

## **The Misuse of Deference and International Standards in Narrowing Withholding of Deportation in Light of *INS v. Aguirre-Aguirre***

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One field of international law, which plays a powerful role in our society, is the law of refugees.<sup>1</sup> This becomes readily apparent as the number of refugees ranges between thirteen and eighteen million globally.<sup>2</sup> The United States alone determined that it would admit 91,000 refugees during 1999.<sup>3</sup> Courts and administrative agencies interpret and apply international legal

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<sup>1</sup> David A. Martin, *Refugees and Migration*, in UNITED NATIONS LEGAL ORDER, 391 (Oscar Schachter & Christopher C. Joyner eds., 1995) (explaining that although refugee law has gained influence, a strong UN refugee protection system will still be necessary). The word “refugee” derives from the French word *réfugié*, which originally referred to Protestant Huguenots expelled from France after Louis XIV abolished the Edict of Nantes in 1685. See W. GUNTHER PLAUT, *ASYLUM: A MORAL DILEMMA* 12 (1995). For some time, it continued to be used to mean Huguenots, but its meaning eventually expanded into a general term denoting people who had left their home country due to duress. See *id.*

<sup>2</sup> See Guy S. Goodwin-Gill, *Towards a Comprehensive Regional Policy Approach: The Case for Closer Inter-Agency Cooperation*, 5 INT’L J. REFUGEE L. 347 (1993) (observing that there are 18 million refugees worldwide and another 24 million internally displaced persons); see also Ranee K.L. Panjabi, *International Politics in the 1990’s: Some Implications for Human Rights and the Refugee Crisis*, 10 DICK J. INT’L L. 1, 4-5 (1991) (noting that approximately 15 million people have fled from their homes in recent years to escape violence and poverty).

<sup>3</sup> 64 Fed. Reg. 47, 341 (1999). President Clinton raised the number of refugee admissions to the United States from 78,000 to 91,000 for Fiscal Year 1999 in order to admit Kosovar refugees. See *id.* The President determined that an unforeseen refugee emergency exists in Europe, and that the admission of the Kosovars was justified by “grave humanitarian concerns” which were in the United States’ interest. *Id.* In the United States, the ceiling for refugee admissions has had a downward trend from 207,000 in 1980 to 91,000 for 1999. See *Refugee Consultation, 1999: Hearings on Refugee Admissions to the United States for Fiscal Year 2000 Before the Subcomm. on Immigration of the Senate Comm. Of the Judiciary*, 105th Cong. (August 4, 1999) (statement of Bishop Nicholas DiMarzio, Bishop of Camden New Jersey, Chairman of the National Conference of Catholic Bishops Committee). It has been argued that the ceiling for refugee admissions should be placed no less than 132,000, which is the admissions level when President Clinton came into office. See *id.* (statement of Ralston H. Deffenbaugh, Jr., President, Lutheran Immigration and Refugee Service; Vice-Chair, InterAction Committee on Migration and Refugee Affairs).

standards daily to determine the fate of refugees.<sup>4</sup> One of these standards is the concept of non-refoulement.<sup>5</sup>

The duty of non-refoulement is enshrined in Article 33 of the Convention Relating to the

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The United States' experience with masses of refugees on its borders may be recently seen in the exodus of Haitians. See Claire P. Gutekunst, *Interdiction of Haitian Migrants on the High Seas: A Legal and Policy Analysis*, 10 YALE J. INT'L L. 151, 154 (1984). For several decades, political repression, human rights abuses and economic deprivation in Haiti have led to a steady flow of migrants seeking refuge in the countries neighboring Haiti and the United States. *Id.* at 152-154. The United States domestic and foreign policy regarding Haitian refugees has had "three goals: 1) to exclude, detain, and restrict the use of parole for Haitians physically present in the United States, 2) to interdict Haitians on the high seas, and 3) to process Haitian refugees in their own country." Carlos Ortiz-Miranda, *Haiti and the United States During the 1980s and 1990s: Refugees, Immigration, and Foreign Policy*, 32 SAN DIEGO L. REV. 673, 680 (1995). This policy began with the Reagan administration and continued throughout the Bush and Clinton administrations. *Id.* Compare *Federation for American Immigration Reform (Advertisement)*, NEWSWEEK, October 18, 1999, at 60(a)-60(b) (holding that immigration is the leading cause of population growth in the United States and that this will lead to environmental destruction) with *Refugee Consultation, 1999: Hearings on Refugee Admissions for Fiscal Year 2000 Before the Subcommittee on Immigration of the Senate Comm. of the Judiciary*, 105th Cong. (August 04, 1999) (statement of Julia Taft, Assistant Secretary of State Bureau of Population, Refugees and Migration, Department of State). (Department of State Representative's testimony to recent refugee Kosovars in the United States: "[t]he American people have been reminded of what it means to be a refugee. The public's response to the plight of the Kosovars was immediate and overwhelming. We received tens of thousands of calls and everyone wanted to do something.")

<sup>4</sup> See Martin, *supra* note 1; see also Goodwin-Gill, *supra* note 2 and accompanying text. The need for refugee deliberations is high as the number of refugees has risen. See *id.*

<sup>5</sup> The term "non-refoulement" derives from the French word *refouler*, meaning to turn back. See Plaut, *supra* note 1, at 12. Some commentators argue that the principle of non-refoulement has emerged as a generally accepted principle of customary international law and is therefore binding on all states regardless of whether or not they have adopted the Refugee Convention and the Protocol. See, e.g., Guy S. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 VA. J. INT'L L. 897, 898 (1986) (arguing that a "moral obligation to assist refugees and to provide them with refuge or safe haven has, over time and in certain contexts, developed into a legal obligation"). But see Kay Hailbronner, *Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, 26 VA. J. INT'L L. 857, 878 (1986) (finding that no international principle exists for providing temporary refuge).

Status of Refugees (Refugee Convention).<sup>6</sup> The concept prohibits returning any refugee to a country where the refugee's life or freedom would be threatened.<sup>7</sup> Non-refoulement is the method by which nations, including the United States, have expressed their commitment to help aid deserving refugees.<sup>8</sup> The United States' duty to non-refoulement was recently analyzed by the Supreme Court in *INS v. Aguirre-Aguirre*.<sup>9</sup>

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<sup>6</sup> Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]; see generally NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION (1953); Paul Weis, *The International Protection of Refugees*, 48 AM. J. INT'L L. 193, 195 (1954) (stating that the goal of the Refugee Convention is the establishment of international legal status for refugees and the creation of international safeguards for its observation).

<sup>7</sup> See *id.* Other international agreements mandating the non-refoulement concept include: (1) Article 45 of the Fourth Geneva Convention of 1949, which prohibits refoulement to a country where there are Geneva Convention violations, and any deportation which violates this mandate is considered a "grave breach" of the Convention. See Karen Parker, *The Rights of Refugees Under International Law*, in REFUGEE LAW AND POL'Y 33, 38 (Ved P. Nanda, eds., 1989); (2) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, 23 I.L.M. 1027, as modified, 24 I.L.M. 535 (June 26, 1987) (Article 3 prohibits any refoulement to a country where there are "substantial grounds" for believing the individual will be a victim of torture); (3) European Convention on Human Rights (Article 3 interpreted by the European Commission on Human Rights as providing a right of non-refoulement to any country where the person would be subjected to torture or inhuman or degrading treatment. See David Scott Nance, *The Individual Rights to Asylum Under Article 3 of the European Convention on Human Rights*, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 477 (1987).

<sup>8</sup> See Kathleen M. Keller, Note, *A Comparative and International Law Perspective on the United States (Non)Compliance With Its Duty of Non-Refoulement*, 2 YALE HUMAN RTS. & DEV. L.J. 183 (1999) (the commitment is based on the death and imprisonment Jewish refugees faced during the Holocaust); see also Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 251 (1996) (explaining that the commitment of non-refoulement was made an obligatory norm by the Refugee Convention). Professor Goodwin-Gill argues that, "[t]here is substantial, if not conclusive, authority that the principle is binding in all states, independently of specific assent. State practice before 1951 is, at the least, equivocal as to whether, in that year, Article 33 of the Convention reflected or crystallized a rule of customary international law." GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 97 (1983).

<sup>9</sup> 119 S. Ct. 1439 (1999). The Ninth Circuit has denied a petition for review of *INS v. Aguirre-Aguirre* on remand from the U.S. Supreme Court. *Aguirre-Aguirre*, 191 F.3d 998 (9th Cir. 1999).

*Aguirre-Aguirre* involved Juan Anibal Aguirre-Aguirre, who had entered the United States illegally.<sup>10</sup> At a hearing before an Immigration Judge he conceded deportability and applied for asylum<sup>11</sup> and withholding of deportation.<sup>12</sup> Mr. Aguirre-Aguirre testified that in his home country of Guatemala, he was involved in student protests against the government, which were considered to be criminal.<sup>13</sup> The Immigration Judge found that Mr. Aguirre-Aguirre's acts were essentially political in nature when balanced against the circumstances in Guatemala.<sup>14</sup> As

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<sup>10</sup> 121 F.3d 521, 522 (9th Cir. 1997).

<sup>11</sup> The word "asylum" has its origin in the Greek language and culture and is derived from the verb "asylao," meaning to violate or lay waste. See Plaut, *supra* note 1, at 11. The adjective "asylos/asylon" represents the opposite, namely, inviolable. See *id.* Today asylum generally indicates a nation where a refugee may find temporary or permanent shelter. See *id.*

<sup>12</sup> See Aguirre-Aguirre, 121 F.3d at 522. In the United States, an alien fleeing persecution has two available options. See KAREN MUSALO, ET AL., REFUGEE LAW AND POLICY 84-85 (1997). The first option is asylum and the second option is withholding of deportation or restriction on removal. See *id.* (Pursuant to the 1996 amendments to the INA "withholding of deportation" has been renamed "restriction on removal." *Id.* The controlling statutory provisions for asylum are INA § 208, 8 U.S.C. 1158, and Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) codified at 8 U.S.C. § 1231(b)(3) for restriction on removal. For purposes of this note "restriction on removal" will be referred to as "withholding of deportation."

