht & Bethlehem, *supra* note 34, p. 140 (para. 192).

[50] UNHCR, *Ahmed Ali v. Deborah Achim, Michael Chertoff, Secretary of the Department of Homeland Security, and Michael Mukasey, United States Attorney General. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner*, No. 06-1346, 28 November 2007, available at: http://www.unhcr.org/refworld/docid/47503a952.html.

[51] Ibid.

[52] See *Note on Non-Refoulement submitted by the High Commissioner for Refugees to the Executive Committee of the High Commissioner's Programme*, 29th Session, Subcommittee of the Whole on International Protection, para. 14 (Aug. 23, 1977) (noting that "where the refugee has been convicted of a serious criminal offence, it is important to take into account any mitigating factors and the possibilities of rehabilitation and reintegration within society."). See also Lauterpacht & Bethlehem, *supra* note 29, p. 140, (para. 191) (recognizing the need for an assessment of the facts of the case including mitigating factors).

39. Based on the above, not any offence and not any criminal conviction may justify expulsion of refugee under the terms of Article 33 (2). Expulsion measures against a refugee should only be taken in very exceptional cases and after due consideration of all the circumstances, including the possibility for the refugee to be admitted to a third country other than his or her country of origin.[53] Against this background UNHCR believes that the list of "particularly serious" crimes, as proposed under Item 2 of the Draft Law, goes beyond the scope of the exception laid out in Article 32 (2) of the 1951 Refugee Convention.

40. In UNHCR's view the proposed changes to Article 50 (2) of the AGIPA are also problematic insofar as neither the Draft Law, nor AGIPA offer an explanation on what is meant by the term 'danger to the community of Estonia'. From the *travaux préparatoires* in order to constitute a 'danger to the community' a single crime will in itself not make a man a danger to the community. The criminal acts of a refugee must be of scale and character that disrupts or upsets civil life, and particularly if this is done on a large scale, so that the refugee concerned actually becomes a public menace.[54] As with the word 'danger' in the national security exception, a high threshold applies in the context of danger to the community, i.e. it is only danger of a very serious nature.[55]

41. Therefore, the proposed changes to Article 50 (2) AGIPA under the Draft Law require to be aligned with Article 33 (2) of the 1951 Refugee Convention.

Recommendation: UNHCR recommends to amend Item 2 of the Draft Law by bringing Item 2 of Article 50 (2) AGIPA into conformity with the 1951 Refugee Convention. This could be achieved by excluding from the proposed list of offences those crimes which do not meet the criteria of a "particularly serious crime" as well as by clarifying the term "danger to the community of Estonia", which shall include only those refugees who incite public disorder or disrupt or upset civil life on a large scale. The text of Item 2 of Article 50 (2) AGIPA shall make it clear that it only applies to refugees who have been convicted of a "particularly serious crime" and, in addition, constitute a "danger to the community" of Estonia.

Also, UNHCR recommends amending Article 50 AGIPA with a safeguard clause allowing a refugee a reasonable time for seeking legal admission into another country pursuant to Article 32 (3) of the 1951 Refugee Convention.

IV. CONCLUDING OBSERVATIONS

42. In conclusion, UNHCR would like to emphasize that the provisions of Article 33 (2) of the 1951 Refugee Convention do not affect Estonia's *non-refoulement* obligations under international human rights law, which allow no exceptions. More specifically, this includes the absolute prohibition against *refoulement* to a risk of torture and other cruel, inhuman or degrading treatment or punishment under international human rights law, contained in and developed under *inter alia* Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Articles 6 and 7 of the International Covenant on Civil and Political Rights. Estonia is a Party to all of these international instruments.

43. Importantly, the absolute prohibition of *non-refoulement* under these human rights treaties prevails even in circumstances where the 1951 Refugee Convention is considered to be applicable. Accordingly, the European Court of Human Rights (ECtHR) continuously held, since its

[53] Pursuant to Article 32 (3) of the 1951 Refugee Convention, the host State shall allow a refugee whom it intends to expel, a reasonable period within which to seek legal admission into another country. Thus, should a reasoned decision - based on an assessment of necessity and proportionality, and reached in accordance with standards of due process - conclude that the refugee in question should no longer benefit from the protection of the principle of *non-refoulment*, then steps should be taken to allow him or her time to seek legal admission into another country.
[54] Grahl-Madsen 1963, p. 143-144.
[55] Lauterpacht & Bethlehem, *supra* note 34, p. 140 (para. 191).

judgment in Soering v. the United Kingdom[56] and most recently in the case of Saadi v Italy[57] that the prohibition of refoulement under Article 3 shall apply irrespective of the behavior of the applicant.

44. As an EU Member State, Estonia is also bound by the Charter of Fundamental Rights of the European Union (CFREU).[58] Article 4 CFREU prohibits torture and inhuman or degrading treatment or punishment. Article 19 (2) CFREU prohibits the return to a state where there is a serious risk that the person concerned would be tortured or subjected to other inhuman or degrading treatment or punishment. Similarly to the ECtHR, the CJEU has held that Member States may not transfer someone to another territory where that individual would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 CFREU.[59]

45. Therefore, under exceptional circumstances, protection against *refoulement* under Article 33 (2) of the 1951 Refugee Convention may be withdrawn from refugees who pose a threat to the security or the community of the host country. However, based on the absolute prohibition of *refoulement* under international and regional human rights law, the removal or expulsion of the refugee concerned will still be prohibited when there are substantial grounds for believing that s/he will be at risk of being subjected to torture or other cruel or inhuman or degrading treatment or punishment.

46. Moreover, reliance on Article 33 (2) of the 1951 Refugee Convention does not mean that the person concerned is no longer a refugee. The application of Article 33 (2) only means that the refugee cannot claim the benefits of the prohibition on *refoulement* under Article 33 (1). Consequently, such a refugee remains entitled to receive protection from UNHCR in accordance with its Statute as well as from other States Parties to the 1951 Refugee Convention for which this refugee does not pose a danger to the national security or community.[60] This has the important implication that whenever UNHCR or a State is able and willing to provide protection and prevent the refugee from being returned to territories where his or her life or freedom would be threatened, the refugee must be able to obtain protection there.

UNHCR Regional Representation for Northern Europe
Stockholm, 25 August 2017

[56] *Soering v. The United Kingdom*, 14038/88, Council of Europe: European Court of Human Rights, 7 July 1989, para. 88, at: http://www.unhcr.org/refworld/docid/3ae6b6fec.html.
[57] *Saadi v. Italy*, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: http://www.refworld.org/docid/47c6882e2.html.
[58] Article 52(5), Charter of Fundamental Rights of the European Union
[59] CJEU, Joined cases C-411/10 and C-493/10, *N. S. v. Secretary of State for the Home Department and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011, para. 75, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=117187&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1430427
[60] J.C. Hathaway, *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press 2005, pp. 344-345. Hathaway suggests that Article 33 should be read together with Articles 31 and 32, to allow dangerous refugees the opportunity to seek entry into a non-persecutory state, as an alternative to being returned to their home country.