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A Tortured Construction: The Illegal Immigration Reform and Immigrant Responsibility Act's Express Bar Denying Criminal Aliens Withholding of Deportation Defies the Principles of International Law Comment.

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COMMENTS

A TORTURED CONSTRUCTION: THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT'S EXPRESS BAR DENYING CRIMINAL ALIENS WITHHOLDING OF DEPORTATION DEFIES THE PRINCIPLES OF INTERNATIONAL LAW

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I. INTRODUCTION

Mercedes Lina Lopez-Galarza and her son arrived in the United States from Nicaragua in 1989.[1] Lopez-Galarza fled her home country to escape psychological, emotional, and sexual abuse apparently resulting from her father's affiliation with the Somoza regime, which directly opposed the Sandanista government.[2] At the age of eighteen, Lopez-Galarza was accused of supporting the Contras, an anti-Sandanista counter-revolutionary group.[3] Sandanista military officers arrested Lopez-Garcia and imprisoned her for fifteen days.[4] While she was imprisoned, Lopez-Galarza was "raped repeatedly, confined to a jail cell for long periods with-

1. *See* Lopez-Galarza v. INS, 99 F.3d 954, 957 (9th Cir. 1996) (describing events that caused Lopez-Galarza to flee Nicaragua).

2. *Lopez-Galarza*, 99 F.3d at 956–57. Based on the fact that the Sandanista regime was defeated in the February 1990 presidential election, the immigration judge exercised his discretion to deny Lopez-Galarza asylum and withholding of deportation, even though her ordeal satisfied the definition of persecution on account of political opinion or membership in a particular social group. *Id.* at 957, 960. The judge reasoned that Lopez-Galarza's traumatic experience constituted past persecution and that the Sandanistas' defeat eliminated the threat of future persecution. *Id.* at 958. On appeal, the United States Court of Appeals for the Ninth Circuit concluded that the Board of Immigration Appeals decision was not consistent with precedent and thus was an abuse discretion. *Id.* at 963. As argued in this Comment, the Ninth Circuit stated that humanitarian reasons influence a court's decision to exercise favorable discretion. *Id.* at 960. An adjudicator must consider the level of atrocity of the past persecution before exercising its discretion to deny relief. *Id.* at 963.

3. *Id.* at 957.

4. *Id.*

out food, forced to clean the bathrooms and floors of the men's jail cells, and subjected to other forms of physical abuse."[5] Upon her release, Lopez-Galarza and her family continued to be persecuted, apparently because her family refused to join, on ideological grounds, the Committee for the Defense of the Sandanistas (CDS).[6] Pro-Sandanista mobs threatened to drive the family from their residence, and stoned and vandalized their house.[7] The family was forced to purchase food on the black market when the CDS, which controlled food rations, took away the family's ration card.[8] Lopez-Galarza attempted to leave the country, but Nicaraguan officials refused to grant her a passport.[9] Ultimately, she bribed an official to issue her a passport and she fled Nicaragua to seek safety in the United States.[10]

Undoubtedly, these horrific acts of abuse constitute clear and convincing evidence that Lopez-Galarza's life and freedom would be jeopardized if she were returned to her country of origin. United States refugee law provides that persons such as Lopez-Galarza are eligible for protections such as asylum,[11] or, at a minimum, withholding of deportation.[12] Fur-

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5. *Id.*
6. *Id.*
7. *Lopez-Galarza*, 99 F.3d at 957.
8. *Id.*
9. *Id.*
10. *Id.*
11. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 604, Pub. L. No. 104-208 (Sept. 30, 1996), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1570, 1805 [hereinafter IIRIRA] (providing that alien who is refugee within meaning of section 101 (a)(42)(A) of Immigration and Nationality Act may be granted asylum at discretion of Attorney General). Section 604 of the IIRIRA amends section 208(a) of the Immigration and Nationality Act [hereinafter INA] to read as follows:

> (1) In General - Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or where applicable, section 235(b).

Id. IIRIRA section 604(b)(1) further clarifies the conditions for granting asylum by providing that "[t]he Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A)." *Id.* § 604(b)(1), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1807.

Prior to 1980, the INA contained no statutory language permitting persons fearing persecution to apply for asylum in the United States. *See* J. Michael Cavosie, Note, *Defending the Golden Door: The Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law*, 67 IND. L.J. 411, 420 (1992) (indicating that refugee procedures were first established by Immigration and Naturalization Act prior to 1980). Through amendments to the INA in 1980, Congress took steps to bring the United States into conformity with international law relating to refugee rights for the first time. *Id.* at 424. The most signifi-

thermore, principles of international law involving human rights necessitate that such an individual not be returned to a country where he or she faces the threat of being tortured.[13]

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cant item contained in these amendments is Congress's adoption of a statutory definition of refugee status. *Id.* Under the statute, a refugee is one who is unable or unwilling to return to a country because of persecution on "account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a), 8 U.S.C. § 1101(a)(42)(A) (1994). Under these amendments, then, a person seeking asylum must demonstrate that he or she is a refugee as a prerequisite to obtaining relief. *See* Surita v. INS, 95 F.3d 814, 818–19 (9th Cir. 1996) (emphasizing that asylum applicant must show she is refugee as defined in INA section 208(a) and statutorily eligible for asylum); *In re* S-P-, Int. Dec. 3287, at 5 (B.I.A. 1996) (holding that asylum applicant has burden of establishing that he or she falls within statutory definition of refugee); Maureen B. Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, 28 WILLAMETTE L. REV. 773, 776 (1992) (discussing process of obtaining asylum); Susan L. Pilcher, *Assessing Collateral Immigration Consequences of Criminal Justice Decisionmaking When the Defendant Is an Alien*, 8 FED. SENTENCING REP. 279, 281 (1996) (stating that asylum is discretionary if alien establishes "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion"). The Attorney General may grant asylum to an individual who qualifies under the definition of refugee. Maureen B. Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, 28 WILLAMETTE L. REV. 773, 776 (1992). The refugee is then entitled to apply for permanent resident status one year following the grant of asylum. *Id.*

12. *See* IIRIRA, *supra* note 11, § 305, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1658 (providing that removal of alien can be withheld if alien shows that life or freedom would be threatened). Section 305 of the IIRIRA redesignates INA section 243 as IIRIRA section 241, and amends the statute's language by providing: "(A) In General - Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." *Id.*; *see also* INS v. Stevic, 467 U.S. 407, 430 (1984) (clarifying that alien must establish "clear probability of persecution" to be granted withholding of deportation); Susan L. Pilcher, *Assessing Collateral Immigration Consequences of Criminal Justice Decisionmaking When the Defendant is an Alien*, 8 FED. SENTENCING REP. 279, 281 (1996) (mentioning that withholding of deportation is related to, but distinct from, asylum); Dorothy E. Graham, Comment, *Alien's Conviction of Aggravated Felony Operates As Absolute Bar to Withholding*, 18 SUFFOLK TRANSNAT'L L. REV. 799, 799 (1995) (explaining that withholding of deportation is available in United States for aliens who face persecution). Withholding of deportation is "less desirable than asylum because such relief does not allow an alien to apply for permanent resident status nor does it preclude deportation to a third country." Maureen B. Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, 28 WILLAMETTE L. REV. 773, 777 (1992). Even if withholding is not granted, an alien who faces persecution may not necessarily be removed to the country where he or she faces persecution. An alien may be removed to a country that will accept the individual if the alien cannot be removed to his or her country of birth or residence. *See* IIRIRA, *supra* note 11, § 305, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1655 (enumerating alternative countries to which alien may be removed).

13. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on Dec. 10, 1984, art. 3, S. TREATY DOC. 100–20, 19, 20, 23

This scenario would be strikingly different, however, if Lopez-Galarza were to be convicted of a criminal offense while in the United States. This conviction, under a recently-enacted amendment to the Immigration and Nationality Act (INA), would statutorily prevent her from seeking asylum and withholding of deportation.[14] Contrary to logic, Lopez-Galarza would be deported regardless of the certain threat of psychological, emotional, physical and sexual abuse she would endure upon return to her home country.[15]

I.L.M. 1027, 1028 [hereinafter Torture Convention] (extending protection under Article 3 to individuals who are in substantial danger of being subjected to torture); J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 125 (1988) (explaining that Article 3 of Convention applies to any person in danger of torture upon return to home country). The relevant section of Article 3(1) of the Torture Convention provides that: "[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Torture Convention, art. 3., S. TREATY DOC. No. 100–20, at 20, 23 I.L.M. at 1028; *see also* Committee Against Torture, Communication No. 41/1996, U.N. Doc. CAT/C/16/D/41/1996 (May 13, 1996), at 2, 8 (holding that Swedish authorities must refrain from returning woman to country where she was beaten, raped and imprisoned); Committee Against Torture, Communication No. 15/1994, U.N. Doc. CAT/C/13/D/15/1994 (Nov. 18, 1994), at 2, 11 (determining that Canada cannot return individual to country where he suffered acts of torture which included beatings and sleep deprivation).

14. *See* IIRIRA, *supra* note 11, § 305, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1659 (forbidding Attorney General from granting relief to alien convicted for "particularly serious crime"). Congress defines a particularly serious crime as a conviction for an aggravated felony for which the alien has been sentenced to at least five years. *Id.* Prior to the express bar to withholding imposed under section 305 of the IIRIRA, the Board of Immigration Appeals interpreted the withholding provision of the INA to bar relief to any alien it concluded had been convicted of a particularly serious crime. *See, e.g.,* Kofa v. INS, 60 F.3d 1084, 1091 (4th Cir. 1995) (stressing that Congress enacted language in order to bar aggravated felons from withholding or asylum under Immigration Act of 1990); Nguyen v. INS, 53 F.3d 310, 311 (10th Cir. 1995) (indicating that "aggravated felon is conclusively disqualified from withholding of deportation"); Mansoori v. INS, 32 F.3d 1020, 1022 (7th Cir. 1994) (upholding precedent barring aggravated felons from withholding); Tarik H. Sultan, *Immigration Consequences of Criminal Convictions*, ARIZ. ATT'Y, June 1994, at 15, 30 (noting conviction for aggravated felony precludes alien from obtaining asylum or withholding of deportation).

15. *See* Garcia v. INS, 7 F.3d 1320, 1324 (7th Cir. 1993) (holding that conviction for particularly serious crime renders alien danger to United States, and thus ineligible for withholding of deportation); Mosquera-Perez v. INS, 3 F.3d 553, 559 (1st Cir. 1993) (opining that Board of Immigration Appeals properly declined to determine whether aggravated felon was danger to community, automatically barring such alien from withholding of deportation); Matter of Carballe, 19 I. & N. Dec. 357, 361 (B.I.A. 1986) (denying withholding of deportation to alien convicted of aggravated felony); *see also* Kathleen M. Kelly, *Immigration Law*, 73 DENV. U. L. REV. 787, 808 (1996) (addressing Tenth Circuit's holding that conviction for aggravated felony precludes alien from withholding of deportation).

Ms. Lopez-Galarza's example raises an important issue concerning the right of a refugee not to be returned to a country where he or she faces a certain threat of torture, or a threat to life or freedom.[16] Significantly, the United States has never *fully* complied with international agreements concerning such refugee rights.[17] This lack of compliance by the United States is exacerbated by two conflicting interests: the growing insistence on keeping aliens outside the nation's borders[18] and protecting the burgeoning number of international refugees who endure gross violations of

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Despite these holdings to the contrary, some authorities contend that the humanitarian nature of protecting refugees from enduring severe persecution necessitates consideration of the merits of a claim before protection is denied. *Cf.* Matter of Gonzalez, 19 I. & N. Dec. 682, 687 (B.I.A. 1988) (Heilman, concurring) (opining that nature of asylum process requires evidence of harm before denying asylum).

16. *See* Letter from John McCallin, Representative, Office of United Nations High Commissioner for Refugees, to Alan K. Simpson, Senator, United States Senate 1 (May 1, 1990) (on file with the *St. Mary's Law Journal*) (emphasizing that crucial principle in asylum adjudication is protection of person's life or liberty). In this regard, the Office of United Nations High Commissioner for Refugees (UNHCR) calls for an individualized review when a refugee has perpetrated a particularly serious crime and poses a threat to the community. *Id.* at 3. According to the UNHCR, if there is the possibility that the refugee would endure severe persecution, such as execution or torture, the threat the alien poses to the community must be grave to justify returning the alien to such persecution. *Id.* Indeed, deportation has been described as a severe sanction which "surpasses all but the most Draconian criminal penalties." Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977). This recognition has been emphasized in Congress's intent under section 212(c) of the INA to allow "worthy aliens" to remain in the United States with family members. *Id.*

17. The long-standing automatic bar to withholding of deportation in United States' immigration law violates the principle of nonrefoulement contained in the 1967 Protocol Relating to the Status of Refugees. Letter from Anne Willem Bijleveld, Representative, Office of United Nations High Commissioner for Refugees, to Nadine K. Wettstein, American Immigration Lawyers Association 1 (May 15, 1996) (on file with the *St. Mary's Law Journal*).

18. *See Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. of the Judiciary*, 104th Cong. (1996) (statement of David A. Martin, General Counsel, Immigration and Naturalization Service (INS)) (stating that between January 1993 and July 1996, 113,000 criminal aliens were removed by INS), *available in* 1996 WL 10830465, at *3; *INS to Announce Record Deportation Numbers*, SAN ANTONIO EXPRESS-NEWS, Oct. 28, 1996, at A1 (announcing record number of deported aliens in 1996 as part of crackdown on illegal immigration). An all-time high number of 67,000 aliens were deported in fiscal year 1996, of which 37,000 were criminals. *Id.* The increased concern over deportation of aliens, particularly criminal aliens, has been intensified by recent acts of terrorism. *See* Gerald F. Seib & John Harwood, *Oklahoma City Bombing: Oklahoma Terror Bombing May Intensify Hard-Line Views on Crime and Immigration*, WALL ST. J., Apr. 21, 1995, at A12 (asserting that Oklahoma bombing could accelerate antiterrorism legislation developing since 1993 World Trade Center bombing). The IIRIRA represents a culmination of congressional efforts to enact stricter immigration laws aimed at deterring illegal immigration. 142 CONG. REC. H11071–72 (daily ed. Sept. 25, 1996) (statement of Rep. Dreier).

their human rights.[19] As a result of this conflict, United States refugee law is subject to continual change.[20]

The recent amendments to the INA provide a contemporary example of the volatility and inconsistency of United States immigration policy. Specifically, before the 1996 amendments to the INA were passed, the United States Board of Immigration Appeals automatically barred aliens convicted of aggravated felonies from obtaining "withholding of deportation."[21] In April of 1996, however, Congress enacted the Antiterrorism and Effective Death Penalty Act[22] (AEDPA) which, under section 413(f), removed this automatic bar to withholding and granted the Attorney General the discretion to withhold the deportation of an alien, regardless of the alien's conviction of an aggravated felony.[23]

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19. *See* 141 CONG. REC. S18366 (daily ed. Dec. 11, 1995) (statement of Mary Robinson, President of Ireland) (addressing failure of international community to respond to gross human rights violations in Rwanda and Zaire); *Country Reports on Human Rights Practices for 1995: Before the Subcomm. on International Operations and Human Rights*, 104th Cong. (1996) (statement of John Shattuck) (testifying that human rights abuses continued unabated in 1995), *available in* 1996 WL 7138003, at *2. Human rights abuses include "extrajudicial killings, disappearances, torture, arbitrary detention, and denial of fair trial." *Id.*; *see also Rwandan Troops Hit Refugees*, SAN ANTONIO EXPRESS-NEWS, Oct. 27, 1996, at A3 (noting that attack on Rwandan refugees possibly resulted in deaths of hundreds).