An alien may apply for either withholding of removal or asylum by offering evidence of a well-founded fear of persecution upon return to his/her own country. See Gwendolyn M. Holinka, Comment, *Q-T-M-T: The Denial of Humanitarian Relief For Aggravated Felons*, 13 EMORY INT'L L. REV. 405, 414 (1999). To gain withholding, an alien must show a greater probability of persecution than for asylum. See *id.* Once granted asylum, an alien is entitled to become a lawful permanent resident of the United States and may eventually become a citizen. See *id.* In comparison, with withholding of deportation the alien is not guaranteed the right to stay in the United States. See *id.* However, an alien may be sent to a third country, but will not be forced to return to his/her country of origin. See *id.* In addition, asylum is a discretionary remedy and withholding of deportation is mandatory once an alien has demonstrated a well-founded fear of persecution. See *id.*

<sup>13</sup> See Aguirre-Aguirre, 121 F. 3d at 522. The protests involved burning several buses, after ousting the passengers, and disrupting the government through private property damages. See *id.* The demonstrations were particularly against the government's raising of student fares on the buses and its indifference to, and possible complicity in, the mysterious disappearances and deaths of political activists. See *id.*

<sup>14</sup> See *id.*; see also Brief of Respondent Juan Anibal Aguirre-Aguirre, *INS v. Aguirre-Aguirre*, 119 S. Ct. 1439 at 7 (1999) (No. 97-1754). The Immigration Judge rejected the INS's suggestion that Mr. Aguirre-Aguirre was a

a result, the Immigration Judge granted both asylum and withholding of deportation.<sup>15</sup>

On appeal, the Board of Immigration Appeals (BIA) reversed the Immigration Judge.<sup>16</sup>

The BIA's rationale was that the nature of his acts in Guatemala made him unworthy of asylum in the United States.<sup>17</sup> Therefore, it was unnecessary to address Mr. Aguirre-Aguirre's statutory

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criminal or a terrorist based on the finding that his acts were politically motivated. *See id.* Guatemala is a violent country with a long history of cruelty, civil strife, and human rights violations by the government. *See id.* The Immigration Judge explained that Mr. Aguirre-Aguirre's activities should be viewed with these circumstances in mind. *See id.*

The applicant for asylum and restriction on removal bears the burden of proof for establishing eligibility for relief. *See* MUSALO ET AL., *supra* note 12, at 878. The term "burden of proof" encompasses both the burden of production of evidence and the burden of persuasion of the adjudicator. *See id.* The burden of production in asylum cases poses special challenges, which are often not present in other domestic administrative or judicial proceedings. *See id.* The events at issue occurred thousands of miles away, making it very unlikely that the applicant will be able to produce witnesses, forensic evidence, or other documentary evidence specific to the claim. *See id.* For these reasons, it is often the case that the applicant's own testimony, if found credible, may constitute the only evidence to prove the facts of her claim. *See id.* In the United States, asylum regulations provide that the applicant's testimony, if it is credible, "may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. 208.13, 208.15 (2000). Courts in the United States consider an array of factors in evaluating the credibility of testimony, including the demeanor of the witness, the consistency, detail and specificity of the testimony, and its overall plausibility. *See* NLRB v. Walton Mfg Co., 369 U.S. 404, 408 (1962) ("[W]eight is given the administrative law judge's determinations of credibility for the obvious reason that he or she 'sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records.'"); *cf.* Joanna Ruppel, *The Need for a Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants*, 23 COLUM. HUM. RTS. L. REV. 1, 35-36 (1991) (explaining that "the Canadian government has incorporated into the structure of refugee adjudication a policy of giving the refugee the benefit of the doubt, not only as to the proof of her claim, but also as to her credibility.").

<sup>15</sup> *See* Aguirre-Aguirre, 121 F.3d at 522.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*; *cf.* Quinn v. Robinson, 783 F.2d 776, 804 (9th Cir. 1986) (the courts stated that in determining the political offense exception:

It is understandable that Americans are offended by the tactics used by many of those seeking to change their governments . . . Sometimes they are employed by those whose views of the nature, importance, or relevance of individual human life differ radically from ours. Nevertheless, it is not our place to impose our notions of civilized strife on people who are seeking to overthrow the regimes in control of their countries in contexts and circumstances that we have not experienced, and with which we can identify only with the greatest difficulty.)

eligibility for asylum.<sup>18</sup> The BIA further held that the criminal nature of his acts outweighed their political nature and therefore, barred him from withholding of deportation.<sup>19</sup> However, the BIA did find that Mr. Aguirre-Aguirre did not engage in terrorist acts and that he was not a danger to the security of the United States.<sup>20</sup>

The Ninth Circuit reversed holding that the BIA did not follow the guidelines set forth by the Refugee Convention and the Protocol Relating to the Status of Refugees (Protocol).<sup>21</sup> The circuit court relied on *McMullen v. INS*, a previous Ninth Circuit case.<sup>22</sup> In *McMullen*, the court applied the Convention's exception for individuals who had committed a "serious nonpolitical crime" to deport an individual who bombed innocent civilians.<sup>23</sup> The Ninth Circuit, in *Aguirre-Aguirre*, again applied the Refugee Convention.<sup>24</sup> Specifically, the *Aguirre-Aguirre* court

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* The BIA opinion did not give any deference to the Immigration Judge's assessment of the historical facts, and seemed to suggest that Mr. Aguirre-Aguirre did not deserve withholding of deportation because of his criminal history. See Mr. Aguirre-Aguirre's Brief, *supra* note 14, at 39.

<sup>20</sup> See *Aguirre-Aguirre*, 121 F.3d at 522.

<sup>21</sup> *Id.* at 521; see also Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol].

<sup>22</sup> See *id.* at 523 (citing *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986)).

<sup>23</sup> *McMullen*, 788 F.2d at 596-597. The *McMullen* court considered several factors to determine whether the act was "political": (1) whether the act was sufficiently linked to its political objectives; (2) whether the act was disproportionate to the political objectives; and (3) the degree of atrocity of the act.

<sup>24</sup> See *Aguirre-Aguirre*, 121 F.3d at 523.

<sup>25</sup> The mandates of the office of the United Nations High Commissioner for Refugees (UNHCR) are: to provide international protection to refugees; to seek permanent solutions for the problems of refugees; to promote the conclusion and supervise the application of international conventions for the protection of refugees; and to promote the implementation of measures calculated to improve the situation of refugees. Statute of the Office of the High Commissioner for Refugees, G.A. Res. 428, U.N. GAOR, 5th Sess., Annex 5, Supp. No. 20, at 46-48, U.N. Doc. A/1775 (1950); see also P.D. Maynard, *The Legal Competence of the United Nations High Commissioner for Refugees*, 31 INT'L & COMP. L.Q. 415, 415-25 (1982) (discusses the jurisdiction of the UNHCR); see generally LOUISE W. HOLBORN, *REFUGEES: A PROBLEM OF OUR TIME: THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 1951-1972* (1975) (providing a description of the early influence of the

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invoked the United Nations High Commissioner for Refugees (UNHCR)<sup>25</sup> Handbook (Handbook) recommendations in applying the “serious nonpolitical crime” exception.<sup>26</sup> As a

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UNHCR); MARJOLEINE ZIECK, UNHCR AND VOLUNTARY REPATRIATION OF REFUGEES: A LEGAL ANALYSIS, 59-123 (1997) (providing historical underpinnings of the creation of the UNHCR).

<sup>25</sup> The mandates of the office of the United Nations High Commissioner for Refugees (UNHCR) are: to provide international protection to refugees; to seek permanent solutions for the problems of refugees; to promote the conclusion and supervise the application of international conventions for the protection of refugees; and to promote the implementation of measures calculated to improve the situation of refugees. Statute of the Office of the High Commissioner for Refugees, G.A. Res. 428, U.N. GAOR, 5th Sess., Annex 5, Supp. No. 20, at 46-48, U.N. Doc. A/1775 (1950); see also P.D. Maynard, *The Legal Competence of the United Nations High Commissioner for Refugees*, 31 INT’L & COMP. L.Q. 415, 415-25 (1982) (discusses the jurisdiction of the UNHCR); see generally LOUISE W. HOLBORN, REFUGEES: A PROBLEM OF OUR TIME: THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 1951-1972 (1975) (providing a description of the early influence of the UNHCR); MARJOLEINE ZIECK, UNHCR AND VOLUNTARY REPATRIATION OF REFUGEES: A LEGAL ANALYSIS, 59-123 (1997) (providing historical underpinnings of the creation of the UNHCR).

Today, the UNHCR cares for some 22.4 million people. See *Fiscal Year 2000 Authorization for Refugee Assistance, 1999: Before the Subcomm. on International Operations of the House of Representatives Comm. on International Relations*, 105th Cong. (March 9, 1999) (statement of Karen Koning Abuzayd, Regional Representative, UNHCR). The United States is its largest and most reliable donor of funds. See *id.* Unfortunately, more funding is needed or essentials such as food, water, shelter, primary health care and primary education will be reduced for most refugees. See *id.*

<sup>26</sup> Aguirre-Aguirre, 121 F.3d at 523-24. The recommendations to be applied to the “serious nonpolitical crime” exception are listed in paragraphs 152 and 156 of the *Handbook on Procedures and Criteria for Determining Refugee Status* [hereinafter *UN Handbook*]:

[152] In determining whether an offence is “non-political” or is, on the contrary, a “political” crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature.

[156] [I]n applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If 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. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a *bona fide* refugee.

result, the Ninth Circuit found that Mr. Aguirre-Aguirre's acts were politically motivated and not serious enough for deportation when balanced against the threat he faced in Guatemala.<sup>27</sup>

The Supreme Court reversed the Ninth Circuit's decision, in part by giving the BIA's decision deference, and in part through its conclusion that the Handbook is not binding on the Attorney General, BIA, or U.S. courts.<sup>28</sup> The Supreme Court held that an alien who has committed a "serious nonpolitical crime" is ineligible for withholding of deportation.<sup>29</sup> In addition, the Court explained that this determination does not require balancing the alien's criminal acts against the risk of persecution the alien would face if returned to his/her home country.<sup>30</sup> The Court further held that the BIA was not required to expressly consider the atrociousness of Aguirre's acts in determining eligibility for withholding of deportation.<sup>31</sup>

This Comment examines the factors considered in determining the "serious nonpolitical

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The Ninth Circuit has been praised for its references to the Handbook. *See, e.g.,* Jineki C. Butler, Comment, *A Country With a Conscience? The Ninth Circuit Develops a Global Perspective of Refugee Law*, 20 MD. J. INT'L L. & TRADE 257, 276 (1996) ("The Ninth Circuit has prioritized the goals of the refugee statute above the narrow interpretations given it by the Supreme Court. In doing so, it has neutralized the legal technicalities which often plague the immigration system and has strengthened the commitment to human rights obligations the United States undertook 29 years ago"); Jennifer A. Rosenfield, Comment, *Immigration Law—Religious Conscientious Objectors—Ninth Circuit Holding Supports United States' Commitment to United Nations Protocol, Canas-Segovia v. Immigration and Naturalization Service*, 902 F.2d 717 (9th Cir. 1990), 15 SUFFOLK TRANSNAT'L L. REV. 390, 407 (1991) ("By adopting the Handbook's guidance, the Ninth Circuit endorsed an interpretation of the Refugee Act which conforms to the United Nations Protocol.").

<sup>27</sup> *See* Aguirre-Aguirre, 121 F.3d at 524. The Ninth Circuit stated that "[w]hen you are dealing with an ass it may be necessary to move a beast by a blow on a sensitive part even though what you want to move are the feet." *Id.* at 524-25.

<sup>28</sup> *See* Aguirre-Aguirre, 119 S. Ct. at 1442.

<sup>29</sup> *See id.*

<sup>30</sup> *See* Aguirre-Aguirre, 119 S. Ct. at 1442. However, the Supreme Court has ignored international law by not applying a balancing test that would consider the potential of persecution if the asylum seeker were to be returned. *See* Keller, *supra* note 8, at 183.

<sup>31</sup> *See id.*



crime” exception to withholding of deportation in light of the Supreme Court’s recent decision in *INS v. Aguirre-Aguirre*. First, this Comment will present an overview of withholding of deportation in the United States. Next, this Comment explores the BIA’s interpretation of “serious nonpolitical crimes” and the deference it is given by the courts. This Comment examines the use of the Handbook by the BIA and the courts in determining questions of domestic law in the United States. In addition, this Comment examines the use of the Handbook at an international level. Next, this Comment analyzes *INS v. Aguirre-Aguirre* and the likely direct impact it will have on future withholding of deportation cases. This Comment concludes that the Court improperly decided *Aguirre-Aguirre* and urges the BIA and the courts to consider a “well-founded” fear of persecution and atrociousness in determining whether an act warrants an exclusion of withholding of deportation.

## I. Withholding of Deportation in the United States

### A. Historical Overview

The United States’ recognition of protecting political asylum seekers from persecution dates back to 1875, when Congress excluded criminals from the lenient immigration policy but created an exception for aliens convicted of political crimes.<sup>32</sup> In 1950, Congress passed the Internal Security Act,<sup>33</sup> which prevented deportation of an alien to any country where the alien would be subject to physical persecution.<sup>34</sup> In 1952, Congress passed section 243(h) of the Immigration and Nationality Act (INA),<sup>35</sup> which authorized the U.S. Attorney General to

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<sup>32</sup> See Act of March 3, 1875, ch. 141, § 5, 18 Stat. 477. The exclusion provision covered “persons who were undergoing a sentence for conviction in their own country of felonious crimes other than political or growing out of or the result of such political offenses.” *Id.*

<sup>33</sup> Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010.

<sup>34</sup> See *id.*

<sup>35</sup> Immigration and Nationality Act of 1952, Pub. L. No. 414, ch. 477, §243(h), 66 Stat. 163, 214 [hereinafter INA].

withhold the deportation of an alien who was subject to physical persecution in his homeland.<sup>36</sup> Under the 1952 INA, the Attorney General had discretionary authority to decline deportation of an alien from the United States.<sup>37</sup>

Strict limiting principles, however, developed in accepting aliens.<sup>38</sup> In fact, the exercise of discretion was limited to cases of clear probability of persecution, where the clear probability standard was applied stringently.<sup>39</sup> In 1968, the United States acceded to the Protocol Relating to the Status of Refugees.<sup>40</sup> This resulted in the United States binding itself to Articles 2 through 34 of the Refugee Convention.<sup>41</sup> As Article 33 of the Refugee Convention<sup>42</sup> prevents returning a refugee to any country where the refugee's life or freedom is threatened,<sup>43</sup> this accession

<sup>36</sup> *See id.*

<sup>37</sup> *See* INA, *supra* note 35. In 1965, the term "physical persecution" was replaced by "persecution on account of race, religion, or political opinion." *See* *In re Tan*, 12 I. & N. Dec. 564 (BIA 1967). This change was considered by Congress to be in harmony with the 1951 UN Convention Relating to the Status of Refugees, even though the United States had not formally acceded to the Convention. *See id.*

<sup>38</sup> *See* Arthur Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J. L. REF. 243, 244-246 (1984).

<sup>39</sup> *See id.* The clear probability standard was reviewable by courts only for administrative abuse of discretion. *See id.* The standard of review was also deferential, "[t]he Attorney General's . . . ungenerous interpretation of the law in a particular case was deemed insufficient cause to hold that he had abused his discretion." *Id.*

<sup>40</sup> *See* Protocol, *supra* note 22; *see generally* MUSALO ET AL., *supra* note 12, at 60-68.

<sup>41</sup> *See* Refugee Convention, *supra* note 6. Article 1 of the Protocol obligates the parties "to apply articles 2 to 34 inclusive to the Convention to refugees as . . . defined." Protocol, *supra* note 22.

<sup>41</sup> *See* Refugee Convention, *supra* note 6. Article 1 of the Protocol obligates the parties "to apply articles 2 to 34 inclusive to the Convention to refugees as . . . defined." Protocol, *supra* note 22.

<sup>42</sup> *United States v. Stevic* held that "Article 33 of the Convention imposes an absolute obligation upon the United States to conform United States domestic law to the Protocol." 467 U.S. 407, 409 (1984). Domestic legislation specifically implements Article 33 of the Protocol. *See* 8 U.S.C. § 1101(a)(42)(A) (1994) (definition of "refugee" adopted from Protocol); § 1158(a) (asylum); § 1253(h) (withholding of deportation).

<sup>43</sup> Article 33.1 provides as follows: "[N]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his

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removed the Attorney General's discretion to grant relief from deportation.<sup>44</sup>

It was not until the Refugee Act of 1980 (Refugee Act),<sup>45</sup> which amended INA section 243(h), that Congress mandated and established formal procedures for granting withholding of deportation.<sup>46</sup> As a result, the United States could not deport an alien whose life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>47</sup> The legislative history of the Refugee Act explains that one of Congress' primary purposes was to bring the United States refugee law into conformance with

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race, religion, nationality, membership of a particular social group or political opinion." Refugee Convention, *supra* note 6, art. 33.1.

<sup>44</sup> See 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, 256 (1996) (explaining the removal of the Attorney General's discretion in deportation cases).

<sup>45</sup> Refugee Act of 1980, Pub. L. No. 96-212, § 203(f), 94 Stat. 102 [hereinafter Refugee Act]. See *Ming v. Marks*, 367 F. Supp. 673, 676-679 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 1170 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975) (discussion of the history and context underlying the United States' accession to the Protocol); see also generally Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981); David A. Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. Y.B. INT'L LEGAL STUD. 91; Katherine 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 the purpose of the Refugee Act of 1980 was to "clarify procedures for admitting refugees" and ensure compliance with international standards of refugee protection).

<sup>46</sup> See Refugee Act *supra* note 46; see also 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 the Refugee Act was enacted to achieve uniform, fair and impartial asylum procedures); [William Sanchez & Adalsinda Lomangino, *Political Asylum and Other Forms of Relief*, 66 FLA. B.J. 18, 18 (1992) (claiming that the Refugee Act created refugee and asylum procedures in an attempt to end the ad hoc treatment of such applications); 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) (explaining that prior to the Refugee Act, the Attorney General had complete discretion over asylum.)

<sup>47</sup> See Refugee Act *supra* note 46.

the Protocol.<sup>48</sup> The language of amended section 243(h) substantially reflected the “nonrefoulement provision” in Article 33 of the Convention.<sup>49</sup> Today, withholding of deportation is codified under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>50</sup>

<sup>48</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). *See also* *United States v. Stevic*, 467 U.S. 407, 426 (1984) (citing *Rosenberg v. Yee Chin Woo*, 402 U.S. 49, 52 (1971) (“[a]lthough the language through which Congress has implemented this policy . . . has changed slightly from time to time, the basic policy has remained constant—to provide a haven for homeless refugees and to fulfill American responsibilities in connection with the International Refugee Organization of the United Nations.”).)

<sup>49</sup> *See* *Cardoza-Fonseca*, 480 U.S. at 436; *see also* *Stevic*, 467 U.S. at 421 n.15 (1984) (“Section 203(e) of the Refugee Act of 1980 amended the language of § 243(h), basically conforming it to the language of Article 33 of the United Nations Protocol.”). Other important textual changes include (1) language from Convention Article 33 (“life or freedom would be threatened”) was adopted into the eligibility standard; and (2) the protected classes were expanded to include “nationality” and “membership in a particular social group.” *Id.*

The legislative history of the Refugee Act is replete with praise for its humanitarian purposes. *See* 126 CONG. REC. 4,501 (1980) (remarks of Rep. Rodino). According to Representative Rodino, the Refugee Act “confirms what this Government and the American people are all about . . . [b]y their deep dedication and untiring efforts, the United States once again has demonstrated its concern for the homeless, the defenseless, and the persecuted peoples who fall victim to tyrannical and oppressive governmental regimes.” *Id.*; *see also* H.R. REP. NO. 781, 96th Cong., 2d Sess. 1-2 (1980); S. REP. NO. 590, 96th Cong., 2d Sess. 1, 19 (1980).

<sup>50</sup> Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified at 8 U.S.C. § 1101 et seq. (1994 and Supp.III 1997)). The prior and new provisions are the same, although the new provision reflects the fact that an alien is now subject to “removal” from the U.S. rather than deportation. *See id.* The most noticeable difference between the two provisions is the use of the word “may” rather than “shall.” *See id.* Section 1231(b)(3) states that the Attorney General “may not remove an alien,” while § 1253(h)(2) stated that the Attorney General “shall not deport or return any alien.” *Id.* It is highly unlikely that Congress intended to change the mandatory nature of the prior provision. *See* Austin T. Fragomen, Jr. et al., *Immigration Legislation Handbook* 9-14 (1999). *See also* IIRIRA Legislative History: H.R. REP. NO. 104-2202, 104th Cong. 2d Sess. (May 7, 1996); H.R. CONF. REP. NO. 104-828, 104th Cong. 2d Sess. (Sept. 24, 1996); S. REP. NO. 104-249, 104th Cong. 2d Sess. (Apr. 10, 1996); 142 CONG. REC. S4730-01, § 150 (May 6, 1996); 142 CONG. REC. H2378-05, § 309 (Mar. 19, 1996) at H10,841-02. However, some have called for the repeal of IIRIRA. *See* Bishop DiMarzio, note 3, stating that:

[t]he 1996 law created the procedure of expedited removal, which empowers low-level Immigration and Naturalization inspectors summarily to remove potential asylum-seekers without a hearing before an immigration judge. Under this procedure, more than 76,000 individuals were removed from the United States during Fiscal Year 1998. While lack of sufficient data and accessibility to interviews conducted by inspectors prevents specific

## B. The Entanglement of Procuring Withholding of Deportation

Within the Executive Branch, two administrative agencies of the Department of Justice, the Immigration and Naturalization Service (INS)<sup>51</sup> and the Executive Office for Immigration Review (EOIR),<sup>52</sup> share responsibilities in the asylum process.<sup>53</sup> The INS serves as the immigration enforcement arm of the Executive Branch.<sup>54</sup> To deport an alien, the INS must commence deportation proceedings in the immigration court, the trial court of the EOIR.<sup>55</sup> If the alien has any claim to relief from deportation, such as withholding of deportation, he or she must present it in the deportation proceedings.<sup>56</sup> If the claim is unsuccessful, the claimant may appeal

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conclusions, it is likely that in the past few years the United States has returned to their persecutors asylum-seekers with valid claims to protection.