20. *See* IIRIRA, *supra* note 11, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1570 (amending portions of INA revised only six months before); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132 (Apr. 24, 1996), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) 1214 [hereinafter AEDPA] (containing amendments to withholding provision which President Clinton signed).

21. *See Kofa*, 60 F.3d at 1091 (stressing that Congress enacted language to bar aggravated felons from withholding or asylum); *Nguyen*, 53 F.3d at 311 (indicating that "an aggravated felon is conclusively disqualified from withholding of deportation"); Al-Salehi v. INS, 47 F.3d 390, 395 (10th Cir. 1995) (determining that bar to withholding does not violate international treaty); *Mansoori*, 32 F.3d at 1022 (upholding precedent barring aggravated felons from withholding of deportation); *see also* Elwin Griffith, *Problems of Interpretation in Asylum and Withholding of Deportation Proceedings Under the Immigration and Nationality Act*, 18 LOY. L.A. INT'L & COMP. L.J. 255, 285 (1996) (discussing how, prior to IIRIRA, bar to withholding was not expressly stated in INA but was interpreted to act as such).

22. AEDPA, *supra* note 20, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1214.

23. AEDPA, *supra* note 20, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1269. Section 413(f) of the AEDPA provides:

> (3) Notwithstanding any other provision of law, paragraph (1) shall apply to any alien if the Attorney General determines, in the discretion of the Attorney General, that (A) such alien's life or freedom would be threatened, in the country to which such alien would be deported or returned, on account of race, religion, nationality, membership in a particular social group, or political opinion; and (B) the application of paragraph (1) to such alien is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees.

Nearly six months later, however, Congress essentially repealed section 413(f) of the AEDPA by passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[24] Under section 305 of the newly-enacted IIRIRA, an alien convicted of an aggravated felony and sentenced to at least a five-year prison term is again automatically barred from having deportation withheld.[25] Furthermore, the Attorney General may now deny withholding to a criminal alien even though his or her prison term may not meet the minimum five-year sentence requirement.[26] Nonetheless, in both cases, section 305 of the IIRIRA runs contrary to the obligations established under Article 33(1) of the 1951 Convention Relating to the Status of Refugees (Convention),[27] which was adopted in its entirety by the 1967 United Nations Protocol Relating the Status of Refugees (Protocol).[28]

Id. According to the UNHCR, section 413(f) of the AEDPA is consistent with international law relating to refugee rights because it requires the Attorney General to undertake an individualized review of withholding eligibility. *See* 142 CONG. REC. S11904–06 (daily ed. Sept. 30, 1996) (statement of UNHCR Rep. Anne Willem Bijleveld) (arguing that AEDPA section 413(f) called for case-by-case analysis when determining whether to deny withholding); Letter from Anne Willem Bijleveld, Representative, Office of United Nations High Commissioner for Refugees, to Nadine K. Wettstein, American Immigration Lawyers Association 3 (May 15, 1996) (on file with the *St. Mary's Law Journal*) (approving language in AEDPA section 413(f) as consistent with mandate of 1951 United Nations Convention).

24. *See* IIRIRA, *supra* note 11, § 305, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1570, 1651 (designating section 241 as "Detention and Removal of Aliens Ordered Removed," effective April 1997); *see also* IIRIRA, *supra* note 11, § 308(g)(7)(B), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1688 (replacing phrase "withholding of deportation" with "withholding of removal"); 142 CONG. REC. S11904–06 (daily ed. Sept. 30, 1996) (statement of UNHCR Rep. Anne Willem Bijleveld) (foretelling that AEDPA section 413(f) would not be effective following adoption of amendments under IIRIRA).

25. IIRIRA, *supra* note 11, § 305(b)(3)(8)(iv), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1659. The relevant portion of the new amendment to the Immigration and Nationality Act provides that "an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least five years shall be considered to have committed a particularly serious crime." *Id.*

26. *Id.* Section 305 states, in pertinent part, states that "notwithstanding the length of sentence imposed, [the Attorney General may determine that] an alien has been convicted of a particularly serious crime." *Id.*

27. Convention Relating to the Status of Refugees, July 28, 1951, art. 33, para. 1, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176 [hereinafter Convention].

28. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. I, para. 1, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 268 (1968) [hereinafter Protocol] (adopting Articles 2 through 34[2] of Convention). Article 33(2) of the Convention contains a narrow exception to the right of nonrefoulement, but does not eliminate the need to review the particular merits of a claim. Letter from John McCallin, Representative, Office of United Nations High Commissioner for Refugees, to Alan K. Simpson, Senator, United States Senate 3 (May 1, 1990) (on file with the *St. Mary's Law Journal*). The UNHCR argues that an

Article 33(1) of the Convention, as adopted by the Protocol, sets out the minimum protection that a refugee must be provided, which has been termed "nonrefoulement."[29] Article 33(1) establishes a mandatory requirement of "nonrefoulement," also termed "withholding of deportation" under United States refugee law, which, in essence, prohibits the forced return of a refugee to a country where his or her life or freedom would be threatened.[30] While narrow exceptions to the right of nonrefoulement exist,[31] they do not extinguish the United States' obliga-

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adjudicator must examine the degree of persecution or serious danger to life, liberty or freedom before denying protection of Article 33(1)). *Id.*; *see also* Elwin Griffith, *Problems of Interpretation in Asylum and Withholding of Deportation Proceedings Under the Immigration and Nationality Act*, 18 LOY. L.A. & INT'L COMP. L.J. 255, 291 (1996) (arguing that right to nonrefoulement is not absolute, but rather that danger to community must be severe in order to negate right to nonrefoulement). *But see Garcia*, 7 F.3d at 1325–26 (holding bar to withholding is consistent with Convention since Article 33(2) is ambiguous as to meaning of "particularly serious crime").

29. *See* Convention, *supra* note 27, art. 33, para. 1, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 176 (adopted by Protocol, *supra* note 28, art. I, para. 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268) (mandating refugees not be returned to country if facing threat of persecution); *cf.* Leon Wildes, *The Dilemma of the Refugee: His Standard for Relief*, 4 CARDOZO L. REV. 353, 369–70 (1983) (explaining that portions of Refugee Act were duplicated verbatim from Protocol with almost no change in language); David D. Jividen, Comment, *Rediscovering the Burden of Proof for Asylum and the Withholding of Deportation*, 54 U. CIN. L. REV. 943, 953–54 (1986) (noting Act's definition of refugee embodies 1967 Protocol's definition of refugee).

30. *See* Convention, *supra* note 27, art. 33, para. 11, 19 U.S.T. at 6276, 189 U.N.T.S. at 176 (adopted by Protocol, *supra* note 28, art. I, para. 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268) (articulating principle of nonrefoulement). Article 33(1) of the Convention, as adopted by the Protocol, states: "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." Convention, *supra* note 27, art. 33, para. 1, 19 U.S.T. at 6276, 189 U.N.T.S. at 176 (adopted by Protocol, *supra* note 28, art. I, para. 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268). Prior to 1980, withholding of deportation was discretionary; however, the Refugee Act of 1980 made withholding of deportation mandatory if the alien satisfied statutory requirements. Dorothy E. Graham, Comment, *Alien's Conviction of Aggravated Felony Operates As Absolute Bar to Withholding*, 18 SUFFOLK TRANSNAT'L L. REV. 799, 802–03 (1995). The mandatory language is consistent with the language in Article 33 of the Convention. *Id.*

31. *See* Convention, *supra* note 27, art. 1, para. F, 19 U.S.T. 6259, 6263–64, 189 U.N.T.S. 150, 156 (enumerating circumstances by which countries may deny withholding of deportation). Under Article 1F of the Convention, a country may deny withholding to a refugee who has committed a crime against humanity, committed a serious non-political crime before coming to the refuge country, or committed acts "contrary to the purposes and principles of the United Nations." *Id.* In addition, under Article 33(2) of the Convention, as adopted by the Protocol, withholding may be denied to a refugee for "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, consti-

tion to provide an opportunity for an applicant to establish a right to have deportation withheld due to threat of persecution.[32]

This Comment analyzes section 305 of the IIRIRA in light of international agreements regarding the protection of aliens and refugees. Part II traces the historical development of the principle of nonrefoulement in United States refugee law under the 1951 Convention and the 1967 Protocol. In addition, Part II discusses the Board of Immigration Appeals' varying interpretations of the withholding of deportation provision under the Refugee Act of 1980 and the Immigration Act of 1990. Part III describes the 1996 amendments to the INA and discusses the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[33] Part IV asserts that section 305 of the IIRIRA is inconsistent with international law. This Comment suggests that section 413(f) of the AEDPA presented a significant move towards upholding the United States' obligations under the 1967 Protocol. Part V concludes by recommending that a case-by-case standard, rather than an automatic bar, should be used in determining whether aliens convicted of criminal offenses have a right to have deportation withheld.

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tutes a danger to the community of that country." Convention, *supra* note 27, art. 33, para. 2, 19 U.S.T. at 6263–64, 189 U.N.T.S. at 176 (adopted by Protocol, *supra* note 28, art. I, para. 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268).

32. *See* OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 154, at 36 (2d ed. 1988) (stating that exclusion from withholding for "particularly serious crime" is invoked only in "extreme cases"); Letter from John McCallin, Representative, Office of United Nations High Commissioner for Refugees, to Alan K. Simpson, Senator, United States Senate 3 (May 1, 1990) (on file with the *St. Mary's Law Journal*) (advising that alien's case should undergo balancing test weighing dangerousness to community against degree of persecution); Letter from Anne Willem Bijleveld, Representative, Office of United Nations High Commissioner for Refugees, to Nadine K. Wettstein, American Immigration Lawyers Association 3 (May 15, 1996) (on file with the *St. Mary's Law Journal*) (arguing that elimination of separate determination of dangerousness violates 1951 Convention); *see also* Elwin Griffith, *Problems of Interpretation in Asylum and Withholding of Deportation Proceedings Under the Immigration and Nationality Act*, 18 LOY. L.A. INT'L & COMP. L.J. 255, 291 (1996) (emphasizing that alien's danger to community must be serious to return alien to face persecution).

33. Torture Convention, *supra* note 13, S. TREATY DOC. No. 100–20, at 19, 23 I.L.M. at 1027.

II. Minimum Obligation of Nonrefoulement Under International Law

A. *The 1951 United Nations Convention Relating to the Status of Refugees*

To understand the rationale behind implementation of a case-by-case determination of granting withholding of deportation to criminal aliens, a review of Congress's steps toward aligning American law with the minimum standards of protection owed to refugees under international law is necessary. The most historically significant international instrument upon which United States refugee law is based is the 1951 United Nations Convention Relating to the Status of Refugees (Convention).[34]

Prompted by events surrounding World War II, the Convention arose out of an increasing international concern for refugees.[35] The protections extended under the Convention were originally intended as temporary measures to address the rising number of displaced individuals in Europe,[36] as evidenced by the events occurring prior to 1951.[37] The substantive language of the Convention provides two principles relevant to

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34. Convention, *supra* note 27, 19 U.S.T. at 6259, 189 U.N.T.S. at 150; *see* Nagendra Singh, Enforcement of Human Rights: In Peace and War and the Future of Humanity 152 (1986) (explaining that Convention was adopted on July 28, 1951 by United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons). The Convention became effective on April 22, 1954. *Id.* Twenty-six states were represented at the Convention, including the United States. Convention, *supra* note 27, 19 U.S.T. at 6260, 189 U.N.T.S. 138; *see also* Guy S. Goodwin-Gill, The Refugee in International Law 13 (1983) (recognizing that Convention continues to be foremost international instrument protecting rights of refugees); Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 Harv. Hum. Rts. J. 229, 299 (1996) (arguing that Convention remains primary instrument for protection of refugees).

35. *See* Office of United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees para. 5, at 3 (2d ed. 1988) (noting that uniform agreement protecting refugees was necessary following World War II); David A. Martin, *The New Asylum Seekers* (stating that millions of displaced individuals were in Europe during 1940s and 1950s), *in* The New Asylum Seekers: Refugee Law in the 1980s 1, 2 (David A. Martin ed., 1988); Ved P. Nanda, *Refugee Law and Policy* (stating that Convention and other international instruments which followed World War II focused primarily on protecting individuals fleeing their homeland because of government persecution), *in* Refugee Law and Policy 3, 3 (Ved P. Nanda ed., 1989); Michele Altemus, *The Sanctuary Movement*, 9 Whittier L. Rev. 683, 688 (1988) (explaining that Convention arose because of massive displacement resulting from World War II).

36. *See* Convention, *supra* note 27, art. 1, para. A, cl. 2, 19 U.S.T. at 6261, 189 U.N.T.S. at 152 (limiting protection to individuals affected by events before January 1, 1951); Guy S. Goodwin-Gill, The Refugee in International Law 12 (1983) (reiterating fact that Convention's protection was limited to individuals eligible for refugee status as result of events before January 1, 1951); Joan Fitzpatrick, *Revitalizing the 1951 Refugee*

current refugee law in the United States. The most essential principle established by the Convention is the definition of the term "refugee."[38] In Article 1, the Convention establishes that a refugee is an individual who has a well-founded fear of persecution in his or her country of origin, based on "race, religion, nationality, membership in a particular social group, or political opinion."[39]

Once an individual has demonstrated a well-founded fear of persecution on account of one of these five bases, the applicant must then avoid

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Convention, 9 HARV. HUM. RTS. J. 229, 232 (1996) (explaining that Convention's protections were limited to certain individuals).

37. *See* Convention, *supra* note 27, art. 1, para. A., cl. 2, 19 U.S.T. at 6261, 189 U.N.T.S. at 152 (stating that Article 1 of Convention applies to events occurring prior to 1952); Lung-Chu Chen, *The United States Supreme Court and the Protection of Refugees*, 67 ST. JOHN'S L. REV. 469, 471 (1993) (supporting assertion that Convention was designed to protect European refugees prior to 1951); Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 232 (1996) (asserting that temporal limitation of Convention reflected reluctance of contracting nation-states to be bound by open-ended treaty). The drafters of the Convention were Western European and North American nation-states seeking to address the problem of persons displaced in Europe due to World War II. *Id.* at 232–33; *cf.* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 13 (1983) (recognizing that Convention's definition of refugee would not cover all individuals). The United Nations Conference of Plenipotentiaries recommended a broader interpretation of the Convention that extended to refugees within a state's territory. *Id.* Notably, the Convention not only seeks to uphold humanitarian rights by establishing uniform standards of treatment given to refugees, it also seeks to even out the burden that countries with liberal benefits undertake. *See* Convention, *supra* note 27, preamble, 19 U.S.T. at 6260, 189 U.N.T.S. at 150 (announcing goal of protecting fundamental rights and freedoms through international cooperation).