<sup>51</sup> See Immigration and Naturalization Act, Pub. L. No. 82-414, § 103(a), 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1103(a) (1994 and Supp.III 1997)).

<sup>52</sup> See 8 C.F.R. §§ 3.0-3.38 (1998).

<sup>53</sup> See 8 C.F.R. § 3.1(d)(1) (1998). Senator Spencer Abraham introduced S. 1563, the INS Reform and Border Security Act of 1999 on August 5, 1999. See Immigration Law Advisory 4-6 (October, 1999). This would establish within the Department of Justice an Immigration Affairs Agency, consisting of the Office of the Associate Attorney General for Immigration Affairs, the Bureau of Immigration Services and Adjudications, and the Bureau of Enforcement and Border Affairs. See *id.* Similar legislation is pending in the House of Representatives. See *id.*

<sup>54</sup> 8 U.S.C. § 1251(a) (1994 and Supp.III 1997). Upon locating an alien in the United States in contravention of the Immigration and Naturalization Act (INA), the INS may seek to deport or grant asylum or other relief to that person. *Id.*

<sup>55</sup> A deportable alien is one who has entered the country before coming to the attention of the INS. See INA, § 241, 8 U.S.C. § 1227 (1998). An excludable alien, on the other hand, has not entered and ordinarily is refused entry to the United States at the border. See *id.* § 1101(a)(13) (1988); see also, e.g., *Ma v. Barber*, 357 U.S. 185 (1958). The legal rights of deportable and excludable aliens differ in several ways. See *Landon v. Plasecia*, 459 U.S. 21, 25-28 (1982). A United States District Court may review the INS's determination that an alien is excludable in habeas corpus proceedings. See 8 U.S.C. § 1105a(b). In contrast, final deportation orders may be appealed only to the federal courts of appeals. See *id.*

<sup>56</sup> See *supra* note 56.

to the Board of Immigration Appeals<sup>57</sup> and ultimately to a United States Court of Appeals.<sup>58</sup> The EOIR serves as the adjudicatory arm of the Executive Branch on immigration matters.<sup>59</sup>

## II. The BIA and its Deference by the Courts

### A. Inconsistent Determinations with the “Serious Nonpolitical Crime” Exception

#### 1. The BIA’s Lack of Deference in Determining a “Serious Nonpolitical Crime”

##### Without Factoring a Well-Founded Fear of Persecution

The United States provides for some exceptions to the obligation of withholding of deportation, including when an alien has committed a “serious nonpolitical crime” outside the United States before arriving in the United States.<sup>60</sup> The purpose of this exception is two-fold.<sup>61</sup> First, the “serious nonpolitical crime” exception avoids granting refugee status to persons who might jeopardize the internal security of asylum countries.<sup>62</sup> Secondly, the exception prevents

<sup>57</sup> See *supra* note 56. The BIA, as an administrative appeals body, has three over-lapping responsibilities. First, the BIA must develop appropriate standards for adjudication where statutes, regulations, and case law do not provide adequate guidance and must adapt those standards to relevant changes in the law. Second, the BIA should set standards that facilitate judicial review and conform its judgments to court decisions that reverse or modify a BIA determination. Third, the BIA must maintain uniformity, fairness, and legality in decision-making within the immigration bureaucracy by ensuring that standards and any new subsequent modifications to them are properly implemented by the officials under its jurisdiction. See Derek Smith, Note, *A Refugee By Any Other Name: An Examination of the Board of Immigration Appeals’ Action in Asylum Cases*, 75 VA. L. REV. 681, 682 (1989).

<sup>58</sup> See *supra* note 56.

<sup>59</sup> See 8 C.F.R. §§ 3.0-3.38 (1998).

<sup>59</sup> See 8 C.F.R. §§ 3.0-3.38 (1998).

<sup>60</sup> See 8 U.S.C. § 1231(b)(3) (Supp.III 1997) (previously codified at 8 U.S.C. § 1253(h)(2)(C) (1994). Other exceptions include when:

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual’s race, religion, nationality, membership in a particular social group, or political opinion; (ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States; . . . (iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

<sup>61</sup> J. HATHAWAY, *THE LAW OF REFUGEE STATUS* 214 (1991).

<sup>62</sup> See *id.*; See also *Matter of Frentescu*, 18 I & N Dec. 244 (BIA 1982) (the most important factor when considering this exception is whether the applicant will be a danger to the community).

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fugitives from abusing the justice system.<sup>63</sup>

With regard to the “serious nonpolitical crime” exception to withholding of deportation, the first reported decision came in *Matter of Rodriguez-Palma*.<sup>64</sup> In this case, the Board had to decide whether a Cuban national had committed a “serious nonpolitical crime” in Cuba before entering the United States.<sup>65</sup> The BIA concluded that Rodriguez-Palma had committed a “serious nonpolitical crime.”<sup>66</sup> In reaching this determination, the BIA referred to the Handbook for an interpretation of the meaning and application of the terms used in the Protocol.<sup>67</sup> The BIA noted that the Conference Report, which accompanied the final version of the Refugee Act, indicated that Congress intended that INA section 1253(h), which deals with the “serious nonpolitical crime” exception, be construed consistently with the Protocol.<sup>68</sup> Thus, the BIA first looked to the Protocol for guidance as to the meaning of the term.<sup>69</sup> Finding none, the BIA found several

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<sup>63</sup> A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 290 (1966); compare Hathaway, *supra* note 62 at 221 (Convention Article 1(F)(b) disallows the claims of persons who seek to escape legitimate criminal liability) with Evangeline G. Abriel, *The Effect of Criminal Conduct Upon Refugee and Asylum Status*, 3 SW. J.L. & TRADE AM. 359, 371-72 (1996) (the conviction of a particular crime should be considered with other mitigating factors such as the expected persecution in the applicant’s country).

<sup>64</sup> 17 I & N Dec. 465 (BIA 1980).

<sup>65</sup> *See id.* at 466. In 1980, there was a massive influx of Cuban refugees to the United States who were allowed to leave Cuba through the port of Mariel. *See Ortiz-Miranda, supra* note 3, at 681. These refugees were to remain in the United States as a result of legislation Congress enacted in 1966 in response to the rise of communist control of Cuba. *See id.* The legislation authorized the attorney general to grant permanent residency to any native or citizen of Cuba who was admitted or paroled into the United States after January 1, 1959, and had been physically present in the United States for at least one year. *See Cuban Refugee Adjustment Act*, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

<sup>66</sup> Rodriguez-Palma, 17 I & N Dec. at 469.

<sup>67</sup> *See id.* at 468.

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

Handbook provisions to be instructive.<sup>70</sup> The Handbook explains that to exclude persons who have demonstrated a justified fear of severe persecution, any crimes committed in a foreign country must be extremely grave.<sup>71</sup> However, the BIA decided that even if this standard was adopted and applied to *Rodriguez-Palma*, it would not have had an affect on its decision.<sup>72</sup>

Shortly thereafter, the BIA considered the same issue in *Matter of Ballester-Garcia*, another Cuban national case.<sup>73</sup> Here, the Board explained that there were serious reasons to believe that the “serious nonpolitical crime” exception applies, regardless of whether the BIA applies the traditional consensus approach or the *Rodriguez-Palma* balancing test.<sup>74</sup> These two cases are the closest the BIA has come to a precedent decision on the question of whether the risk of the persecution is considered in applying the serious nonpolitical crime exception.<sup>75</sup>

The BIA decision in *Matter of Rodriguez-Coto*<sup>76</sup>, however, casts doubt on these two decisions. At issue was whether exclusion proceedings could be reopened to consider additional

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<sup>70</sup> See *id.* The BIA referred to paragraphs 155 and 156 of the UN Handbook:

[155] [W]hat constitutes a “serious” non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term “crime” has different connotations in different legal systems. In some countries the word “crime” denotes only offences of a serious character. In other countries it may comprise anything from petty larceny to murder. In the present context, however, a “serious” crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under article 1F(b) even if technically referred to as “crimes” in the penal law of the country concerned.

See also UN Handbook, *supra* note 25, at paragraph 156.

<sup>71</sup> See *id.*

<sup>72</sup> See *id.* at 470.

<sup>73</sup> 17 I & N Dec. 592 (BIA 1980).

<sup>74</sup> See *id.* at 596.

<sup>75</sup> Commentators have also argued that the BIA’s decisions in *Rodriguez-Palma* and *Ballester-Garcia* misinterpreted the asylum statute by equating the grounds of denial for both asylum and withholding of deportation. See Robert G. Rooney, Note, *The Power To Pretermit an Application For Asylum: Improper Policy For American Asylum Law*, 5 GEO. IMMIGR. L.J. 641, 660 (1991). The result has been a blurred distinction between the requirements for allowing or denying each. See *id.*

<sup>76</sup> 19 I & N Dec. 208 (BIA 1985).



evidence regarding applications for asylum and withholding of deportation.<sup>77</sup> Rodriguez-Coto argued that additional evidence of a fear of persecution arising from his membership in a particular social group made him eligible for asylum and/or withholding of deportation.<sup>78</sup> The BIA rejected Rodriguez-Coto's argument.<sup>79</sup> In doing so, the BIA also rejected an interpretation of the phrases "particularly serious crime" and "serious nonpolitical crime" in sections 243(h)(2)(B) and (C), which would vary with the nature of evidence of persecution.<sup>80</sup> In a one-sentence footnote the BIA dismissed its prior precedent decisions, *Rodriguez-Palma* and *Ballester-Garcia*, which presented persecution of the alien as a factor in evaluating the "serious nonpolitical crime" exception.<sup>81</sup> The Board arrived at this conclusion even though the case did not present a serious nonpolitical crime issue.<sup>82</sup> In fact, the issue was whether the alien's behavior created a danger to the U.S. community.<sup>83</sup>

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<sup>77</sup> See Rodriguez-Coto, 19 I & N Dec. at 208.