38. *See* Convention, *supra* note 27, art. 1, para. A, cl. 2, 19 U.S.T. at 6261, 189 U.N.T.S. at 152 (defining "refugee" as individual who left his or her own country "owing to a well-founded fear of being persecuted . . ."). The UNHCR argues that two elements should be considered when determining refugee status: one, the individual's frame of mind, and two, whether that frame of mind is "supported by an objective situation." OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 38, at 11–12 (2d ed. 1988).

39. Convention, *supra* note 27, art. 1, para. A, cl. 2, 19 U.S.T. at 6261, 189 U.N.T.S. at 152; *see also* Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1197–98 (1994) (noting that definition of refugee originates in constitution of International Refugee Organization (IRO)). The IRO defined a refugee as an individual within a category that "expressed valid objections" to returning to his or her country of naturalization or residence. *Id.* According to Musalo, the United States advocated such a generous definition because "individuals ha[ve] the right to choose to migrate in search of personal freedom." *Id.* at 1198.

several bases for disqualification in order to be classified as a refugee.[40] Specifically, Article 1(F) of the Convention prevents individuals whose conduct runs contrary to the purposes of the Convention from being defined as refugees regardless of whether those persons subsequently face persecution themselves.[41] For example, Article 1(F) prohibits individuals who have committed war crimes or crimes against peace and humanity from attaining refugee status.[42] Article 1(F) also disqualifies individuals who have committed serious nonpolitical crimes before arriving in the

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40. *See* Convention, *supra* note 27, art. 1, para. C, 19 U.S.T. at 6262, 189 U.N.T.S. 150, at 156 (listing circumstances not protected by Convention). The following situations terminate the Convention's protection of a refugee under Article 1(C):

> (1) he has voluntarily re-availed himself of the protection of the country of his nationality; or
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> (2) having lost his nationality, he has voluntarily reacquired it; or
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> (3) he has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
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> (4) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
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> (5) he can no longer, because the circumstances in connexion [sic] with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
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> (6) being a person who has no nationality he is, because the circumstances in connexion [sic] with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

Id.

41. *See* Convention, *supra* note 27, at art. 1, para. F, 19 U.S.T. at 6263–64, 189 U.N.T.S. at 156 (stating circumstances which preclude Convention's protection). The Convention shall not apply to a person when:

> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purpose and principles of the United Nations.

Id.

42. Convention, *supra* note 27, at art. 1, para. F, 19 U.S.T. at 6263–64, 189 U.N.T.S. at 156. In contrast, section 305 of the IIRIRA amends the language in the withholding provision, previously designated as section 243(h)(2)(A) of the INA, by stating that withholding does not apply to an alien who has "ordered, incited, assisted, or otherwise participated in the persecution of an individual" on account of one of the five statutory bases of religion, political opinion, race, religion, group membership or nationality. IIRIRA, *supra* note 11, § 305, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1658.

country of refuge or who have acted contrary to the principles of the United Nations.[43]

In addition to defining refugee, the Convention also establishes an obligation of "nonrefoulement" which, under United States' immigration law, is referred to as "withholding of deportation" or the "withholding of removal."[44] Under Article 33(1) of the Convention, no contracting nation can return a person classified as a refugee under Article 1 to a country where his or her life or freedom would be threatened on account of one of the five bases listed above.[45] Although the language in Article 33(1) purports to establish a mandatory right to nonrefoulement, this right is not absolute.[46] According to a narrowly-drawn provision in Article 33(2), a contracting nation may return a refugee to his or her home country, even though he or she faces persecution upon return, if he or she

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43. *See* Convention, *supra* note 27, art. 1, para. F, 19 U.S.T. at 6263–64, 189 U.N.T.S. at 156 (denying relief under subsection (C) when "there are serious grounds for considering that the alien has committed" serious nonpolitical crime outside United States); IIRIRA, *supra* note 11, § 305, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1658 (denying withholding to alien when grounds exist for believing alien may have committed serious nonpolitical crime or poses danger to community under subsection (iii) or (iv)).

44. *See* Evangeline G. Abriel, *Presumed Ineligible: The Effect of Criminal Convictions on Applications for Asylum and Withholding of Deportation Under Section 515 of the Immigration Act of 1990*, 6 GEO. IMMIGR. L.J. 27, 31–2 (1992) (tracing definition of "refugee" in United States law to Protocol); Leon Wildes, *The Dilemma of the Refugee: His Standard for Relief*, 4 CARDOZO L. REV. 353, 369–70 (1983) (explaining that since portions of Refugee Act were copied from Protocol, almost no change in language occurred).

45. *See* Convention, *supra* note 27, art. 33, para. 1, 19 U.S.T. at 6276, 189 U.N.T.S. at 176 (proclaiming that Article 33(1) of Convention prohibits expulsion or return of refugee where life or freedom would be threatened). Article 33(1) states: "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." *Id.*; *see also* Elwin Griffith, *Problems of Interpretation in Asylum and Deportation Proceedings Under the Immigration and Nationality Act*, 18 LOY. L.A. INT'L & COMP. L.J. 255, 256 (1996) (reiterating that accession to Convention mandates that Attorney General grant withholding to individual satisfying refugee definition).

46. *See* Convention, *supra* note 27, art. 33, para. 2, 19 U.S.T. at 6276, 189 U.N.T.S. at 176 (outlining grounds under which refugee may be returned by refuge country). Article 33(2) states that "[t]he benefit of the present provision [nonrefoulement] may not, however, be claimed by a refugee for whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." *Id.*; *see also* Garcia v. INS, 7 F.3d 1320, 1324–25 (7th Cir. 1993) (exercising right, under Article 33(2) of Convention, to preclude criminal alien's relief from withholding).

has been convicted of a "particularly serious crime" and has been found to constitute a danger to the community.[47]

The drafters of the Convention believed that the interest of countries of refuge in securing the safety of their communities must be balanced with the interest of refugees in not being returned to countries where they face persecution.[48] Thus, an individualized evaluation of the circumstances of each particular case, as opposed to the formalistic use of objective criteria, is arguably necessary to comply with the Convention.[49]

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47. Convention, *supra* note 27, art. 33, para. 2, 19 U.S.T. at 6276, 189 U.N.T.S. at 176; *see* Letter from John McCallin, Representative, Office of United Nations High Commissioner for Refugees, to Alan K. Simpson, Senator, United States Senate 3 (May 1, 1990) (on file with the *St. Mary's Law Journal*) (recognizing that exception to nonrefoulement exists, but "should be interpreted restrictively"). McCallin urges that when an alien has been convicted of a "particularly serious crime" and is considered a danger to the United States community, an adjudicator must still examine the serious danger to life, liberty or freedom faced by the individual if returned. *Id.*

48. *See* OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 151, at 36 (2d ed. 1988) (stating that aim of Article 1(F)(b) of Convention is to "protect the community of a receiving country from the danger of admitting a refugee who has committed a serious crime"). Article 1(F)(b) also seeks to "render due justice to a refugee who has committed a common crime of a less serious nature or has committed a political offense." *Id.*; *see also* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 63 (1983) (explaining that objective of exclusion provision is to "obtain a humanitarian balance" between potential threat to community and interest in avoiding fear of persecution); Evangeline G. Abriel, *Presumed Ineligible: The Effect of Criminal Convictions on Applications for Asylum and Withholding of Deportation Under Section 515 of the Immigration Act of 1990*, 6 GEO. IMMIGR. L.J. 27, 35 (1992) (arguing that drafters of Convention believed balance should be struck between degree of persecution and interest in safety); Letter from Anne Willem Bijleveld, Representative, Office of United Nations High Commissioner for Refugees, to Nadine K. Wettstein, American Immigration Lawyers Association 2 (May 15, 1996) (on file with the *St. Mary's Law Journal*) (stating that situations exist where interest to return refugee does not outweigh gravity of persecution to be inflicted upon deportation).

49. *See* American Immigration Lawyers Assoc., Amicus Curiae Brief in Response to Board Request for Brief on Section 413(f) of the AEDPA, *submitted to* Executive Office for Immigration Review, Board of Immigration Appeals (May 20, 1996), at 15 (asserting that bar to withholding of deportation violates United States law and international treaty obligations); Letter from Anne Willem Bijleveld, Representative, Office of United Nations High Commissioner for Refugees, to Nadine K. Wettstein, American Immigration Lawyers Association 2 (May 15, 1996) (on file with the *St. Mary's Law Journal*) (advising that continued bar to withholding of deportation violates Protocol).

B. *The 1967 United Nations Protocol Relating to the Status of Refugees*

Notably, the United States and other non-European countries did not sign the 1951 Convention.[50] However, the United States did accede to the 1967 United Nations Protocol Relating to the Status of Refugees,[51] which essentially adopted and extended the Convention's protections.[52] The Protocol modernized the Convention by removing the Convention's temporal and geographic limitations in order to meet the burgeoning refugee problem that persisted beyond World War II.[53]

The greatest significance of the Protocol continues to be its embodiment of the international community's commitment to comply with Arti-

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50. *See* Brian K. McCalmon, Note, *States, Refugees, and Self-Defense*, 10 GEO. IMMIGR. L.J. 215, 218 (1996) (stating that United States did not sign Convention). Eighteen out of the twenty-three European nations became parties to the Convention before 1960. David A. Martin, *The New Asylum Seekers*, *in* THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s 2 (David A. Martin ed., 1988); *cf.* Kofa v. INS, 60 F.3d 1084, 1090 (4th Cir. 1995) (explaining that United States is bound to Convention, even though it is not signatory).

51. *See* Mosquera-Perez v. INS, 3 F.3d 553, 556–57 (1st Cir. 1993) (explaining that Refugee Act of 1980 attempted to comply with Protocol by incorporating Articles 2 through 34 of Convention); OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 9, at 4 (2d ed. 1988) (concluding that accession to Protocol binds signatories to Convention's principles); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 20 CORNELL INT'L L.J. 625, 634 (1993) (reporting that Protocol incorporated Articles 2 through 34 of Convention, most of which United States incorporated into Refugee Act of 1980); Lowenstein International Human Rights Clinic, *Aliens and the Duty of Nonrefoulement*: Haitian Centers Council v. McNary, 15 IMMIGR. & NATIONALITY L. REV. 333, 346 (1993) (commenting that nonrefoulement is fundamental principle in international law prohibiting return of refugee fearing persecution); J. Michael Cavosie, Note, *Defending the Golden Door: The Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law*, 67 IND. L.J. 411, 425 (1992) (commenting that definition of refugee in Refugee Act resembled definition in Convention). This language was adopted into former INA section 243(h). *Id.*

52. *See* Protocol, *supra* note 28, art. I, para. 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268 (adopting fundamental principles espoused in 1951 Convention in their entirety); 142 CONG. REC. S11905 (daily ed. Sept. 30, 1996) (statement of UNHCR Rep. Anne Willem Bijleveld) (noting United States' obligation to Convention's principles through 1967 Protocol's incorporation of Convention); *see also* Carlos Ortiz Miranda, *Toward a Broader Definition of Refugee: 20th Century Development Trends*, 20 CAL. W. INT'L L.J. 315, 319 (1990) (stating that Protocol sought to eliminate temporal limitation of Convention).

53. *See* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 13 (1983) (discussing Protocol's extension of Convention's protection to individuals otherwise not within Convention's limited protection); Brian K. McCalmon, Note, *States, Refugees, and Self-Defense*, 10 GEO. IMMIGR. L.J. 215, 218 (1996) (noting that Protocol's expansion of Convention's protections was triggered by decolonization of African states in 1960s).

cle 33(1) of the Convention.[54] No contracting nation-state may be a party to the Protocol without agreeing to the minimum standard of protection under Article 33(1) of the Convention; that is, the mandatory requirement of withholding of deportation of refugees who would otherwise face certain persecution.[55]

C. *Interpreting the Refugee Act of 1980: Establishing Formal Procedures for Asylum and Withholding of Deportation*

Although the United States acceded to the 1967 Protocol, it did not establish formal procedures for granting asylum and withholding of deportation until the Refugee Act of 1980,[56] which established the first statutory procedures for administration of refugee and asylum cases in the United States.[57] Prior to the Refugee Act, the Immigration and Naturalization Service conducted asylum proceedings through regulations pursu-

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54. *See* Protocol, *supra* note 28, art. I, para. 2, 19 U.S.T. at 6225, 606 U.N.T.S. at 268 (incorporating Convention's provisions while extending its protections to additional classes of individuals).

55. *See* Protocol, *supra* note 28, art. I, para. 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268 (setting out in Article 1 that contracting parties to Protocol must accede to Articles 2 through 34 of Convention); Lowenstein International Human Rights Clinic, *Aliens and the Duty of Nonrefoulement*: Haitian Centers Council v. McNary, 15 IMMIGR. & NATIONALITY L. REV. 333, 346 (1994) (arguing that principle of nonrefoulement is nonderogable and that no reservation should be allowed).

56. *See* Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 437 (1992) (emphasizing that purpose of Refugee Act was to "eliminate *ad hoc* treatment of refugees"); Katharine S. Dodge, *Eligibility for Withholding of Deportation: The Alien's Burden Under the 1980 Refugee Act*, Stevic v. Sava, 49 BROOK. L. REV. 1193, 1195 (1983) (explaining that purpose of Refugee Act of 1980 was to "clarify procedures for admitting refugees" and ensure compliance with international standards of refugee protection); Karen K. Jorgensen, *The Role of the U.S. Congress and Courts in the Application of the Refugee Act of 1980* (quoting Senator Kennedy as stating that "present law and practice is inadequate, and that the piecemeal approach of our government" in refugee cases is intolerable), *in* REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES 129, 131 (Ved P. Nanda ed., 1989).