<sup>78</sup> See *id.* at 209.

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*, n. 2. ("[W]e did not find it necessary to resolve this issue in *Matter of Rodriguez-Palma . . . and Ballester-Garcia . . .* but do so here.")

<sup>82</sup> See *id.* at 208. Many circuit court cases have criticized and reversed the BIA for the poor quality of its decision-making and faulty reasoning and analysis. See *Marquez v. INS*, 105 F.3d 374, 378 (7th Cir. 1997) (faulting BIA for disorganization of its opinion and "twisted strands" of reasoning; the BIA must announce its decision in terms sufficient to enable a reviewing court to perceive it has heard and thought and not merely reacted); *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994) (the BIA departed significantly from prior unpublished decisions treating the identical issue); *Espinoza v. INS*, 991 F.2d 1294, 1300-01 (7th Cir. 1993) (BIA's decision rested on nothing but speculation without evidence to support it; the BIA relied on an incomplete record); *Diaz-Resendiz v. INS*, 960 F.2d 493, 495, 497-98 (5th Cir. 1992) (the BIA decision departed from established precedent without a reasoned explanation; BIA failed to consider meaningfully all relevant factors, or sufficiently articulate its reasons); *Martinez-Benitez v. INS*, 956 F.2d 1053, 1055 (11th Cir. 1992) (reversing BIA for failing to evaluate the nature and underlying circumstances of the applicant's conviction before denying asylum).

<sup>83</sup> See 19 I & N at 208.

After the *Rodriguez-Coto* decision, the INS published asylum regulations that set forth an interpretation of the “serious nonpolitical crime” exception.<sup>84</sup> The INS promulgated that, in order to be consistent with the Refugee Convention and the Protocol, the “serious nonpolitical crime” standard was to be applied in asylum cases with full consideration of the totality of circumstances and equities on a case-by-case basis.<sup>85</sup> Because every asylum application is also considered to be an application for withholding of deportation, full consideration would also apply to withholding of deportation.<sup>86</sup>

## 2. Atrociousness as a Determining Factor

The Handbook notes that in determining whether an offense is “non-political,” an adjudicator should take into account whether the act was grossly out of proportion to the objective or atrocious.<sup>87</sup> The BIA applied this line of reasoning in *Matter of McMullen*.<sup>88</sup>

<sup>84</sup> See 53 Fed. Reg. 11300-11301 (April 6, 1988). In *Andriasian v. INS* 180 F.3d 1033, 1046 (9th Cir. 1999), the Ninth Circuit noted the BIA’s failure to abide by its own regulations. The court stated:

<sup>84</sup> See 53 Fed. Reg. 11300-11301 (April 6, 1988). In *Andriasian v. INS* 180 F.3d 1033, 1046 (9th Cir. 1999), the Ninth Circuit noted the BIA’s failure to abide by its own regulations. The court stated:

In denying [the] request for asylum, however, the BIA did not determine that the regulation permitted denial of asylum; rather, it failed even to consider or apply the regulation governing discretionary denials on account of a petitioner’s opportunity to reside elsewhere. It is the failure to abide by its own regulations that renders the BIA’s decision ‘contrary to law.’ *Lopez-Galarza v. INS*, 99 F.3d at 960 (quoting *Padilla-Agustin v. INS*, 21 F.3d 970, 973 (9th Cir. 1994)), and therefore an abuse of discretion. For while, in the absence of any regulatory guide, the BIA’s authority to consider various factors in exercising its discretion would be relatively unconstrained, ‘[i]t is a well-known maxim that agencies must comply with their own regulations.’ *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984).

<sup>85</sup> See Fed. Reg. 11300-11301. The INS stated that:

[E]vidence of the commission of such non-political crimes will now be a discretionary factor to be considered together with the totality of circumstances and equities on a case-by-case basis consistent with the proper intent of the Refugee Act of 1980 as well as the 1951 U.S. Convention and the 1967 Protocol Relating to the Status of Refugees. The ‘equities’ in any particular case would include the persecution an applicant faces upon forced return to his or her country. The ‘totality of the circumstances’ would include the political purposes of the act and the political and social conditions in the home country at the time of the alleged crime. *Id.*

<sup>86</sup> See *Stevic*, 467 U.S. at 420 n. 13; 8 CFR 208.3(b)(2000).

<sup>87</sup> See UN Handbook, paragraph 152.

<sup>88</sup> 19 I. & N. Dec. 90 (BIA 1984), *aff’d*, 788 F.2d 591 (9th Cir. 1986). The matter involved a native and citizen of the Republic of Ireland and the United Kingdom. See *id.* at 91. The BIA did not explicitly refer to the UN

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McMullen argued that he would be subject to persecution if deported.<sup>89</sup> The issue, then, was whether this made him eligible for either asylum or withholding of deportation.<sup>90</sup> The BIA found, among others, that McMullen's participation in terrorist use of explosives and his participation in a campaign of violence randomly directed against civilians represented acts of an atrocious nature.<sup>91</sup> As such, the acts were out of proportion with McMullen's political goal making him ineligible for both asylum and withholding of deportation.<sup>92</sup> In evaluating the political nature of the crime, the BIA determined that the political aspect of the offense outweighed its common-law character.<sup>93</sup> The BIA further explained that this would not be the case if the crime was grossly out of proportion to the political objective or if it involved acts of an atrocious nature.<sup>94</sup>

An understanding of the limits of the atrociousness factor can be found in *Matter of Rodriguez-Majano*.<sup>95</sup> Rodriguez-Majano contended that his activities, which occurred during his country's civil war, did not constitute persecution or assistance of persecution.<sup>96</sup> These activities included the destruction of property and the forcible recruiting and disciplining of civilian

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Handbook for guidance. *See id.* For an analysis and discussion of *McMullen* see generally Timothy P. McElduff, Jr., *In Re McMullen and the Supplementary Extradition Treaty: An Unconstitutional Bill of Attainder*, 11 N.Y. INT'L L. REV. 139 (1998); Katherine M. Sheehan, Note, *And Then There Was One: Peter Gabriel John McMullen's Bill of Attainder Challenge to the U.K.-U.S. Supplementary Extradition Treaty*, 57 ALB. L. REV. 235 (1993).

<sup>89</sup> *See McMullen*, 19 I & N Dec. at 92.

<sup>90</sup> *See id.*

<sup>91</sup> *See id.* at 98.

<sup>92</sup> *See id.* at 95. (McMullen's political goal was to unify Ireland).

<sup>93</sup> *See id.* at 97-98.

<sup>94</sup> *See id.*

<sup>95</sup> 19 I & N Dec. 811, 815-16 (BIA 1988).

<sup>96</sup> *See id.* at 812 (the activities and civil war took place in the country of El Salvador).

members.<sup>97</sup> The BIA held that these actions were typical within the nature of civil wars.<sup>98</sup>

### **B. *Chevron* and the “Serious Nonpolitical Crime”**

Deference to administrative agencies has been strengthened through the judicial implementation of the *Chevron* doctrine.<sup>99</sup> The *Chevron* doctrine explains that when reviewing an agency’s statutory construction, a court should confront two questions:<sup>100</sup> First, whether Congress has directly spoken on the precise question at issue,<sup>101</sup> and second, if the statute is silent or ambiguous with respect to the issue at hand, the question for the court is whether the agency’s answer is based on permissible construction of the statute.<sup>102</sup> When answering these questions, considerable weight should be given to the agency’s construction of a statute for

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<sup>97</sup> *See id.*

<sup>98</sup> *See id.* at 816; In *Matter of Izatula*, 20 I. & N. Dec. 149, 152-53 (BIA 1990), the BIA conceded that violent actions may be the only option for people seeking to change the political structure of their governments. *See also* *Matter of Sanchez and Escobar*, 19 I. & N. Dec. 276 (BIA 1985); *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985) (all holding that harm resulting from generalized civil strife is not persecution.) *See also* *Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982).

<sup>99</sup> *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 860 (1984) (holding that the Environmental Protection Agency’s regulation allowing states to treat all pollution-emitting devices within the same industrial grouping as though they were encased within one category was based on a permissible construction of the term “source” in the Clean Air Act Amendments); *cf.* Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 60 (1998) (the *Chevron* test withstands challenges by contextual, political and interpretive critiques in U.S. Courts of Appeals).

<sup>100</sup> *Chevron*, 467 U.S. at 842-43.

<sup>101</sup> *See id.*; *cf.* Note, *A Pragmatic Approach To Chevron*, 112 HARV. L. REV. 1723, 1739-40 (in addition to whether the language is ambiguous courts should identify the type of indeterminacy and thus the corresponding message regarding the scope of authority given to the agency).

<sup>102</sup> *See Chevron*, 467 U.S. at 842-843. *See A Pragmatic Approach to Chevron*, *supra* note 101, at 1740 (in addition to whether the agency acted reasonably, the court should determine whether the agency interpretation falls within the scope of agency authority determined in question one).

which it is entrusted to administer.<sup>103</sup> The judiciary, however, is the final authority on issues regarding statutory construction.<sup>104</sup> As a result, courts must reject administrative constructions that are contrary to clear Congressional intent.<sup>105</sup>

The *Chevron* doctrine's importance in the immigration law context was presented in *INS v. Cardoza-Fonseca*.<sup>106</sup> Here, the INS argued that the Court should defer to the agency's interpretation of the INA as amended by the Refugee Act.<sup>107</sup> The *Cardoza-Fonseca* Court rejected the INS' argument and relied on the *Chevron* doctrine to emphasize that courts are the final authority on issues of statutory construction.<sup>108</sup> The Court explained that the issue before it was purely one of statutory construction and that the courts needed to use "traditional tools" such as language and legislative history of the statute.<sup>109</sup> In reviewing these sources, the *Cardoza-Fonseca* Court concluded that Congress did not intend to require asylum-seekers to establish a clear probability of persecution.<sup>110</sup> Instead, the Court held that Congress intended the asylum-

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<sup>103</sup> See *id.* at 844; see also John G. Osborn, *Legal Philosophy and Judicial Review of Agency Statutory Interpretation*, 36 HARV. J. ON LEGIS. 115, 158 (1999) (Supreme Court's historic approach to agency interpretation indicate a tension between natural law and legal positivism).

<sup>104</sup> See *id.* at 843 n.9.

<sup>105</sup> See *id.*

<sup>106</sup> 480 U.S. 421 (1987).

<sup>107</sup> See *id.* at 445.

<sup>108</sup> See *id.* at 447-48.