57. *See* Doris Meissner, *Reflections on the Refugee Act of 1980* (commenting that Refugee Act provided solution to fragmented and inefficient handling of refugee cases), *in* THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s 57, 58 (David A. Martin ed., 1986); John A. Scanlan & O.T. Kent, *The Force of Moral Arguments for a Just Immigration Policy in a Hobbesian Universe: The Contemporary American Example* (stating that Refugee Act's adoption of language in Protocol attempted to remove "last statutory vestiges of discrimination from U.S. immigration law"), *in* OPEN BORDERS? CLOSED SOCIETIES?: THE ETHICAL AND POLITICAL ISSUES 61, 83 (Mark Bigney ed., 1988); J. Michael Cavosie, Note, *Defending the Golden Door: The Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law*, 67 IND. L.J. 411, 424 (1992) (explaining that Congress added definition of refugee for first time in Refugee Act of 1980 to conform with international obligations).

ant to the Attorney General's broad authority.[58] Therefore, the Refugee Act signified Congress's express intent to move the United States into accord with the obligations imposed under international refugee law.[59] In passing the Refugee Act, Congress adopted the international legal definition of refugee and attempted to establish a uniform standard for adjudicating refugee and asylum claims.[60] The Refugee Act also incorporated the mandatory nonrefoulement requirement, essentially verbatim from the 1967 Protocol, into the INA.[61] Finally, the Refugee Act required a balancing of factors to determine whether an alien convicted of an aggravated felony could be excluded under the narrow exception to nonrefoulement laid out in the Convention.[62]

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58. *See* Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 438–39 (1992) (maintaining that Refugee Act was enacted to achieve uniform, fair and impartial asylum procedures); Michelle N. Lewis, Note, *The Political-Offense Exception: Reconciling the Tension Between Human Rights and International Public Order*, 63 GEO. WASH. L. REV. 585, 599 (1995) (noting that prior to Refugee Act, Attorney General had complete discretion over asylum). Since prior to 1980 no laws directly applied to the admission of refugees into the United States, asylum decisions were "based on the foreign policy of the day." *Id.* Thus, the purpose of the Act was to withdraw the influence of politics and foreign policy by providing objective criteria to determine refugee status. *Id.*; *see also* William Sanchez & Adalsinda Lomangino, *Political Asylum and Other Forms of Relief*, 66 FLA. B.J. 18, 18 (1992) (claiming that Refugee Act created refugee and asylum procedures in attempt to end "ad hoc treatment" of such applications).

59. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) (stating that purpose of Act "was to bring United States refugee law into conformance" with Protocol); 138 CONG. REC. S15274, S15275 (daily ed. Sept. 25, 1992) (statement of Sen. Kennedy) (describing Refugee Act's embodiment of nonrefoulement principle contained in 1957 Convention and 1967 Protocol); H.R. Rep. No. 608, at 1, 6, 17–18 (1979) (stating that purpose of Refugee Act was to develop U.S. refugee policy consistent with 1967 Protocol); David D. Jividen, Comment, *Rediscovering the Burden of Proof for Asylum and the Withholding of Deportation*, 54 U. CIN. L. REV. 943, 954 (1986) (explaining that Congress intended Act to be "construed consistently" with 1967 Protocol).

60. *See* Jacqueline Reardon, 13 SUFFOLK TRANSNAT'L L.J. 855, 859 (1990) (stating that Refugee Act of 1980 marked significant revision of United States' immigration policy). The Act was an attempt to provide a "uniform standard in refugee cases." *Id.*; *see also* William Sanchez & Adalsinda Lomangino, *Political Asylum and Other Forms of Relief*, 66 FLA. B.J. 18, 19 (1992) (noting that Act adopted international definition of refugee).

61. *See Cardoza-Fonseca*, 480 U.S. at 437 (asserting that definition of refugee is "virtually identical to the one prescribed by Article 1(2) of the Convention"); D.A. MARTIN, FEDERAL JUDICIAL CENTER, MAJOR ISSUES IN IMMIGRATION LAW 80–81 (1987) (commenting that Refugee Act modified INA to parallel Article 33 of Convention); Leon Wildes, *The Dilemma of the Refugee: His Standard for Relief*, 4 CARDOZO L. REV. 353, 369–70 (1983) (stating that Congress followed Protocol in defining "refugee").

62. *See* Matter of Frentescu, 18 I. & N. Dec. 244, 247 (B.I.A. 1982) (maintaining that most deportation proceedings should be determined on case-by-case basis).

In the 1982 case of *Matter of Frentescu*, the Board of Immigration Appeals (Board) first determined whether a criminal alien should be denied the mandatory right to withholding of deportation under the Act.[63] In *Frentescu*, the Board held that the totality of circumstances did not elevate the alien's crime to a "particularly serious crime," precluding him from withholding.[64] The Board began its analysis by noting that neither the INA nor the Protocol defined the phrase "particularly serious crime" which would render the alien a danger to the community under section 243(h)(2)(B) of the INA.[65] Thus, the Board held that deportation hearings involving criminal offenses must be reviewed on a case-by-case basis to determine whether the alleged offense constitutes a particularly serious crime.[66] The Board then set forth four factors to be considered by courts when determining whether a crime is a "particularly serious crime" for deportation purposes: (1) the nature of the crime; (2) the circumstances and underlying facts of the conviction; (3) the type of sentence imposed; and, most importantly, (4) the degree of dangerousness the alien poses to the community.[67] The Board concluded by holding that, when a court fails to find that a criminal alien is a danger to the community, withholding cannot be denied.[68]

Subsequently, the Board reiterated the reasoning of *Frentescu* in *Matter of Carballe*,[69] holding that a denial of withholding is proper only when the criminal alien is found to be a danger to the community.[70] According

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63. *See Frentescu*, 18 I. & N. Dec. at 246 (declaring that determining whether crime is "particularly serious crime" is matter of first impression).

64. *Id.* at 247.

65. *See id.* at 245–46 (stating that INA and Protocol do not specifically define "particularly serious crime"). In addition, the UNHCR Handbook does not define the phrase "particularly serious crime". *Id.*

66. *Id.* at 247. In *Frentescu*, the Board stated:

> In judging the seriousness of a crime, we look to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.

Id.

67. *Id.*; *see* OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 157, at 37 (2d ed. 1988) (stating that determining seriousness of offense calls upon adjudicator to consider all relevant factors of case, including mitigating circumstances).

68. *See Frentescu*, 18 I. & N. Dec. at 247 (finding applicant eligible for withholding because applicant was not convicted of "particularly serious crime"); *see also* Matter of Carballe, 19 I. & N. Dec. 357, 360 (B.I.A. 1986) (determining that applicant must be found to be danger to community in order to fall under exclusion section of INA).

69. 19 I. & N. Dec. 357 (B.I.A. 1986).

70. *See Carballe*, 19 I. & N. Dec. at 360 (stating that determination must be made as to whether applicant constitutes danger to community). In *Carballe*, the Board did not neces-

to *Carballe*, this determination solely depends on a finding that the alien has been convicted of a particularly serious crime.[71] The Board in *Carballe* reasserts the cautionary note expressed in *Frentescu* that certain crimes are not inherently "particularly serious."[72] When such an instance presents itself, *Carballe* holds that the adjudicator may apply the multiple-factor analysis established in *Frentescu*.[73] In addition to upholding the multiple-factor test, *Carballe* adds to the early interpretation of withholding relief but refuses to require two separate factual findings when determining whether to render an alien ineligible for withholding.[74] Rather than require the adjudicator to find a conviction for a particularly serious crime *and* a threat of dangerousness, *Carballe* holds that an alien is *presumed* dangerous when convicted of a particularly serious crime.[75]

In essence, the Board's interpretation of the Refugee Act in *Carballe* and its progeny fails to fully reflect the principle of nonrefoulement contained in the 1967 Protocol. Refusing to require a separate finding of dangerousness effectively bars a refugee from presenting mitigating factors that may show that his or her claim of persecution outweighs the seriousness of the crime. Unfortunately, Congress did not respond to the Protocol's principle of nonrefoulment by moving toward an explicit balancing standard; rather, subsequent amendments to the INA further digressed from the principles of the Protocol by including an automatic bar for withholding to aliens convicted of aggravated felonies.[76]

D. *The Immigration Act of 1990 and Its Interpretation by the Board of Immigration Appeals*

Two important changes concerning asylum and withholding relief to refugees convicted of aggravated felonies[77] were made by the amend-

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sarily impose a bar on withholding. *Id.* Indeed, the court noted, as it did in *Frentescu*, that there will be some crimes that are inherently "particularly serious." *Id.*

71. *Id.*

72. *Id.*; *see Frentescu*, 18 I. & N. Dec. at 247 (stating some crimes are per se "particularly serious crimes" while others are not).

73. *See Carballe*, 19 I. & N. Dec. at 360 (articulating that seriousness of certain crimes will be judged by weighing factors promulgated in *Frentescu*).

74. *See id.* (holding that section 243(h)(2)(B) of INA does not require two separate factual findings to determine withholding eligibility).

75. *See id.* (asserting that classifying crime as "particularly serious" also classifies alien as dangerous).

76. *See* Matter of K, 20 I. & N. Dec. 418, 424 (B.I.A. 1991) (holding that new language of INA bars alien convicted of aggravated felony from withholding deportation).

77. *See* James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry After Deportation: A Proposal for Simplified and Principled Sentencing*, 8 FED. SENTENCING REP. 264, 265 (1996) (stating that 1990 amendments to INA represented first major broadening of definition of aggravated felony). The original definition of aggra-

ments to the INA presented under the Immigration Act of 1990 (1990 Amendments).[78] Under these amendments, an alien convicted of an aggravated felony was statutorily barred from asylum.[79] In contrast to the asylum prohibition, the 1990 Amendments did not completely bar aliens convicted of aggravated felonies from receiving withholding of deportation.[80] Rather, Congress added language to the withholding provision in an attempt to assist courts in classifying an offense as a "particularly serious crime." Prior to the 1990 Amendments, section 243(h)(2)(B) of the INA stated that withholding was not available to an alien convicted of a "particularly serious crime" constituting a danger to the community.[81] As noted in *Frentescu* and *Carballe*, this language prompted controversy because a "particularly serious crime" was not defined by the statute.[82] In response to this ambiguity, the 1990 Amendment includes a sentence intended to clarify section 243(h)(2)(B) by providing that an alien convicted of an aggravated felony is "considered to have committed a partic-

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vated felony was introduced in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, § 7342, 102 Stat. 4181 (codified at 8 U.S.C. § 1101(a)(43) (1994)). *Id.*; *see also* Craig H. Feldman, Note, *The Immigration Act of 1990: Congress Continues to Aggravate the Criminal Alien*, 17 SETON HALL LEGIS. J. 201, 202 (1993) (noting statutory expansion of number of crimes for which relief is unavailable as significant effect of 1990 Act); *FYI: AILA Amicus Brief on Issue of Withholding of Deportation for Aggravated Felons Under the AEDPA*, IMMIGRATION PRACTITIONER'S ADVISORY (AILF Legal Action Center, Wash., D.C.), July 10, 1996, at 1 (commenting that Immigration Act of 1990's bar to withholding of deportation is currently under review following passage of AEDPA).

78. Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

79. *See* IIRIRA, *supra* note 11, § 604, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1808 (barring asylum relief to alien convicted of aggravated felony). Section 604 of the IIRIRA amends the asylum provision, INA section 208, by enumerating the exceptions to asylum relief. *Id.* at 1805. One exception denies asylum relief to an alien who "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." *Id.* at 1807. Section 604 of the IIRIRA further provides that conviction of an aggravated felony constitutes a particularly serious crime. *Id.* at 1808.

80. *But see* Matter of K, 20 I. & N. Dec. 418, 424 (B.I.A. 1991) (dismissing argument that lack of ambiguous language in withholding provision does not mean that Congress did not intend bar).

81. *See* 8 U.S.C. § 1253(h)(2)(B) (providing that withholding of deportation is not available to alien who had "been convicted by a final judgment of a particularly serious crime, constitut[ing] a danger to the community of the United States").

82. *See* Matter of Carballe, 19 I. & N. Dec. 357, 360 (B.I.A. 1986) (reiterating that "particularly serious crime," not defined by INA, is dispositive element determining withholding eligibility); Matter of Frentescu, 18 I. & N. Dec. 244, 247 (B.I.A. 1982) (noting that certain crimes will be particularly serious while others will not). Most deportation proceedings will consist of reviewing the facts of each particular case to determine whether to classify an offense as particularly serious. *Id.*

ularly serious crime."[83] Notably, the 1990 Amendments did not repeal the language in section 243(h)(2)(B) which states that an alien convicted of a particularly serious crime constitutes a danger to the community.[84] Therefore, a humanitarian interpretation of the amended INA would continue to call for a judicial determination of whether an alien is a danger to the community, separate and distinct from the determination of whether he or she has committed a particularly serious crime, before denying withholding relief.[85]

Although the language of the statute seems to indicate otherwise, the legislative history of the Immigration Act of 1990 reveals that Congress did not intend to bar convicted aliens from withholding of deportation.[86] At the time the Act was enacted, several bills before Congress contained language that would follow the asylum provision in absolutely barring criminal aliens from withholding.[87] During consideration of these bills, the Office of United Nations High Commissioner for Refugees (UNHCR) sent a letter to the Senate Committee of Immigration and Refugee Affairs arguing that an absolute bar to withholding would violate the Protocol.[88] In response, Senator Alan K. Simpson, who drafted the 1990 withholding provision, affirmed that the United States would not

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83. *See* 8 U.S.C. § 1253(h)(2)(B). In section 305 of the IIRIRA, Congress provided further guidance to what constitutes a particularly serious crime precluding withholding relief. IIRIRA, *supra* note 11, § 305, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1659. Section 305 states that "an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least five years shall be considered to have committed a particularly serious crime." *Id.*

84. *Matter of K*, 20 I. & N. Dec. at 423 (reflecting that Congress did not change statutory language in section 243(h)(2)(B) of INA in 1990 Amendments).

85. *See* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 96 (1983) (asserting that "principles of natural justice and due process of law requires something more than mere mechanical application of exception").

86. *See* Appellant's Brief, Before the Board of Immigration Appeals, Appeal of the Immigration Judge's Decision in Deportation Proceedings, *submitted to* Executive Office for Immigration Review (Jan. 22, 1996), at 22 (arguing that conviction of "particular serious crime" is "*threshold* factual element" which authorizes separate determination of dangerousness). The brief further argued that when viewing the amended provision in "context of the whole statute, it is clear that a bar to withholding was not intended." *Id.* at 24.

87. *See* S. 3055, 102d Cong. § 5(b) (1990); H.R. 5284, 101st Cong. § 5(b) (1990) (proposing that conviction for class one felony be considered conviction for "particularly serious crime"); *see also* S. 2957, 101st Cong. § 12 (1990); S. 2652, 101st Cong. § 6112 (1990) (proposing addition of persons convicted of aggravated felony to class of individuals barred from withholding).

88. *See* Letter from John McCallin, Representative, Office of United Nations High Commissioner for Refugees, to Alan K. Simpson, Senator, United States Senate 3 (May 1, 1990) (on file with the *St. Mary's Law Journal*) (voicing concern that elimination of individualized review of case is inconsistent with principle of nonrefoulement).

deviate from its obligation to conform with the nonrefoulement provision of the 1967 Protocol.[89] In addition, Senator Edward M. Kennedy, the chairman of the subcommittee that drafted the Immigration Act of 1990, indicated that a bar to withholding of deportation for criminal aliens would be contrary to Congressional intent.[90] Rather, Senator Kennedy stated, Congress intended the Attorney General to be responsible for determining whether an alien was a danger to the community after finding that he or she was convicted of an aggravated felony.[91] Notwithstanding these explicit assertions of congressional intent, the Board of Immigration Appeals adopted an interpretation of the 1990 Amendment that denied the protection of nonrefoulement and denied refugees the opportunity to have bona fide claims of persecution heard.[92]

The Board first established what would become the general rule that an alien convicted of an aggravated felony is automatically barred from withholding of deportation in *Matter of K*.[93] Reflecting on its decision in *Carballe*, the Board reiterated that a denial of withholding is proper only when an alien is convicted of a particularly serious crime and thus found to be a danger to the community.[94] With this established rule in mind, the Board reasoned that Congress approved of its prior decisions because the 1990 Amendment supplemented, but did not alter, the statutory language of section 243(h)(2)(B) of the INA.[95] The Board reasoned that the statute continued to provide that an alien convicted of a particularly serious crime constitutes a danger to the community.[96] The purpose of the amendment, according to the Board, was to clarify that aggravated felo-

89. *See* Letter from Alan K. Simpson, Senator, United States Senate, to John McCallin, Representative, Office of United Nations High Commissioner for Refugees 1 (May 10, 1990) (on file with the *St. Mary's Law Journal*).