<sup>109</sup> See *id.* at 446; see also *Federal Labor Relations Authority v. Aberdeen Proving Ground*, 495 U.S. 409, 414 (1988) (citing *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983)) (courts should not rubber stamp administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (reviewing agency interpretation as "a purely legal question of statutory interpretation").

<sup>110</sup> See *Cardoza-Fonseca*, 480 U.S. at 446. For a discussion of the standard applied by the Board of Immigration Appeals and lower courts in response to *Cardoza-Fonseca*, see THOMAS A. ALEINIKOFF & DAVID A. MARTIN, *Immigration: Process and Policy* 759-66; see also Michael E. Mangelson, *Three Years After Matter of Mogharrabi: Is a "Reasonable Person" Test the Answer to the Confusing "Well-Founded Fear of Persecution"*

seeker to satisfy a more generous standard to be granted asylum.<sup>111</sup>

The *Chevron* doctrine was narrowed in *Bowen v. Georgetown University Hospital*.<sup>112</sup> In *Bowen*, the issue was whether the Secretary of Health and Human Service could reissue a 1981 wage-index rule to promulgate retroactive cost limits.<sup>113</sup> The Court rejected the validity of the Secretary's act.<sup>114</sup> The Court explained that an agency is not entitled to deference when its interpretation is presented for the first time as a litigation position.<sup>115</sup> Such a litigation position is one that is "wholly unsupported by regulations, rulings, or administrative practice."<sup>116</sup> As a result, an agency's decision will be given deference under *Chevron*, unless its interpretation is

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*Standard in Asylum Cases?*, 1990 B.Y.U. L. REV. 1123 (stating that "well-founded fear of persecution" based on reasonable person standard substantially conforms to UN Protocol and will protect bona fide refugees).

<sup>111</sup> See *Cardoza-Fonseca*, 480 U.S. at 446. As there was clear congressional intent on the question, the Court did not proceed to the second step of the *Chevron* inquiry on whether the agency's interpretation of the statute was reasonable. See *id.* at 443-49; see also *In the Matter of the Extradition of Francisco Pazienza*, 619 F. Supp. 611, 619 (S.D.N.Y. 1985) (the task of defining what is a political offense is left to the judiciary).

<sup>112</sup> 488 U.S. 204, 212-213 (1988); see also *Florida Manufactured Hous. Ass'n v. Cisneros*, 53 F.3d 1565, 1574 (11th Cir. 1995) (no deference to changed interpretation when the new interpretation is a mere litigation position); *USX Corp. v. office of Workers' Compensation Programs*, 978 F.2d 656, 658 (11th Cir. 1992) (no deference to agency's litigating position absent prior interpretation); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. REG. 1, 60-61 (1990) (Litigation positions do not and should not receive deference.).

<sup>113</sup> *Bowen*, 488 U.S. at 206.

<sup>114</sup> See *id.* at 216. Compare Richard J. Wolf, *Judicial Review of Retroactive Rulemaking: Has Georgetown Neglected The Plastic Remedies?*, 68 U. L.Q. 157 (1990) (retroactive rules are a valid form of agency rulemaking under the Administrative Procedure Act) with David M. Gossett, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 682 (1997) (courts give equal deference to revised agency interpretations of statutes as to initial interpretations).

<sup>115</sup> See *id.* at 212-13.

<sup>116</sup> See *id.* at 209-13.

presented for the first time, in which case it is not entitled to deference.<sup>117</sup>

The Supreme Court expanded the *Chevron* doctrine in immigration cases, however, in *INS v. Abudu*.<sup>118</sup> Here, Abudu sought reopening of his deportation case to apply for asylum and withholding of deportation.<sup>119</sup> He wanted to prove that he had a well-founded fear of persecution were he to be returned to his native country.<sup>120</sup> The *Abudu* Court held that a court generally must apply a deferential abuse of discretion standard in reviewing the BIA's denial of a motion to reopen when the applicant fails to reasonably explain the reason for not applying for relief.<sup>121</sup> In addition, the *Abudu* Court explained that since INS exercises "especially sensitive political functions that implicate questions of foreign relations [deference to] agency decisions . . . [applies] with even greater force in the INS context."<sup>122</sup>

<sup>117</sup> See *id.* at 212-13; see also William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 138 (1991) ("Bowen negates reasonable agency assertions of a particular type of power unless Congress has expressly (or "clearly") granted that authority to the agency.").

<sup>118</sup> 485 U.S. 94 (1988).

<sup>119</sup> See *id.* at 97.

<sup>120</sup> See *id.*

<sup>121</sup> See *id.* at 105-08.

<sup>122</sup> See *id.* at 105-08.

<sup>122</sup> *Id.* at 110. The concept of giving greater deference to the Executive Branch lies in the Plenary Doctrine. This Doctrine shield's the Executive Branch's immigration decisions from meaningful judicial review. See also e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (holding that Congress constitutionally may make distinctions between illegitimate "alien" children seeking preference for admission depending on whether the natural father or mother is legally in the country); *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (holding that Congress constitutionally may impose conditions on an "alien's" eligibility for federal medical insurance); *Kleindienst v. Mandel*, 408 U.S. 753, 765-70, 766 & n.6 (1972) (holding that Congress constitutionally may bestow Attorney General with discretion to deny visa to "alien" advocating communism); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (holding that Congress could allow deportation of "alien" because of past membership in Communist party). See generally Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-60 (1990) (discussing history and impact of Plenary Power Doctrine). The Supreme Court first invoked the Doctrine in the late 1800's to preclude judicial review of racist immigration laws.

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### III. The Handbook's Struggle for Acceptance

#### A. The Inconsistent Use of the Handbook in the United States

The Supreme Court first recognized international law as early as 1793 in *Chisholm v. Georgia*.<sup>123</sup> The Court observed that the United States became “amenable to the law of nations” when it came into being.<sup>124</sup> Although the Constitution gives Congress the power to “define and punish . . . offenses against the Law of Nations”<sup>125</sup> and identifies treaties as part of the “supreme Law of the Land,”<sup>126</sup> the federal courts have the task of defining the role of international law in the U.S. legal system.<sup>127</sup> The Court has, thus, interpreted domestic legislation in a way that is consistent with international obligations.<sup>128</sup> The Court recognizes that an act of Congress should

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*See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 705-32 (1893); *The Chinese Exclusion Case*, 130 U.S. 581, 609-11 (1889), Justice Field emphasized that if Congress:

[c]onsiders the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the Judiciary . . . The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one . . . If there be any just ground of complaint . . . it must be made to the political department of our government, which is alone competent to act upon the subject.

Justice Frankfurter captured the Plenary Power Doctrine by stating that “[W]hether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to the Congress.” *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (Frankfurter, J., concurring).

<sup>123</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>124</sup> *See id.* at 474. *See also* *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (“[W]hen the United States declared their independence, they were bound to receive the law of nations in its modern state of purity and refinement.”).

<sup>125</sup> U.S. CONST. ART. I, § 8, cl. 10.

<sup>125</sup> U.S. CONST. ART. I, § 8, cl. 10.

<sup>126</sup> *Id.* at art. VI, cl. 2.

<sup>127</sup> Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39 (1994) (finding that the Supreme Court enforces the obligations stemming from international law some of the time).

<sup>128</sup> *See id.*

<sup>129</sup> *See Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804):

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not be construed in a manner that would violate international law if other constructions remained.<sup>129</sup> In fact, domestic law may supersede international obligations only by express abrogation,<sup>130</sup> or by subsequent legislation that conflicts irrevocably with international obligations.<sup>131</sup>

In refugee law, neither the Refugee Convention nor the Protocol "create a centralized status determination body nor prescribed detailed guidelines for implementation by national states."<sup>132</sup> As a result, the UNHCR issued the Handbook to promote greater uniformity in national practice and to ensure that fundamental refugee protections are respected.<sup>133</sup> The United States, however, has applied the guidelines set forth in the Handbook inconsistently.<sup>134</sup>

### 1. The Inconsistency in the BIA

Although the BIA did not use the Handbook with respect to *Aguirre-Aguirre* and the

<sup>129</sup> See *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804):

It has also been observed that an act of Congress ought never to be construed to violate the Law of Nations, if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the Law of Nations as understood in this country.

See also *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Clark v. Allen*, 331 U.S. 503, 508-511 (1947); *Cook v. United States*, 288 U.S. 102, 118-120 (1933).

<sup>130</sup> See *Chew Heong v. United States*, 112 U.S. 536, 538 (1884) ("[B]ut even in the cases of statutes, whose repeal or modification involves no question of good faith with the government or people of other countries, the rule is well settled that repeals by implication are not favored, and are never admitted where the former can stand with the new act.").

<sup>131</sup> See *Reid v. Covert*, 354 U.S. 1, 18 (1957) ("[a]n act of congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null").

<sup>132</sup> Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 13 (1997).

<sup>133</sup> See *id.*

<sup>134</sup> See *id.*<sup>135</sup> Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook*, 247 (6th ed. 1998). See also INS Basic Law Manual, which advises asylum officers that while the UN Handbook is "not legally binding," it may be cited where it "does not conflict with United States law or regulations." United States Department of Justice Immigration and

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“serious nonpolitical crime” exception, the BIA has used it when interpreting other areas of refugee law.<sup>135</sup> Recently, in *Matter of N-M-A*,<sup>136</sup> the BIA used Handbook paragraph 135 to determine a well-founded fear of persecution from a changed regime.<sup>137</sup> The BIA also used paragraph 136 of the Handbook for an exception to the cessation provision,<sup>138</sup> which “mirrored the language of Article 1C(5) of the Convention.”<sup>139</sup> In *Matter of S-M-J*, another recent BIA case,<sup>140</sup> the BIA also referred to the Handbook in its determinations.<sup>141</sup> First it used paragraph 42 of the Handbook to interpret the context of an asylum applicant’s statements.<sup>142</sup> Secondly, the BIA referred to paragraphs 205(a)(i)-(iii), 203 and 204 of the Handbook in determining the role of the asylum applicant and the benefit of doubt the BIA should have with regard to the applicant’s statements.<sup>143</sup> Therefore, the BIA has consulted the Handbook when dealing with issues of refugee law.<sup>144</sup>

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Naturalization Service, Basic Law Manual: U.S. Law and INS Refugee Asylum Adjudications ch. II.B, reprinted in 8 Charles Gordon et al., *Immigration Law and Procedure*, Special Supplement 1995.

<sup>135</sup> Ira J. Kurzban, *Kurzban’s Immigration Law Sourcebook*, 247 (6th ed. 1998). *See also* INS Basic Law Manual, which advises asylum officers that while the UN Handbook is “not legally binding,” it may be cited where it “does not conflict with United States law or regulations.” United States Department of Justice Immigration and Naturalization Service, Basic Law Manual: U.S. Law and INS Refugee Asylum Adjudications ch. II.B, reprinted in 8 Charles Gordon et al., *Immigration Law and Procedure*, Special Supplement 1995.