90. *See* Letter from Edward M. Kennedy, Chairman, Subcommittee on Immigration and Refugee Affairs, to Gene McNary, Commissioner, Immigration and Naturalization Service & David Milhollan, Director, Executive Office for Immigration Review 1 (Apr. 16, 1992) (on file with the *St. Mary's Law Journal*) (clarifying that Board's interpretation of Immigration Act of 1990 is not consistent with Congress's intent). Senator Kennedy insisted that Congress did not intend there to be an absolute bar to withholding. *Id.* Instead, Congress intended that the Attorney General would continue to review cases on an individualized basis to determine eligibility for withholding. *Id.*

91. *Id.* at 1–2.

92. *See Matter of K*, 20 I. & N. Dec. at 424 (rejecting argument that Congress would have "used the same unambiguous language that it did for asylum" if it intended to bar aggravated felons from withholding).

93. *See id.* at 425 (reasoning that removing eligibility for withholding of deportation discourages aliens from committing aggravated felonies).

94. *Id.* at 424; *accord* Matter of U-M-, 20 I. & N. Dec. 327, 330 (B.I.A. 1991) (holding that conviction for "particularly serious crime" makes alien ineligible for withholding).

95. *See Matter of K*, 20 I. & N. Dec. at 423.

96. *Id.* at 424.

nies are particularly serious crimes.[97] Accordingly, the Board determined that this clarification eliminated the necessity of a case-by-case review to determine whether the merits of a particular case demonstrate that the threat of persecution outweighs the alien's dangerousness.[98]

In reviewing Board decisions, federal courts have held that the Board's interpretation is a reasonable construction of section 243(h)(2)(B) of the INA and that this interpretation does not violate a criminal alien's due process rights.[99] Most importantly, these courts hold that the automatic bar to withholding does not violate the United States' nonrefoulement obligation under the 1967 Protocol.[100] Despite these holdings, Congress, through the AEDPA, again amended the statutory language in section 243(h)(2) of the INA to explicitly state that an automatic bar to withholding of deportation does in fact run contrary to the mandatory requirement of nonrefoulement contained in the 1967 Protocol.[101]

III. The 1996 Amendments to the Immigration and Nationality Act

A. *Section 413(f) of the Antiterrorism and Effective Death Penalty Act*

The Antiterrorism and Effective Death Penalty Act (AEDPA) presents a more recent, and more significant, alteration of the INA.[102] The AEDPA was enacted on April 24, 1996, purportedly "[t]o deter terrorism, provide for an effective death penalty, and for other purposes."[103] The

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97. *Id.*

98. *Id.*

99. *See* Garcia v. INS, 7 F.3d 1320, 1326 (7th Cir. 1993) (holding that bar to withholding does not violate alien's due process). The court in *Garcia* noted that section 243(h) of the INA creates an entitlement to withholding if the alien meets specific criteria. *See Garcia*, 7 F.3d at 1326 (noting that when statute places condition on entitlement, due process is not violated); *see also* Martins v. INS, 972 F.2d 657, 662 (5th Cir. 1992) (holding that due process is not violated when individual is statutorily ineligible to receive benefit). Congress's power to expel or exclude aliens is said to be "largely immune from judicial control." Fiallo v. Bell, 740 U.S. 787, 792 (1977). Congress can apply rules which would not be applicable to citizens. *Id.*

100. *See* Al-Salehi v. INS, 47 F.3d 390, 395 (10th Cir. 1995) (reasoning that uncertainty as to meaning of Article 33(2) of Convention is ambiguous, thus plausible construction does not violate Convention of Protocol); *Garcia*, 7 F.3d at 1326 (asserting that bar to withholding does not violate Article 33(2)).

101. *See* AEDPA, *supra* note 20, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1269 (granting Attorney General discretion to withhold deportation of aggravated felon to ensure compliance with 1967 Protocol).

102. *See AEDPA, supra* note 20, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1269 (providing Attorney General discretion to withhold deportation of alien convicted of aggravated felony).

103. AEDPA, *supra* note 20, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat) at 1214; *see Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996*, WEEKLY

"other purposes" category includes amendments that significantly alter the rights of aliens facing detention and removal from the United States. For example, AEDPA section 440(a)(10) extinguishes a court of appeals' jurisdiction over petitions for review filed by aliens convicted of certain criminal offenses.[104] Furthermore, to maximize the United States' ability to remove criminal aliens from the community, the AEDPA broadens the class of aliens who can be detained and deported.[105] Despite these somewhat draconian anti-immigrant provisions, however, one amendment within the AEDPA provides for an expansion of the rights of criminal aliens who fall under the definition of "refugee."[106]

Section 413(f) of the AEDPA amends INA section 243(h)(2) by giving the Attorney General the discretion to grant withholding of deportation.[107] Prior to the enactment of the AEDPA, no express language within section 243(h)(2) of the INA, which had previously provided the rule governing withholding of deportation, plainly provided such discretion.[108] Rather, under the Board's rigid interpretation of prior immigra-

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COMP. PRES. DOC. 719 (Apr. 24, 1996) (stating AEDPA is comprehensive approach for fighting terrorism). The President stated that "[t]he United States remains in the forefront of the international effort to fight terrorism through tougher laws and resolute enforcement." *Id.* at 270.

104. AEDPA, *supra* note 20, § 440(a)(10), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1276–77 (amending INA section 106). AEDPA section 440(a)(10) states that "[a]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense . . . shall not be subject to review by any court." *Id.*; *see* Hincapie-Nieto v. INS, 92 F.3d 27, 29 (2d Cir. 1996) (stating that AEDPA retroactively repeals courts of appeals' jurisdiction to review petitions filed by criminal aliens).

105. *See* AEDPA, *supra* note 20, § 440(e), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1277–78 (amending definition of aggravated felony); *Detention at Ports of Entry*, IMMIGRATION PRACTITIONER'S ADVISORY (AILF Legal Action Center, Wash., D.C.), July 22, 1996 (noting that AEDPA expanded list of aggravated felonies). Conviction of the following crimes subjects an alien to mandatory detention and deportation: murder; trafficking any controlled substances, drugs, firearms or destructive devices; money laundering; crimes of violence for which the term of imprisonment imposed was at least five years; offenses related to child pornography; RICO and gambling offenses; offenses related to operating or controlling a prostitution business: transportation for purpose of prostitution; making, forging, counterfeiting, mutilating or altering a passport; offenses related to failure to appear by a defendant for sentencing if the underlying offense is punishable by five or more years. *Id.*

106. *See* AEDPA, *supra* note 20, § 413(f), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1269 (eliminating bar to withholding by granting Attorney General discretionary authority to grant withholding).

107. *Id.*; *see* 142 CONG. REC. S11905 (daily ed. Sept. 30, 1996) (statement of UNHCR Rep. Anne Willem Bijleveld) (urging reinstatement of AEDPA section 413(f) which allows for case-by-case evaluation of withholding application).

108. *See* Immigration & Nationality Act § 243(h)(2), 8 U.S.C. § 1253(h)(2) (1994) (providing terms under which withholding would not apply). Section 243(h)(2) formerly stated that withholding "shall not apply to any alien if the Attorney General determines

tion statutes, the Attorney General had no discretion to withhold a criminal alien from deportation, no matter how compelling the refugee's interest.[109]

Congress's enactment of section 413(f) of the AEDPA, protecting refugees from forced return to countries where they face a threat to life or freedom, finally fulfilled the United States' international obligations owed to refugees under the Protocol.[110] Accordingly, the UNHCR applauded Congress's steps to remove the automatic bar to withholding and provide for an individualized review of eligibility for withholding.[111] Despite this apparent progress, Congress subsequently amended the INA soon thereafter, again placing the United States outside of the Protocol's mandates by reinstating the automatic bar to withholding.

B. *Section 305 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*

In the most recent move to curb illegal immigration, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) on September 30, 1996.[112] Key provisions in the new law expedite removal procedures and expand the range of aggravated felonies invoking the automatic bar to withholding.[113] In addition, the IIRIRA

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that" the alien was convicted of a particularly serious crime, constituting a danger to the United States. *Id.*

109. *See* Kofa v. INS, 60 F.3d 1084, 1091 (4th Cir. 1995) (finding that alien convicted of aggravated felony has committed particularly serious crime and is ineligible for withholding); Nguyen v. INS, 53 F.3d 310, 311 (10th Cir. 1995) (holding that "aggravated felon is conclusively disqualified from withholding"); *Matter of K*, 20 I. & N. Dec. at 425 (denying withholding to applicant convicted of aggravated felony without considering merits of claim).

110. *See* Letter from Anne Willem Bijleveld, Representative, Office of United Nations High Commissioner for Refugees, to Nadine K. Wettstein, American Immigration Lawyers Association 3 (May 15, 1996) (on file with the *St. Mary's Law Journal*) (advising that section 413(f) of AEDPA provides for individualized review consistent with Convention).

111. *See id.* (expressing support for AEDPA section 413(f), which provides opportunity for aggravated felon to obtain withholding of his or her deportation); 142 CONG. REC. S11905 (daily ed. Sept. 30, 1996) (statement of UNHCR Rep. Anne Willem Bijleveld) (urging that Congress maintain discretion afforded Attorney General under AEDPA section 413(f) to grant withholding of criminal aliens).

112. IIRIRA, *supra* note 11, § 1, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1570.

113. *See* IIRIRA, *supra* note 11, § 305(a)(3), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1651 (providing guidelines for prompt removal of aliens under section 241(a)(1)(A) & (B)). The relevant language regarding the removal process under Section 241(a)(1)(A) provides: "Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')." *Id.*

replaces the commonly used term "withholding of deportation" with the phrase "withholding of removal."[114] These changes are minimal, however, when measured against the new changes made to the withholding provision of the INA under section 305 of the IIRIRA. Section 305 of the IIRIRA effectively curtails the right of certain individuals to not be removed from the United States based on their refugee status.

Under section 305, Congress has, for the first time, provided specific guidance as to what constitutes a particularly serious crime such that the alien poses a danger to the United States.[115] Beginning in *Matter of Frentescu*,[116] the Board of Immigration Appeals has long grappled with the issue of what constitutes a "particularly serious crime."[117] Essentially, section 305 establishes a class of individuals that are, once again, automatically barred from withholding of deportation.[118] Specifically, section 305 gives the Attorney General the discretion to conclude that a crime for which a sentence of less than five years was imposed nevertheless constitutes a "particularly serious crime."[119] Furthermore, an alien who has been convicted of an aggravated felony and sentenced to a five-year prison term is statutorily deemed to be a *per se* danger to the community and thus ineligible for withholding relief.[120] Thus, in providing the Board with some guidance to conform decisions on this issue, Congress has simultaneously narrowed the rights of refugees provided through international law.[121]

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114. *See id.* (moving section 243 of INA to section 241 and changing title to "Detention and Removal of Aliens Ordered Removed under IRA Section 305").

115. *See* Matter of Frentescu, 18 I. & N. Dec. 244, 245–46 (B.I.A. 1982) (stating that neither INA, Protocol, nor UNHCR Handbook define "particularly serious crime"); *cf.* Matter of Rodriguez-Palma, 17 I. & N. Dec. 465, 468 (B.I.A. 1980) (commenting on lack of guidance as to meaning of "serious nonpolitical crimes").

116. 18 I. & N. Dec. 244 (B.I.A. 1982).

117. *See Frentescu*, 18 I. & N. Dec. at 247 (concluding that courts must make case-by-case analysis to determine whether individual crime is "particularly serious crime"); *cf. Rodriguez-Palma*, 17 I. & N. Dec. at 468 (expressing need to determine "serious nonpolitical crime" to determine withholding eligibility).

118. *See* IIRIRA, *supra* note 11, § 305(b)(3)(13)(iv), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1659 (pronouncing statutory bar to withholding of removal for aliens convicted of aggravated felony and sentenced to five year prison term).

119. *See id.* (granting Attorney General broad discretion to deny withholding of removal). The relevant language in section 305 of the IIRIRA states that the Attorney General is not precluded from "determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime." *Id.*

120. *See id.* (expressing in plain language that five year sentence for aggravated felony is "particularly serious crime" barring alien from withholding).

121. *Compare* IIRIRA, *supra* note 11, § 305(b)(3)(B)(iv), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1659 (denying withholding to alien convicted of aggravated felony where sentenced imposed was at least five years), *with* AEDPA, *supra* note 20, § 413(f)(3)(1)(A), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1269 (granting Attor-

By affirming the use of an automatic bar to withholding, the IIRIRA has deleted the progressive steps made through the AEDPA to bring United States' refugee law in compliance with international obligations.[122] In particular, under the IIRIRA, an alien convicted of an aggravated felony may by law, or under the discretion of the Attorney General, be denied withholding, regardless of the degree of persecution the alien faces in his or her country of origin.[123] To the contrary, section 413(f) of the AEDPA had eliminated the automatic bar and called for an individualized review of withholding eligibility based upon this threat of persecution.[124] Thus, by re-establishing the automatic bar to withholding, section 305 of the IIRIRA is inconsistent with the obligations and purposes for protecting refugees promulgated in the 1967 Protocol.[125] Moreover, section 305 is inconsistent with other international treaties that the United States is obligated to uphold.[126]

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ney General discretion to withhold deportation, regardless of conviction for aggravated felony).

122. *See* Letter from Anne Willem Bijleveld, Representative, Office of United Nations High Commissioner for Refugees, to Nadine K. Wettstein, American Immigration Lawyers Association 3 (May 15, 1996) (on file with the *St. Mary's Law Journal*) (opining that section 413(f) of AEDPA allows for individualized review of withholding eligibility required by 1967 Protocol).

123. *See* IIRIRA, *supra* note 11, § 305(b)(3)(B)(iv), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1659 (pronouncing statutory bar to withholding of removal for aggravated felons sentenced to at least five year prison term).

124. *See* AEDPA, *supra* note 20, § 413(f), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1269 (granting Attorney General discretion to withhold deportation of aggravated felon); OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1957 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 156, at 37 (2d ed. 1988) (calling for balancing test in determining withholding eligibility). The relevant portion of paragraph 156 of the Handbook provides that "[i]f a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him." *Id.*; *see also* Letter from Anne Willem Bijleveld, Representative, Office of United Nations High Commissioner for Refugees, to Nadine K. Wettstein, American Immigration Lawyers Association 3 (May 15, 1996) (on file with the *St. Mary's Law Journal*) (opining that section 413(f) of AEDPA provides for case-by-case determination of withholding eligibility required under Convention).

125. *See* IIRIRA, *supra* note 11, § 305(b)(3)(B)(iv), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1659 (barring alien convicted of aggravated felony which carried minimum five-year prison term from withholding, regardless of threat of persecution); Letter from Anne Willem Bijleveld, Representative, Office of United Nations High Commissioner for Refugees, to Orrin G. Hatch, Chairman, Senate Judiciary Committee 3 (Mar. 6, 1996) (on file with the *St. Mary's Law Journal*) (concluding that failure to provide case-by-case determination for bona fide refugee violates 1951 Convention).

126. *See* Torture Convention, *supra* note 13, art. 3, S. TREATY DOC. No. 100-20, at 20, 23 I.L.M. at 1028 (requiring mandatory prohibition against returning individual to state where threat of torture exists).

C. *The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Section 305 of the IIRIRA not only runs contrary to the principles of the Protocol, but also falls short of complying with the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), of which the United States is a signatory.[127] As of yet, the Board has not determined how the Torture Convention's principles may protect an alien in deportation proceedings who is convicted of an aggravated felony and is threatened with torture upon return to his or her home country.[128] However, the Board has announced that it is in the process of determining such an administrative procedure.[129] Therefore, the Torture Convention is not merely a symbolic stance against the concept of torture, but should become an important instrument in guiding statutory construction and immigration agency interpretation of the withholding provision of the IIRIRA.[130]

The Torture Convention defines "torture" as the intentional infliction of severe pain or suffering on an individual to intimidate, punish or obtain information.[131] Acts of torture may include beatings, sensory depri-

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127. Torture Convention, *supra* note 13, art. 3, S. TREATY DOC. No. 100–20, at 19, 23 I.L.M. at 1028. Article 3 of the Torture Convention requires a state to not remove an individual in danger of being subjected to torture. *Id.*

128. *See* Facsimile from Executive Office for Immigration Review to National Immigration Project (Sept. 20, 1996) (on file with the *St. Mary's Law Journal*) (announcing that deportation proceedings in particular case have been halted to consider whether respondent is entitled to protection under Article 3 of Torture Convention).

129. *Id.*

130. *See id.* (announcing that aggravated felon in removal proceedings may be entitled to protection under Torture Convention); Appellant's Brief, Before the Board of Immigration Appeals, Appeal of the Immigration Judge's Decision in Deportation Proceedings, *submitted to* Executive Office for Immigration Review (Jan. 22, 1996), at 34 (on file with the *St. Mary's Law Journal*) (arguing that INA and Department of State are obligated to comply with Convention).

131. Torture Convention, *supra* note 13, art. 1, S. TREATY DOC. No. 100–20, at 19, 23 I.L.M. at 1027. Article 1(1) states:

> For the purpose of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id.

vation, electric shock, psychological torture, and sexual violence.[132] These egregious violations of human rights have long been recognized as intolerable under a number of international agreements, several of which the United States is a signatory.[133] Indeed, the prohibition against torture has been elevated to the status of *jus cogens*, which is a norm recognized by the international community as one that cannot be derogated.[134] Thus, the prohibition against torture shall "prevail over and invalidate" international laws or agreements inconsistent with this norm.[135]

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132. *See Victims of Torture: Before the House Comm. on Int'l Relations Subcomm. on Int'l Operations and Human Rights*, 104th Cong. (May 8, 1996) (statement of Phyllis A. Coven, Director of Int'l Affairs, INS), *available in* 1996 WL 10164383, at *3.

133. These agreements include the Universal Declaration of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights, the Universal Declaration of Human Rights and Fundamental Freedoms. Article 5 of the Universal Declaration of Human Rights and Fundamental Freedoms states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." G.A. Res. 217 (III), U.N. Doc. A/810 (1948). Article 7 of the International Covenant on Civil and Political Rights states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment." International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171. Article 5(2) of the American Convention of Human Rights provides: "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." American Convention on Human Rights, Jan. 7, 1970, O.A.S. Official Records, OEA/Ser.k/xvi/1.1, doc. 65 rev. 1, corr. 2 (1970), *reprinted in* 9 I.L.M. 673 (1970).

134. *See* 136 CONG. REC. S17486, S17487 (daily ed. Oct. 27, 1990) (statement of Sen. Helms) (proclaiming notion that torture is condemned by all civilized nations); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992) (stating that prohibition of torture has attained status of *jus cogens*); M.E. Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980) (holding that "official torture is now prohibited by the law of nations"); RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF UNITED STATES § 702(d) & cmt n. (stating that practice of torture violates *jus cogens*); *see also* Lyal S. Sunga, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 85 (1992) (commenting that prohibition against torture is generally acknowledged as non-derogable).

135. *See* J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 12 (1988) (urging that prohibition of torture has developed into customary international law). The authors note that under the Vienna Convention on the Law of Treaties of 1969, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.*; *see also* I.M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 110 (1973) (commenting upon controversy that arises by voiding treaty that violates customary international law).

1. The Principle of Nonrefoulement in Article 3 of the Torture Convention

Article 3 of the Torture Convention reinforces the universally-held standard that governmental acts of torture will not be tolerated by the international community.[136] Essentially, Article 3 states that a country cannot expel, return or extradite an individual to a State where he or she would be in danger of being tortured.[137] Currently, a person who faces torture upon return to his or her country of origin may be able to apply for relief under United States asylum and withholding of deportation laws.[138] Nevertheless, there are important distinctions between the provisions of the Torture Convention and the relief available under contemporary asylum and withholding laws that should be emphasized.

One shortcoming of current United States' immigration law is that the term "torture" is narrowly defined so as to possibly exclude some victims of torture, or potential victims of torture, from the protections of asylum and withholding.[139] Such a situation may arise when a particular infliction of suffering does not constitute a threat to life or freedom grounded

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136. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 n.20 (1984) (noting "at least four acts that are now subject to unequivocal international condemnation" as including torture); Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1210 (1994) (commenting that torture is "universally and unequivocally prohibited in international law"); David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1188 (1993) (listing protection against torture as nonderogable right).

137. Torture Convention, *supra* note 13, art. 3, S. TREATY DOC. No. 100–20, at 20, 23 I.L.M. at 1028. Article 3 of the Torture Convention states:

> (1) No State shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Id. The Committee Against Torture, established under Article 17 of the Torture Convention, has indicated that the aim of the determination is whether the individual would personally be at risk of being tortured. Committee Against Torture, Communication No. 13/1993, CAT/C/12/D/13/1993 (Apr. 27, 1994), at 9. Furthermore, the lack of a consistent pattern of gross violations of human rights does not preclude a finding of a risk of being tortured. *Id.* All relevant factors in a particular case must be reviewed. *Id.*

138. *See Victims of Torture: Hearing Before House Comm. on Int'l Relations, Subcomm. on Int'l Operations and Human Rights*, 104th Cong. (May 8, 1996) (statement of Phyllis A. Coven, Director of Int'l Affairs, INS) (testifying that asylum and withholding relief are available to individuals fleeing torture), *available in* 1996 WL 10164383, at *5–6.

139. *See id.* at *14 (noting that torture may not include "all threats to life or freedom or all persecution" that may warrant asylum or withholding).

on one of the INA's five statutory bases.[140] As a result, if an alien faces a type of persecution not outlined in the INA, he or she will be deported, regardless of the substantial threat of torture.

The Torture Convention offers significant advantages to the refugee because it also extends a more generous protection of the right of nonrefoulement.[141] As noted above, the nonrefoulement provision of the INA, as well as the nonrefoulement principle of the Convention, as adopted by the Protocol, requires an applicant to establish a threat based on nationality, political opinion, group membership, religion or race.[142] By contrast, the Torture Convention does not require that torture be inflicted by a governmental official on account of one of these five statutory bases.[143] Rather, torture for any reason prohibits a State from returning an alien to a country where the threat exists.[144]

The essential difference between the Torture Convention and United States' refugee laws and other international laws is the Torture Convention's absolute right to nonrefoulement. Specifically, Article 3 of the Tor-

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140. *See id.* (noting that Torture Convention does not list particular reasons "for which torture must be inflicted"); IIRIRA, *supra* note 11, § 305(b)(3)(A), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1658 (stating that withholding is mandatory when alien's life or freedom is threatened on account of "race, religion, nationality, membership in a particular social group, or political opinion"). *Id.*

141. *See* J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 124, 125 (1988) (commenting that Article 3 reaffirms "absolute character of the prohibition of torture"). The authors comment that Article 3 is generally seen as providing greater protection than is provided in other human rights instruments. *Id.* at 125. Like the 1951 Convention, there is a provision in the Torture Convention concerning nonrefoulement. *Id.* However, the Torture Convention applies this right to all persons for any reason. *Id.*

142. *See* IIRIRA, *supra* note 11, § 305(b)(3)(A), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1658 (requiring showing of threat on account of "race, religion, nationality, membership in a particular social group, or political opinion" to avoid deportation); Convention, *supra* note 27, art. 33, para. 1, 19 U.S.T. at 6276, 189 U.N.T.S. at 176 (articulating in Article 33(1) that refugee threatened on "account of race, religion, nationality, membership of a particular social group or political opinion" shall not be deported).

143. *See* Torture Convention, *supra* note 13, art. 1, S. TREATY DOC. No. 100-20, at 19, 23 I.L.M. at 1027 (containing no language that torture must be based on a particular intent); *Victims of Torture: Hearing Before House Comm. on Int'l Relations, Subcomm. on Int'l Operations and Human Rights*, 104th Cong. (May 8, 1996) (statement of Phyllis A. Coven, Director of Int'l Affairs, INS) (advising that "Article 3 enumerates no particular protected reasons for which torture must be inflicted"), *available in* 1996 WL 10164383, at *14.

144. *See Victims of Torture: Hearing Before House Comm. on Int'l Relations, Subcomm. on Int'l Operations and Human Rights*, 104th Cong. (May 8, 1996) (statement of Phyllis A. Coven, Director of Int'l Affairs, INS) (commenting that torture for any reason prohibits return of alien to country where threat of torture exists), *available in* 1996 WL 10164383, at *14.

ture Convention does not provide even a narrow exception to the right of nonrefoulement.[145] Therefore, in contrast to current United States' refugee law, the Torture Convention mandates that an alien not be returned to a country where he or she faces torture, even if that individual has been convicted of an aggravated felony.[146]

2. Implementation of the Provision of the Torture Convention in the United States

In order to ensure domestic compliance with the Torture Convention, Congress has enacted several important laws that implement its provisions.[147] For example, under the Torture Victim Protection Act of 1991,[148] Congress created a civil cause of action for individuals who have been tortured, implementing Articles 5 and 14 of the Torture Convention.[149] In addition, the Violent Crime Control and Law Enforcement

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145. *See* Torture Convention, *supra* note 13, S. TREATY DOC. No. 100-20, at 20, 23 I.L.M. at 1028 (containing no exception to right of nonrefoulement); J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 12 (1988) (explaining that prohibition against torture has developed into "rule of customary international law"); Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1210 (1994) (commenting that nations cannot deviate from prohibition against torture).

146. *See* Torture Convention, *supra* note 13, art. 3, S. TREATY DOC. No. 100–20, at 20, 23 I.L.M. at 1028 (expressing in plain language that no party "shall" return individual to country where he or she fears torture). Unlike the language of the 1951 Convention, the Torture Convention does not provide language that would narrowly limit the right not to be returned to a country where one faces torture. *Id.*; *see* Convention, *supra* note 27, art. 33, para. 2, 19 U.S.T. at 6276, 189 U.N.T.S. at 176 (stating narrow exception to nonrefoulement). Under Article 33(2) of the Convention, nonrefoulement is unavailable to a refugee when there are reasonable grounds to consider the refugee a danger to the community. *Id.* Additionally, a refugee will not be eligible for protection if that individual has been convicted of a "particularly serious crime" and constitutes a "danger to the community." *Id.*; *see also* Committee Against Torture, Communication No. 15/1994, U.N. Doc. CAT/C/13/D/15/1994 (Nov. 18, 1994) (stating fact that conviction for crime is not relevant when determining eligibility for protection under Article 3 of Torture Convention).

147. *See* Torture Convention, *supra* note 13, art. 2, S. TREATY DOC. No. 100–20, at 20, 23 I.L.M. at 1028 (requiring that member states take legislative action to comply with Convention). Article 2(1) provides that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." *Id.* Similarly, Article 5 of the Torture Convention states that "[e]ach State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses referred to in Article 4." *Id.* at 9.

148. Torture Victim Protection Act of 1991, Pub. L. No. 102–256, 106 Stat. 73 (1992).

149. *Id.* § 2; *see* Torture Convention, *supra* note 13, art. 5, para. 1, S. TREATY DOC. No. 100–20, at 20, 23 I.L.M. at 1028 (articulating in Article 5(1) that state "shall take such

Act of 1994[150] implements Articles 2, 4 and 5, which mandate the creation of criminal penalties for committing torture.[151]

Significantly, however, Congress has not enacted legislation to implement the nonrefoulement provision of Article 3, which prohibits the deportation of an alien facing torture.[152] Nonetheless, many commentators argue that this provision is self-executing.[153] After all, the purpose of the Torture Convention is to prevent the return of individuals to countries where they face possible torture.[154] As a practical matter, the Torture Convention would be ineffective in protecting torture victims if contracting parties did not abide by the nonrefoulement provision in Article

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measures as may be necessary to establish its jurisdiction over the offense referred to in article 4 . . ."). Furthermore, Article 14 of the Torture Convention states:

> [e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

Id. at 22–23.

150. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–236, 108 Stat. 463 (as amended in Pub. L. No. 103–322, 108 Stat. 1979).

151. *See id.* (creating criminal penalties for acts of torture). Compare this legislation with Article 2(1) of the Torture Convention which states: "Each State shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Torture Convention, *supra* note 13, art. 2, para. 1, S. TREATY DOC. No. 100–20, at 20, 23 I.L.M. at 1028. The first sentence in Article 4(1) of the Torture Convention provides that: "[e]ach State Party shall ensure that all acts of torture are offenses under its criminal law." *Id.*

152. *See* Torture Convention, *supra* note 13, art. 3, S. TREATY DOC. No. 100–20, at 20, 23 I.L.M. at 1028 (omitting language calling for legislative action to implement provision in Article 3). Unlike Articles 2 or 4, Article 3 states in plain language that "[n]o State Party shall" expel, return or extradite an individual in danger of torture. *See id.* (insisting that Article 3 of Torture Convention be self-executing by omitting to call upon state legislature to implement provision).

153. *See* People of Saipan v. United States Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974) (opining that international agreement may establish "enforceable obligations without implementing legislation"). The court lists a number of factors to be examined, such as (1) the purpose and objective of the treaty, (2) the ability of organs to direct implementation, (3) the availability of alternative enforcement methods, and (4) the "social consequences of self- or non-self-execution." *Id.*; *see also* United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992) (expressing that first step in determining construction of treaty is "to look to its terms to determine its meaning"); Vienna Convention on the Law of Treaties, *opened for signature* Mar. 12, 1968, art. 31(1), U.N. Doc. A/Conf. 39127 (stating that treaties are 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 object and purpose").