<sup>136</sup> *Matter of N-M-A*, Int. Dec. 3368 (BIA 1998).

<sup>137</sup> *See id.* at 11.

<sup>138</sup> 8 C.F.R. § 208.13(b)(1)(ii) (2000).

<sup>139</sup> Int. Dec. 3368, at 11 (BIA 1998).

<sup>140</sup> Int. Dec. 3303 (BIA 1997).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 4.

<sup>142</sup> *Id.* at 4.

<sup>143</sup> *Id.* at 4-5.

<sup>144</sup> Other BIA cases referring to the Handbook when dealing with issues of refugee law include: *Matter of Y-B*, Int. Dec. 3337 (BIA 1998); *Matter of H*, Int. Dec. 3287 (BIA 1996); *Matter of R*, 20 I. & N. Dec. 621, 625 (BIA 1992);

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## 2. The Inconsistency Within U.S. Federal Courts

The BIA's inconsistent use of the Handbook has resulted in the Handbook's disfavor within many U.S. federal courts.<sup>145</sup> However, in *Cardoza-Fonseca* the Supreme Court embraced the Handbook.<sup>146</sup> The issue was whether a "clear probability" standard of proof governed asylum applications.<sup>147</sup> In the *Cardoza-Fonseca* Court's determination that a "well-founded fear" standard was more appropriate,<sup>148</sup> the Court referred to paragraph 42 of the Handbook to interpret the Protocol's definition of "refugee."<sup>149</sup> The *Cardoza-Fonseca* Court explained that as Congress sought to conform with the Protocol, the Handbook provided significant guidance in

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Matter of Dass, 20 I. & N. Dec. 120, 125 (BIA 1989); Matter of Fefe, 20 I. & N. Dec. 116, 118 (BIA 1989); Matter of Chen, 20 I. & N. Dec. 16, 19 (BIA 1989).

<sup>145</sup> For instance, in *Stevic* the Supreme Court faced the issue of whether a deportable alien must demonstrate a clear probability of persecution in order to qualify for withholding of deportation. 467 U.S. at 409 (withholding of deportation was considered under § 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1253(h) (1976 ed.), as amended by § 203(e) of the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 107). The Ninth Circuit held that the burden of showing a clear probability of persecution no longer existed. *See id.* at 407. The court reasoned that the Refugee Act changed the standard of proof to a well-founded fear of persecution. *See id.* The Supreme Court, however, held that the likelihood of persecution is required for an alien to qualify for withholding of deportation. *See id.* at 422. In doing so, the *Stevic* Court ignored paragraphs 37 through 65 of the UN Handbook offering an interpretation of the "well-founded" fear provision in the Refugee Act. Fitzpatrick, *supra* note 136 at 14. *Cf.* Scott Busby, *The Politics of Protection: Limits and Possibilities in the Implementation of International Refugee Norms in the United States*, 15 BERKELEY J. INT'L L. 27, 32 (1997) (U.S. court decisions that cite the Handbook follow its recommendations more often than not).

<sup>146</sup> *See Cardoza-Fonseca*, 480 U.S. 421 (1987).

<sup>147</sup> *Id.* at 425.

<sup>148</sup> *Id.* at 427-50.

<sup>149</sup> *Cardoza-Fonseca*, 480 U.S. 438-3; *see also* *Chang v. INS*, 119 F.3d 1055, 1061-62 (3d Cir. 1997); *Rodriguez-Roman v. INS*, 98 F.3d 416, 425-26 (9th Cir. 1996); *Singh v. Ilchert*, 63 F.3d 1501, 1511 (9th Cir. 1995); *Ramos-Vasquez v. INS*, 57 F.3d 853, 863 (4th Cir. 1995); *Canas-Segovia v. INS*, 902 F.2d 717 (9th Cir. 1990), *aff'd* on alternate grounds after remand, 970 F.2d 599 (9th Cir. 1992); *Zavala-Bonilla v. INS*, 730 F.2d 562 n.7 (9th Cir. 1984); *Yang v. Carroll*, 852 F. Supp. 460, 470 n.22 (E.D. Va. 1994).

construing it.<sup>150</sup> The Court did note, however, that the Handbook does not have the force of law.<sup>151</sup>

## **B. International Acceptance of The Handbook**

### **1. Europe's Reliance on the "Fear of Persecution" Test**

Some foreign domestic courts are unwilling to apply the Handbook in determining asylum.<sup>152</sup> The European Court of Human Rights (ECHR), on the other hand, has been more receptive to a proportionality test in using future persecution as a factor for determining

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<sup>150</sup> *See id.* at 439 n. 22; *see also* Department of Justice statement that "[W]e assume that Congress was aware of the criteria articulated in the Handbook when it passed the [Refugee] Act in 1980, and that it is appropriate to consider the guidelines in the Handbook as an aid to construction of the Act." *U.S. Refugee Program: Oversight Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 97th Congress, 1st Session 24, 26 (1981)* (Memorandum from Theodore B. Olson, Assistant Attorney General, office of Legal Counsel, to David Crossland, General Counsel, Immigration and Naturalization Service).

<sup>151</sup> *See id.* The UN Handbook states that "the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself." *Id.* Although the UN Handbook does not have the force of law, where it has not been followed by a U.S. court, the court has generally explained its reasoning for not following the UN Handbook's recommendations. *See Busby, supra* note 147, at 32.

<sup>152</sup> *See, e.g., T v. Secretary of State for the Home Department, 2 All E.R. 865 (H.L. 1996)*, where the House of Lords was confronted with the issue of whether to grant political asylum to T (T was an Algerian citizen and had been denied asylum by both the Special Adjudicator and the Court of Appeal). *See id.* T, the asylum-seeker in question, had committed airport bombings and had raided a military depot, killing eleven people. *See id.* T asserted that his removal would be contrary to Art. 33(1) of the Convention as his life or freedom would be threatened based on his political opinions. *See id.* Lord Mustill rejected using a proportionality test that factored T's threatened persecution in determining asylum. *See id.* He explained that a crime either is or is not political. *See id.* Lord Mustill noted that the character of the crime cannot depend on the consequences an offender may suffer if returned. *See id.* See also the Canadian approach in *Malouf v. Canada (Minister of Citizenship and Immigration)*, (1995) 190 N.R. 230 (Fed. Ct. App.). There, the Court explained that Article 1(F) of the Convention, does not require a balance between the seriousness of the applicant's conduct against the alleged fear of persecution. *See id.* However, the Malouf Court did reiterate its decision in *Gil v. Minister of Employment and Immigration*, (1994), 174 N.R. 292. The holding there was that a "proportionality test" is appropriate for the purposes of determining whether a serious crime

asylum.<sup>153</sup> In *Chahal v. United Kingdom*,<sup>154</sup> the British Home Secretary had detained Chahal for deportation based on his threat to national security.<sup>155</sup> Relying on Article 3, 5 (4) and 13 of the Refugee Convention, Chahal argued that his deportation would expose him to a real threat of torture or inhuman or degrading treatment.<sup>156</sup> The *Chahal* court agreed,<sup>157</sup> and held that Article 33(2) of the Convention's exception to the principle of non-refoulement based on danger to national security requires balancing that danger against the degree of persecution feared.<sup>158</sup>

The use of a "well-founded" fear of persecution has been affirmed, in recent times, by the fifteen members of the European Union (EU) who have issued a Joint Position on the Harmonized Application of the Definition of the Term "Refugee."<sup>159</sup> The EU states that the

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is political. *See id.* Therefore, the court's decision presented an inconsistent use of the proportionality test and the Handbook in Canadian courts. *Id.*

<sup>153</sup> *See Chahal v. United Kingdom*, 13 E.H.R.R. 413 (Eur. Ct. H.R. 1996); *see also* Beate Rudolf, *European Convention on Human Rights—Absolute Prohibition of Torture—Assessment of Real Risk of Being Subjected to Torture Abroad—Effective National Remedy in Deportation Proceedings Involving National Security*, 92 AM. J. INT'L L. 70, 73 (1996) (assessing that the decision ensures refugee protection beyond that provided by the Geneva Convention).

<sup>154</sup> *See id.*

<sup>155</sup> *See id.*

<sup>155</sup> *See id.*

<sup>156</sup> *See id.* (the state of deportation would have been India).

<sup>156</sup> *See id.* (the state of deportation would have been India).

<sup>157</sup> *See id.*

<sup>158</sup> *See id.* This view was confirmed in *Ahmed v. Austria*, 24 Eur. Ct. H.R. 413, where the European Court held that as long as the applicant faced a real risk of being persecuted in his country, the applicant's criminal record was immaterial as to his eligibility for relief from expulsion under the European Convention.

<sup>158</sup> *See id.* This view was confirmed in *Ahmed v. Austria*, 24 Eur. Ct. H.R. 413, where the European Court held that as long as the applicant faced a real risk of being persecuted in his country, the applicant's criminal record was immaterial as to his eligibility for relief from expulsion under the European Convention.

<sup>159</sup> E.U. Doc. No. 96/196/JHA P. 13 (1996).

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persecution is to be outweighed against the nature of the criminal offense.<sup>160</sup> Therefore, although domestic courts have not been receptive to this proportionality test, the ECHR and the EU have been quite receptive.<sup>161</sup>

## 2. International Commentators and the Proportionality Test

Most commentators have been receptive to using a “well-founded” fear of persecution as a factor in determining a “serious nonpolitical crime” to withholding of deportation.<sup>162</sup> Beginning with the historical debate on the Refugee Convention, many delegates expressed the view that even in exceptional circumstances it would be intolerable to return a refugee to the country of origin where “certain death” awaited.<sup>163</sup> One delegate explained that when a person with a criminal record seeks asylum as a refugee, the country of refuge needs to strike a balance between the offenses committed and that refugee’s well-founded fear of persecution.<sup>164</sup> In addition, today’s commentators are in virtual unanimity for factoring a “well-founded” fear of persecution in determining a “serious nonpolitical crime.”<sup>165</sup> An individual may not be deported for a “serious nonpolitical crime” where the risk and gravity of the persecution feared outweighs the significance of the criminal conduct.<sup>166</sup> Therefore, according to most commentators, a “well-founded” fear of persecution should be a factor in determining a “serious nonpolitical crime.”

<sup>160</sup> See *id.* The Joint Position however provides that it “shall not bind the legislative authorities or affect the judicial authorities of the Member State[s].” *Id.* (Preamble).

<sup>161</sup> See Rudolf *supra* notes 163-69 and accompanying text.