154. *See* J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 124 (1988) (explaining that absolute prohibition of torture in Article 3 of Torture Convention is necessary to make prohibition against torture effective).

3. Thus, Congress's failure to enact Article 3 should not, and cannot, relieve the United States from its obligation to abide by the Torture Convention and protect victims of torture.

IV. SECTION 305 OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT IS INCONSISTENT WITH INTERNATIONAL LAW

A. *Section 305 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Violates the 1967 United Nations Protocol Relating to the Status of Refugees*

In direct contradiction to the Protocol, section 305 of the IIRIRA prevents a class of aliens from presenting evidence of persecution or torture to show that they are worthy of protection. Applying the rule of statutory construction established by the United States Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council*,[155] section 305 of the IIRIRA expressly mandates that withholding does not apply to a "particular" class of aggravated felons.[156] According to the *Chevron* rule, when the congressional intent of a statute is discernible from the statute's plain language, Congress's intent must be given effect.[157] Adhering to this rule, it is clear from section 305 of the IIRIRA that the "particular" class of persons Congress intended to bar from withholding relief are aliens who "hav[e] been convicted by a final judgment of a particularly serious crime" which renders them a danger to the United States community.[158] Furthermore, Congress provides a specific definition of a "particularly serious" offense. The IIRIRA states that an alien has committed a particularly serious crime when convicted of an aggravated felony for which he or she has been sentenced to at least a five-year imprisonment term. Thus, IIRIRA section 305 statutorily imposes an automatic bar to having deportation withheld. The consequences of this legislation are

155. 467 U.S. 837 (1984).

156. *See* IIRIRA, *supra* note 11, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1658–59 (discussing removal of criminal aliens).

157. *See Chevron*, 467 U.S. at 842–43 (explaining that when Congress's intent is clear, that intent must be given effect); *see also* FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 31 (1981) (holding that determination of whether agency's construction of act is reasonable does not apply when act is stated in plain language); Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968) (reiterating that courts cannot uphold agency construction of statute not consistent with statutory mandate).

158. *See* IIRIRA, *supra* note 11, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1658.

drastic. Essentially, the merits of a bona fide claim of persecution are of no consequence.[159]

Imposing a statutory bar to withholding is fundamentally flawed and inconsistent with international agreements concerning refugee rights. Denying a refugee the right to have his or her claim reviewed for merit forecloses the possibility of showing that the threat to life or freedom significantly outweighs the seriousness of the offense.[160] Rather, any offense designated as a particularly serious crime will always trump the threat to life or freedom. Under the binding principles of the 1967 Protocol, such a curtailment of rights is inconsistent with the international commitment for refugee protection and sharing of refugee responsibility.[161]

Article 33(1) of the Convention, as adopted by the Protocol, specifically mandates that a nation-state protect a refugee from forced return to a country when the applicant establishes that his or her life or freedom is threatened based upon either "race, religion, nationality, membership in a particular social group, or political opinion."[162] The Convention, and thus, the Protocol does include a narrow exception, however, to the principle of nonrefoulement.[163] That exception provides under Article 33(2)

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159. *See* IIRIRA, *supra* note 11, § 305, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1659 (proclaiming that aggravated felon sentenced to at least five-year prison term is statutorily barred from withholding).

160. *See* OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 156, at 31 (2d ed. 1988) (asserting that compliance with Protocol necessitates case-by-case evaluation of refugee's claim). When an individual fears very severe persecution, the crime he or she committed must be grave to warrant exclusion of the individual. *Id.* Thus, the adjudicator must weigh the degree of potential persecution against the seriousness of the crime. 142 CONG. REC. S11886, S11905, S11906 (daily ed. Sept. 30, 1996) (statement of UNHCR Rep. Anne Willem Bijleveld). This is both a logical and humanitarian obligation since Congress has continued to expand the definition of aggravated felonies. *Id.* at S11906.

161. *Cf.* Convention, *supra* note 27, preamble, 19 U.S.T. at 6260, 189 U.N.T.S. at 152 (announcing Convention's purposes to protect refugees and encourage international cooperation). The Convention's Preamble is very clear that one of its purposes is to "assure refugees the widest possible exercise of [their] fundamental rights and freedoms." *Id.* A second important principle of the Convention recognizes that protecting refugees "may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation." *Id.*

162. Convention, *supra* note 27, art. 33, para. 1, 19 U.S.T. at 6276, 189 U.N.T.S. at 176 (proclaiming that *no* state can return refugee where life or freedom is threatened on account of one of five bases).

163. *See* Convention, *supra* note 27, art. 33, para. 2, 19 U.S.T. at 6276, 189 U.N.T.S. at 176 (pronouncing narrow grounds under which refugee can be excluded from Convention's protections).

that a country of refuge can deny withholding when it is determined that the refugee was convicted of a particularly serious crime and constitutes a danger to the community.[164]

The UNHCR has advised that the exception to nonrefoulement under Article 33(2) is narrow and is to be considered as an option only after the adjudicator has applied a balancing of factors analysis and determines that the danger posed to the community is extreme.[165] The UNHCR asserted that in determining the refugee status of persons convicted of a crime, the court must first reach a determination as to whether the person comes within the definition of refugee.[166] After this review, the adjudicator can then make a decision as to whether one of the narrow exceptions to nonrefoulement under the Convention and the Protocol applies to the refugee.[167] This determination should include a weighing of the alien's dangerousness, which includes aggravating and mitigating factors, against the serious danger of life or freedom that the alien faces upon return to the country of origin.[168]

Section 305 of the IIRIRA does not permit an individualized assessment of withholding eligibility consistent with the standard continuously endorsed by the UNHCR.[169] According to the UNHCR, even if the alien seeking withholding has been convicted of an aggravated felony and sen-

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164. *See* GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 95–96 (1983) (emphasizing that nonrefoulement is not absolute principle). The author notes that the exception in Article 33(2) is "framed in terms of the individual," so that justice requires more than a mechanical denial of nonrefoulement. *Id.* at 96.

165. *See* 142 CONG. REC. S11904–06 (daily ed. Sept. 30, 1996) (statement of UNHCR Rep. Anne Willem Bijleveld) (emphasizing that excluding refugee from Protocol's protection "should only be invoked in 'extreme cases' and only after a balancing test has been applied"); *see also* Matter of Frentescu, 18 I. & N. Dec. 244, 246 (B.I.A. 1982) (noting that refugee may be excluded from Convention's nonrefoulement provision in extreme cases).

166. *See* OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 176, at 41 (2d ed. 1988) (commenting that initial assessment is to determine if individual is refugee as defined by inclusion clauses).

167. *See id.* at para. 177, at 42 (noting that second assessment in determining withholding eligibility is possible exclusionary grounds).

168. *See id.* at para. 156, at 37 (advising that adjudicator must strike balance between nature of offense and persecution feared). When determining whether to deport a refugee based upon a criminal conviction, the danger posed by the individual must be so severe as to outweigh the threat of persecution feared. *Id.*

169. *Compare* IIRIRA, *supra* note 11, § 305, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1659 (amending withholding provision to statutorily bar aggravated felon sentenced to at least five year prison term), *with* OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 156, at 37 (2d ed. 1988) (explaining that when fear of persecu-

tenced to a prison term of five years, the court must still determine whether the individual can demonstrate a clear probability that his or her life or freedom is threatened on account of one of the five statutory grounds of persecution.[170] Simply stated, an adjudicator must determine if the alien is a refugee within the meaning of the statute. If it is determined that the alien is a refugee, then the issue of dangerousness enters the analysis of whether the individual should be excluded Under Article 33(2) from the provision's protection.[171]

Further, the UNHCR has urged a weighing of various factors to support the drastic decision to return a person to endure severe persecution.[172] As noted by courts, deportation is a draconian measure in and of itself.[173] This hardship is intensified when a refugee faces severe emotional, physical, mental or sexual abuse upon deportation.[174] Hence, section 305 of the IIRIRA destroys the United States' commitment to

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tion exists, degree of crime must individually be determined to greatly outweigh persecution).

170. *See* OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 176, at 41 (2d ed. 1988) (determining that first assessment in withholding application must be whether individual is refugee within definition of inclusion clauses). After this initial assessment, it is then possible to determine possible grounds for exclusion by conducting a balancing test. *Id.* para. 177, at 42.

171. *See* OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, para. 176, at 41 (2d ed. 1988) (asserting that application for refugee status must first be examined "from the standpoint of the inclusion clauses" in Convention); Letter from Anne Willem Bijleveld, Representative, Office of United Nations High Commissioner for Refugees, to Nadine K. Wettstein, American Immigration Lawyers Association 2 (May 15, 1996) (on file with the *St. Mary's Law Journal*) (advising that first determination is deciding whether individual is refugee before considering exclusion grounds).

172. *See* OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 157, at 37 (2d ed. 1988) (concluding that adjudicator must consider all relevant factors, including mitigating circumstances). Mitigating factors include age, lack of prior convictions, and evidence of rehabilitation. Letter from John McCallin, Representative, Office of United Nations High Commissioner for Refugees, to Alan K. Simpson, Senator, United States Senate 3 (May 1, 1990) (on file with the *St. Mary's Law Journal*).

173. *See* Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977) (describing deportation as severe sanction surpassing "all but most Draconian criminal penalties").

174. *See* 138 CONG. REC. S11960–62 (daily ed. Aug. 7, 1992) (statement of Sen. Deconcini) (arguing United States has moral responsibility and legal obligation under international law to protect refugees fleeing persecution); 133 CONG. REC. S972, 978 (daily ed. Jan. 20, 1987) (GAO Report on Asylum Practices and Procedures at the Immigration and Naturalization Service and the State Department) (explaining that Protocol's adoption

respect basic human rights by denying victims of torture, or severe emotional, psychological and sexual abuse protection extended under the 1967 Protocol.

B. *The Recently-Repealed Section 413(f) of the AEDPA Was Consistent with the 1967 United Nations Protocol Relating to the Status of Refugees*

Section 413(f) of the AEDPA was a significant provision marking the United States' attempt to align its refugee law with international standards for refugee protection. This provision becomes all the more important since its principles have been repealed under section 305 of the IIRIRA. The protections provided under AEDPA section 413(f) were viewed by some to provide too generous a right to an already liberal asylum process. Thus, AEDPA section 413(f) quickly fell victim to stricter provisions reinstating an automatic bar to withholding, once again placing the United States in violation of the Protocol.

Section 413(f) of the AEDPA states that withholding of deportation may be granted to an alien convicted of an aggravated felony, notwithstanding the criminal conviction, to ensure that the United States complies with the 1967 Protocol.[175] Congress's intent is discernible from a reading of the statute's plain language.[176] The AEDPA provision was intended to replace the long-standing bar to withholding with an individualized assessment of withholding eligibility consistent with the standard endorsed by the UNHCR.[177]

By granting the Attorney General the discretion to withhold the deportation of a refugee, the AEDPA allowed for an assessment of a claim that weighed various factors.[178] In contrast, section 305 of the IIRIRA strips

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of definition of refugee reflects United States' humanitarian concern to protect persons fearing persecution).

175. AEDPA, *supra* note 20, § 413(f), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1269.

176. *See Chevron*, 467 U.S. at 842–43 (holding that Congress's intent must be given effect when unambiguous); American Immigration Lawyers Assoc., Amicus Curiae Brief in Response to Board Request for Brief on § 413(f) of the AEDPA, *submitted to* Executive Office for Immigration Review Board of Immigration Appeals (May 20, 1996), at 16 (arguing plain language of section 413(f) voids absolute bar to withholding for criminal aliens).

177. *See* 142 CONG. REC. S11905 (daily ed. Sept. 30, 1996) (statement of UNHCR Rep. Anne Willem Bijleveld) (commending AEDPA section 413(f) for providing case-by-case determination of withholding eligibility). According to the UNHCR, the case-by-case evaluation allows the adjudicator to determine if the individual has been convicted of a "particularly serious crime" and also constitutes a danger to the community. *Id.*

178. *See* AEDPA, *supra* note 20, § 413(f), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1269 (authorizing Attorney General under § 413(f) to withhold removal of refugee in her discretion, even when alien is convicted of aggravated felony).

the Attorney General of her discretion to grant withholding, regardless of a criminal offense.[179] Thus, section 413(f) of the AEDPA was an amendment to the INA consistent with international obligations calling for an individualized assessment of withholding eligibility.[180] By enacting IIRIRA section 305 and reinstating an automatic bar to withholding to a particular class of refugees, the United States essentially is again denying protection to refugees facing threats to life and freedom.

C. *Denying the Right to an Individualized Review Is Inconsistent with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Section 305 of the IIRIRA not only denies protection to refugees protected under the 1967 Protocol, but also denies protection extended under the Torture Convention, which is of equal status to the Protocol.[181] Under Article 3 of the Torture Convention, a country shall not "expel, return ('refouler') or extradite" any individual to a state where there is a substantial belief that the person will more likely than not be subject to torture.[182] Although the Board of Immigration Appeals has not yet addressed the applicability of the Torture Convention, Article 3 is a self-

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179. *See* 142 CONG. REC. S11905 (daily ed. Sept. 30, 1996) (statement of UNHCR Rep. Anne Willem Bijleveld) (noting that section 305 of IIRIRA will nullify AEDPA section 413(f)).

180. *See id.* (urging Congress to retain Attorney General's discretionary authority to grant withholding, which is consistent with 1967 Protocol); Letter from Anne Willem Bijleveld, Representative, Office of United Nations High Commissioner for Refugees, to Nadine K. Wettstein, American Immigrations Lawyers Association 3 (May 15, 1996) (on file with the *St. Mary's Law Journal*) (advising that AEDPA section 413(f) allows for individualized assessment of withholding consistent with 1967 Protocol).

181. *See* Torture Convention, *supra* note 13, art. 3, S. TREATY DOC. No. 100–20, at 20, 23 I.L.M. at 1028 (mandating nonrefoulement of individual substantially fearing threat of torture); Head Money Cases, 112 U.S. 580, 598–99 (1884) (holding that treaty is as much the "law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined"); *see also* RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1986) (stating rule governing inconsistencies between international agreements and domestic law). Section 115(2) of the Restatement proscribes that "[a] provision of a treaty of the United States that becomes effective as law to the United States supersedes as domestic law any inconsistent preexisting provision of a law or treaty of the United States." *Id.* § 115(2).

182. Torture Convention, *supra* note 13, art. 3, S. TREATY DOC. No. 100–20, at 20, 23 I.L.M. at 1028; *see* Evelyn Mary Aswad, Note, *Torture by Means of Rape*, 84 GEO. L.J. 1913, 1923 (1996) (discussing elements that must be satisfied for abuse to constitute torture).

executing treaty provision which requires the United States' to adhere to the nonrefoulement provision.[183]

Under Article VI of the United States Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[184] Further, the language in Article 3 of the Torture Convention states that the right of nonrefoulement to victims or potential victims of torture is mandatory.[185] Thus, the Torture Convention is a treaty obligation that is of equal stature to the IIRIRA under the Constitution and must be as strictly adhered to in kind.[186]

Despite the Torture Convention's status as a binding obligation, Congress has not passed specific legislation directly implementing the nonrefoulement provision in Article 3 of the Torture Convention. Furthermore, when the Senate ratified the Torture Convention, it declared that several articles, including Article 3, should not be self-executing.[187]

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183. *See* RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) (1986) (stating rule on interpreting international agreements). Under section 325(1), "an international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose." *Id.* Treaties may declare or establish a rule of law or require domestic legislation to give them effect. J.E.S. FAWCETT, THE LAW OF NATIONS 97 (1968). The language in Article 3 of the Torture Convention contains no language that calls on the legislature to implement it. *Compare* Torture Convention, *supra* note 13, art. 3, S. TREATY DOC. No. 100-20, at 20, 23 I.L.M. at 1028 (stating that no party "shall expel, return ('refouler') or extradite" a person in danger of being subjected to torture), *with* Torture Convention, *supra* note 13, art. 4, para. 2, S. TREATY DOC. No. 100-20, at 20, 23 I.L.M. at 1027 (stating that party "shall make these offenses [torture] punishable by appropriate penalties").

184. U.S. CONST. art. VI, § 2; *see* RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 comment d (1987) (explaining Article VI of United States Constitution declares treaties to be "supreme Law of the Land").

185. *See* Torture Convention, *supra* note 13, art. 3, S. TREATY DOC. No. 100-20, at 20, 23 I.L.M. at 1028 (stating in unequivocal language that no state shall expel, return or extradite individual in danger of torture).

186. *See* Head Money Cases, 112 U.S. at 598 (stating that treaty made under United States' authority "shall be the supreme law of the land"); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (stating that "Constitution declares a treaty to be the law of the land"). Justice Marshall further commented that a treaty is to be "regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." *Id.*; *see also* United States v. Percheman, 32 U.S. (7 Pet.) 51, 88-89 (1833) (concluding treaty required no action by United States to come into force).

187. *See* 136 CONG. REC. S17492 (daily ed. Oct. 27, 1990) (ratification resolution) (advising that Articles 1 through 16 of Torture Convention are not self-executing).

However, this declaration does not, and cannot, impede the United States' obligation under Article 3 to protect an individual from torture.[188]

The fact that Congress has not passed legislation implementing Article 3 does not, by implication, allow the United States to ignore the right to nonrefoulement proposed in Article 3.[189] Treaties should be interpreted in accordance with the purposes and objectives of each treaty's terms.[190] In light of the Torture Convention's clear objective of prohibiting torture, which has also been recognized by the international community as a principle of *jus cogens*, the United States must strictly adhere to Article 3.[191] Like the Protocol and the Convention, the Torture Convention similarly requires the Board to conduct a case-by-case review of refugee applications to determine whether a threat of torture exists, even where the applicant has an aggravated felony conviction.[192] Otherwise, ignoring the

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188. *See* Siderman de Blake v. Republic of Arg., 965 F.2d 699, 717 (9th Cir. 1992) (proclaiming that torture has attained status of *jus cogens*); Filartiga v. Pena-Irala, 630 F.2d 876, 884 (1980) (holding that "official torture is prohibited by the law of nations"); *see also* Timothy D. Rudy, *Did We Treaty Away* Ker-Frisbie?, 26 ST. MARY'S L.J. 791, 822 n.204 (1995) (noting that Senate non-self-execution declaration is not true reservation to become part of treaty).

189. *See Genocide Convention: Hearing on Executive Order Before a Subcomm. of the Senate Comm. on Foreign Relations*, 92d Cong. 106 (1971) (stating declaration not substantially affecting obligations, or relating to domestic matters, has no effect on treaty); Timothy D. Rudy, *Did We Treaty Away* Ker-Frisbie?, 26 ST. MARY'S L.J. 791, 818 (1995) (reflecting that United States courts are obliged to "apply customary international law unless a controlling executive, legislative or judicial act holds to the contrary"). Rudy notes that an open debate exists regarding the executive branch's ability to disregard customary international law. *Id.* Nevertheless, the courts may indirectly incorporate a treaty's norms and provisions [deemed to be non-self-executing] into American jurisprudence. *Id.* at 822.

190. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340; *see* United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992) (asserting that first step in construing treaty is to look at its meaning and purpose).

191. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 n.20 (D.C. Cir. 1984) (noting torture is act unequivocally condemned by international community); J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 12 (1988) (commenting that prohibition against torture has developed into customary international law from which there is no derogation).

192. *See* Torture Convention, *supra* note 13, art. 3(2), S. TREATY DOC. No. 100-20, at 20, 23 I.L.M. at 1028 (listing factors to consider in determining substantial danger of torture). Article 3(2) states: "For the purpose of determining whether there are such grounds [danger of torture], the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." *Id.*; *see also Victims of Torture: Hearing Before House Comm. on Int'l Relations Subcomm. on Int'l Operation and Human Rights*, 104th Cong. (statement of Phyllis A. Coven, Director of International Affairs, INS), at *3-4 *available in* 1996 WL 10164383 (recognizing need to formulate interviews to deal with victims of torture suffering post-traumatic stress disorder). The trauma

merits of particular cases may subject certain individuals to gross violations of human rights—such as beatings, electrical shocks, sexual abuse, and even executions—which greatly outweigh the threat these individuals pose to the United States. Such actions violate the United States' mandatory obligations under the Torture Convention.[193]

The Torture Convention provides a more generous right to nonrefoulement than provided in the Protocol.[194] The Protocol does not mandate withholding deportation of aliens convicted of particularly serious crimes.[195] The withholding provision of the INA similarly rejects a mandatory right of nonrefoulement to aliens convicted of aggravated felonies. Under United States' legislation, the AEDPA calls upon the Attorney General, in her discretion, to determine whether such a refugee should be granted withholding.[196] This determination necessarily means that the Attorney General should weigh the dangerousness posed by the criminal alien against the threat of life or freedom the alien faces upon deportation.[197] Thus, under the AEDPA, a person facing torture may still be denied withholding relief, despite the Torture Convention's mandatory right to nonrefoulement.

Notwithstanding this distinction, the international community has yet to recognize a crime where the criminal alien would pose such a danger so as to outweigh the horrific act of torture. Thus, statutory language or

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suffered may cause a person to lose memory, become disoriented or disassociated, and may cause blockage of the torture experience. *Id.* at *4.

193. *See* Kay Hailbronner, *Nonrefoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?* (explaining general recognition that surrendering person to violator of human rights is to participate in violation), *in* THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s 140 (David E. Martin ed., 1986). Prohibition of torture is considered a basic human right adopted by the international community. *Id.*

194. *See* Torture Convention, *supra* note 13, art. 3, S. TREATY DOC. No. 100-20, at 20, 23 I.L.M. at 1028 (containing no language that would exclude individual from protection of Article 3); Kay Hailbronner, *Nonrefoulement and "Humanitarian" Refugees: Customary International Law or Wishful Thinking?* (stating that right not to be tortured is "peremptory rule of customary international law"), *in* THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980's 140 (David E. Martin ed., 1986).

195. *See* AEDPA, *supra* note 20, § 413(f), *reprinted in* 1996 U.S.C.C.A.N. (110 Stat.) at 1269 (stating that Attorney General has discretionary authority to grant withholding to alien convicted of aggravated felony).

196. *Id.*

197. *See* Committee Against Torture, Communication No. 15/1994, U.N. Doc. CAT/C/13/D/15/1994 (Nov. 18, 1994) (omitting consideration of criminal offense in analyzing individual's right under Article 3 of Torture Convention). This decision involved an individual being deported from Canada and facing danger of being tortured in Pakistan. *Id.* The fact that he was convicted of an assault causing bodily injury was not relevant to determining that he not be returned because of the torture. *Id.*

administrative guidelines that mandate a case-by-case review are needed to ensure the Board properly deals with aliens who are torture victims or are likely to be tortured upon return to their country of origin. Most importantly, compliance with the Torture Convention mandates that a victim or likely victim of torture not be removed from the country of refuge.

V. RECOMMENDATIONS

As a threshold matter, *any* law that denies a refugee the minimum opportunity to obtain withholding of deportation without an individualized determination of eligibility violates international law.[198] Thus, the language in recently-enacted section 305 of the IIRIRA should be amended to restore the protections provided by section 413(f) of the AEDPA or provide for a case-by-case review of withholding eligibility.[199] Under such a system, the first issue to be addressed by the adjudicator would be whether the alien can be classified as a refugee.[200] If the alien is classified as a refugee, and does not fall within one of the excludable classes of refugees, the right to withholding of deportation should be mandatory.[201] However, if the adjudicator is presented with evidence that the alien has been convicted of an aggravated felony, that fact should *immediately trig-*

198. *See* OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 157, at 37 (2d ed. 1988) (requiring review of relevant factors when considering excludability); Letter from Anne Willem Bijleveld, Representative, Office of United Nations High Commissioner for Refugees, to Nadine K. Wettstein, American Immigration Lawyers Association 3 (May 15, 1996) (on file with the *St. Mary's Law Journal*) (opining that denying withholding of removal without balancing all relevant factors in case violates 1967 Protocol).

199. *See* OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 157, at 37 (2d ed. 1988) (advising that balancing test is required when determining whether to deny protection of Protocol). One can consider such factors as the purpose of the crime, the use of violence or arms, age, lack of prior convictions, or evidence of rehabilitation. Letter from John McCallin, Representative, Office of United Nations High Commissioner for Refugees, to Alan K. Simpson, Senator, United States Senate 2, 3 (May 1, 1990) (on file with the *St. Mary's Law Journal*).

200. *See* OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 176, at 41 (2d ed. 1988) (commenting that first determination when considering withholding of removal is whether the individual is refugee).

201. *See* Convention, *supra* note 27, art. 33(1), 189 U.N.T.S. at 176 (mandating right to nonrefoulement when individual establishes threat to life or freedom).

ger a separate determination of dangerousness.[202] It is within this second determination that a balancing test should be applied.[203] On one hand, the adjudicator should analyze the degree of dangerousness the refugee poses to the community.[204] Such factors as the type of crime committed and the sentence imposed, as well as mitigating factors like age, prior convictions and demonstrated rehabilitation, should be taken into account.[205] These determinations should then be weighed against a more important factor: the seriousness of the threat of severe physical, emotional, mental or sexual abuse upon deportation.[206] If the threat to freedom or life is of such a degree so as to outweigh the dangerousness posed to the community, withholding should be granted.[207]

Complying with the Torture Convention is a more complicated task, but one that is necessary to ensure that the horrific act of torture is not imposed upon any human being. The current relief proposed under IIRIRA section 305 falls short of absolutely protecting torture victims, or potential torture victims, as required under the Torture Convention.[208]

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202. *See* OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 156–57, at 37 (2d ed. 1988) (recommending that all relevant factors of case be considered and that balancing between degree of persecution and threat to community be weighed).

203. *See id.* (calling for balancing of factors when determining nonrefoulement eligibility).

204. *See* OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 156, at 37 (2d ed. 1988) (stating that conviction for an aggravated felony should trigger determination of whether crime is severe enough to warrant deportation of individual and possible infliction of persecution).

205. *See* Letter from John McCallin, Representative, Office of United Nations High Commissioner for Refugees, to Alan K. Simpson, Senator, United States Senate 3 (May 1, 1990) (on file with the *St. Mary's Law Journal*) (emphasizing that in considering application for withholding of deportation of one convicted of crime, adjudicator should balance factors to determine severity of crime in relation to persecution feared by applicant).

206. *See* Letter from Anne Willem Bijleveld, Representative, Office of United Nations High Commissioner for Refugees, to Orrin G. Hatch, Chairman, Senate Judiciary Committee 3 (Mar. 6, 1996) (on file with the *St. Mary's Law Journal*) (proclaiming UNHCR's position that seriousness of offense committed must be weighed against degree of persecution that is feared).

207. *See* Letter from John McCallin, Representative, Office of United Nations High Commissioner for Refugees, to Alan K. Simpson, Senator, United States Senator 3 (May 1, 1990) (on file with the *St. Mary's Law Journal*) (advising that degree of crime must be grave to justify returning individual to country where severe threat of torture exists).

208. *Compare* IIRIRA, *supra* note 11, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1659 (proclaiming in section 305 that aggravated felons sentenced to at least five year sentence are barred from withholding eligibility), *with* Torture Convention, *supra* note 13,

Article 3 of the Torture Convention calls for the mandatory right to nonrefoulement for an individual in danger of being subjected to torture, regardless of an alien's conviction for an aggravated felony.[209] In contrast, the IIRIRA's withholding provision provides a lesser standard of protection, automatically barring certain aggravated felons from withholding eligibility and granting the Attorney General the discretion to deny withholding to those not already statutorily barred.[210] To comply with the Torture Convention, Congress must enact legislative provisions implementing Article 3 in order to protect individuals from torture. Essentially, such legislation should provide that withholding must be granted in those cases where an individual can show a substantial threat of being subjected to torture upon his or her return to the home country.[211]

VI. CONCLUSION

Congress's recent enactment of the Illegal Immigration Reform and Immigrant Responsibility Act has again placed the United States in a position inconsistent with its obligations under the 1967 Protocol Relating to the Status of Refugees and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Both of these international treaties require contracting nation-states to withhold the deportation of individuals facing a substantial threat of torture, execution, or threat to liberty or freedom. Conviction for an aggravated felony cannot automatically bar a refugee from withholding of deportation. Rather, a separate and distinct determination is necessary to consider whether the persecution to be faced upon deportation outweighs the danger posed to the United States community. In addition, the international *jus cogens* status of torture essentially forbids any nation-state from derogating from the absolute prohibition against torture. Consequently, the strength of the Torture Convention's mandatory right of nonrefoulement cannot be contradicted by nation-states for any reason. According to the interna-

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art. 3, S. TREATY DOC. No. 100-20, at 20, 23 I.L.M. at 1028 (mandating that contracting state not return individual who is in danger of being subjected to torture).

209. *See* Torture Convention, *supra* note 13, art. 3, S. TREATY DOC. No. 100-20, at 20, 23 I.L.M. at 1028 (holding that no state can "expel, return ("refouler") or extradite person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture").

210. *See* IIRIRA, *supra* note 11, § 305, *reprinted in* 1996 U.S.C.C.A.N. (110 Stat. 3009) at 1659 (stating that aggravated felon sentenced to minimum of five year sentence is statutorily barred from withholding).

211. *See* Torture Convention, *supra* note 13, art. 3, S. TREATY DOC. No. 100-20, at 20, 23 I.L.M. 1027, 1028 (mandating that contracting state not return individual to country when danger of torture exists).

tional agreements to which the United States has acceded and is bound, an individual establishing that he or she is more likely than not to be subjected to torture cannot be denied withholding of deportation, regardless of whether the individual has been convicted of an aggravated felony. Thus, Congress must take legislative action to comply with the United States' international obligation to protect the basic human rights of individuals fearing persecution and torture.