<sup>162</sup> See Goodwin-Gill, *supra* note 2.

<sup>163</sup> Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC. 32/SR.20 at 15 (Feb. 1, 1950) (remarks of the Chairman).

<sup>164</sup> UN Doc. A/CONF.2/SR.29 at 23; see UN Doc. A/CONF.2/SR.24 at 13.

<sup>165</sup> See, e.g., Goodwin-Gill, *supra* note 2, at 106-07; see also Grahl-Madsen, *supra* note 16, at 298; Hathaway, *supra* note 14, at 224-25.

<sup>166</sup> See *id.*

<sup>167</sup> *INS v. Aguirre-Aguirre*, 119 S. Ct. 1439.

#### IV. *INS v. Aguirre-Aguirre*: The Supreme Court's Misguided Determination

##### A. The Supreme Court's Reasoning

The Supreme Court reversed the Ninth Circuit's decision in *Aguirre-Aguirre*.<sup>167</sup> First, the Court held that because the Court of Appeals was confronted with questions implicating the BIA's construction of the statute that it administered, "the court should have applied the principles of deference described in *Chevron*."<sup>168</sup> Thus, the court should have asked: (1) "whether the statute was silent or ambiguous with respect to the specific issue" before it; and (2) "whether the agency's answer was based on a permissible construction of the statute."<sup>169</sup> The *Aguirre-Aguirre* Court added that in asking these questions, judicial deference to the BIA was "especially appropriate in the immigration context."<sup>170</sup>

Secondly, the Court determined that the "Handbook may be a useful interpretative aid."<sup>171</sup> However, the Court noted that "it is not binding on the Attorney General, BIA, or U.S. courts" in determining whether an alien is ineligible for withholding of deportation on the ground that he has committed a "serious nonpolitical crime" before entering the United States.<sup>172</sup> As a result, the Court rejected the Ninth Circuit's determination that the BIA should have balanced *Aguirre-Aguirre*'s acts against his risk of persecution.<sup>173</sup> The *Aguirre-Aguirre* Court explained that it was reasonable for the BIA to consider the risk of persecution by itself, and not as a factor

<sup>167</sup> *INS v. Aguirre-Aguirre*, 119 S. Ct. 1439.

<sup>168</sup> *See id.* at 1445.

<sup>169</sup> *See id.*

<sup>170</sup> *See id.*

<sup>170</sup> *See id.*

<sup>171</sup> *See id.* at 1447.

<sup>171</sup> *See id.* at 1447.

<sup>172</sup> *See id.* at 1446-48.

<sup>173</sup> *See id.* at 1446.

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in determining whether the acts were serious and nonpolitical.<sup>174</sup>

Also, the *Aguirre-Aguirre* Court rejected the Ninth Circuit’s assertion that the BIA should have considered whether Aguirre-Aguirre’s acts were grossly disproportionate to their alleged objective and atrocious in light of *McMullen*.<sup>175</sup> The BIA’s method of determining a “serious nonpolitical crime” identifies a general standard whether an offense’s political aspect outweighs its common law character.<sup>176</sup> The *Aguirre-Aguirre* Court then pointed out that two specific inquiries may be used in applying this standard: (1) "whether there is a gross disproportion between means and ends"; and (2) "whether atrocious acts are involved."<sup>177</sup> The Court further noted, however, that although an offense involving atrocious acts will result in a denial of withholding of deportation, an offense’s criminal element "may outweigh its political aspect even if none of the acts are deemed atrocious."<sup>178</sup> Therefore, the BIA did not have to consider "atrociousness . . . before determining [whether Aguirre-Aguirre had] committed a serious nonpolitical crime."<sup>179</sup>

Lastly, the *Aguirre-Aguirre* Court determined that the BIA did not have to give "consideration to the 'necessity' and 'success' of [Aguirre-Aguirre’s] actions."<sup>180</sup> The BIA was required only to find Aguirre-Aguirre’s acts not politically based on the lack of proportion with

<sup>174</sup> See *id.* at 1446-47.

<sup>175</sup> See *id.* at 1447.

<sup>176</sup> See *id.*; see also *supra* notes 91-97 and accompanying text.

<sup>177</sup> See *id.* at 1448.

<sup>178</sup> See *id.*

<sup>179</sup> See *id.*

<sup>179</sup> See *id.*

<sup>180</sup> See *id.*

<sup>180</sup> See *id.*

<sup>181</sup> See *id.* at 1449.

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his objectives.<sup>181</sup> Therefore, "even in a case with a clear causal connection, a lack of proportion . . . may still render a crime nonpolitical."<sup>182</sup>

### B. The Potential Impact

The potential ramifications of the Supreme Court's decision in *Aguirre-Aguirre* could yield grossly inhumane results.<sup>183</sup> This is primarily because the construction of the "serious nonpolitical crime" exception for withholding of deportation would be made on a minimum

<sup>181</sup> See *id.* at 1449.

<sup>182</sup> See *id.*

<sup>183</sup> Already, several decisions have been made using *INS v. Aguirre-Aguirre*. See *Mwongera v. INS*, 187 F.3d 323 (3d Cir. 1999) (explaining that "[T]o the extent that the BIA's decision rests on an interpretation of the agency's governing statute on a matter as to which Congress has not expressed a clear intent, we defer to the agency's reasonable interpretation of the statutory language."); *Purveegiin v. United States INS Processing Center*, 1999 WL 804128 (S.D.N.Y.) ("[I]t is well-settled that even if an applicant for asylum establishes that he is a "refugee" within the meaning of the Act, the decision whether to grant asylum is still within the discretion of the Attorney General."); *Phan v. Reno*, 56 F.Supp.2d 1149 (W.D. Washington 1999) ("[M]oreover, judicial deference allows the political branches to exercise especially sensitive political functions that implicate questions of foreign relations."); *Barapind v. Reno*, 1999 WL 627352 (E.D.Cal.) ("Judicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations."); *Matter of Li*, 1999 WL 965437 (D.Hawai'i) (Judicial deference is especially appropriate in the immigration context).

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threshold of seriousness without regard to context.<sup>184</sup> Such a construction would require the BIA to deny refugee status in any case in which there were serious reasons to consider that a person had committed a crime that reached this threshold.<sup>185</sup> This denial would be without regard to the likelihood and severity of the persecution feared.<sup>186</sup> Secondly, the *Aguirre-Aguirre* decision will continue to allow the BIA to neglect its previous decisions and to receive deference in cases where it is litigating a position for the first time.<sup>187</sup>

In endangering future applicants for withholding of deportation, the *Aguirre-Aguirre* Court erred in several respects.<sup>188</sup> Primarily, the Court should not have given deference to the BIA in eliminating persecution as a factor in determining whether an act is a “serious nonpolitical crime.”<sup>189</sup> The Court reasoned that the fear of subsequent persecution in *Rodriguez-*

<sup>184</sup> See *INS v. Aguirre-Aguirre*, 119 S. Ct. 1439 (1999).

<sup>185</sup> See Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Respondent; *INS v. Aguirre-Aguirre*, 119 S. Ct. 1439 at 17 (1999) (No.97-1754).

<sup>186</sup> See *id.* Other considerations that might be disregarded are 1) the fact that many years have past since the act had been committed; and 2) whether the suspect had served his sentence or been pardoned.

<sup>187</sup> See Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861, 871 (1994) (since Congress often provides agencies with inadequate standards for the performance of their work, it may make a great deal of sense to defer to agencies on some issues, yet not on others); see also Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 470 (1985) (Congress often provides agencies with inadequate standards for the performance of their work); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2088-89 (1990) (although it is an important virtue to give agencies the opportunity to administer their own laws in response to changing facts and needs, there still is a need for courts to play an instrumental role in the interpretation of statutes, and that Chevron is but one guide in this interpretive venture); *Ortiz-Salas v. INS*, 992 F.2d 105, 107-08 (7th Cir. 1993) (In reviewing the BIA’s decision of a discretionary denial by an immigration judge, Judge Posner used the terms “astonishingly,” “irresponsible,” and “incoherently” to characterize the quality of reasoning under review.). Posner was particularly perturbed by the government’s statement that the BIA has no fixed standard of review, thus varying its standard from case to case. *Id.* at 107.

<sup>188</sup> See *Aguirre-Aguirre v. INS*, 121 F.3d 521 (explaining the factors that should be used in determining whether to apply the “serious nonpolitical crime” exception).

<sup>189</sup> See *id.*

*Palma* and *Ballester-Garcia* were overturned by *Rodriguez-Coto*.<sup>190</sup> However, a thorough analysis of these cases establishes that at a minimum, these cases are inconsistent.<sup>191</sup> First, in *Rodriguez-Coto*, the BIA was not presented with a “serious nonpolitical crime” issue.<sup>192</sup> The issue was whether the alien’s behavior created a danger to the community.<sup>193</sup> Therefore, any disregard in factoring fear of persecution for withholding of deportation should be limited to only cases confronted with that specific issue.<sup>194</sup> Furthermore, the *Rodriguez-Coto* decision is further doubted based on the activities of the INS.<sup>195</sup> Only three years after the BIA decision in *Rodriguez-Coto*, the INS published asylum regulations with regard to the “serious nonpolitical crime” exception.<sup>196</sup> In these regulations, the INS promulgated applying a standard that included a full consideration of the totality of circumstances.<sup>197</sup> If *Rodriguez-Coto* eliminated fear of persecution as a factor in determining the “serious nonpolitical crime” exception, then the INS

<sup>190</sup> See *id.*

<sup>190</sup> See *id.*

<sup>191</sup> See *Matter of Rodriguez-Coto*, 19 I & N Dec. 208.

<sup>191</sup> See *Matter of Rodriguez-Coto*, 19 I & N Dec. 208.

<sup>192</sup> 17 I & N Dec. 208.

<sup>192</sup> 17 I & N Dec. 208.

<sup>193</sup> See *id.*

<sup>194</sup> The BIA’s decision to overturn *Rodriguez-Palma* and *Ballester-Garcia* is also doubtful as it was presented in a footnote. *Rodriguez-Coto*, 19 I & N Dec. 208. If the *Rodriguez-Coto* Board was going to overturn these previous cases it would have surely inserted such language in the actual opinion *Id.*

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<sup>195</sup> See *INS v. Stevic*, 467 U.S. at 407, 420 n.13.

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<sup>196</sup> See *id.*

<sup>196</sup> See *id.*

<sup>197</sup> See *id.*

<sup>197</sup> See *id.*

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regulations are completely contradictory.<sup>198</sup>

As a result of the doubtful precedent *Rodriguez-Coto* established and the inconsistency in factoring fear of persecution in determining the “serious nonpolitical crime exception,” the *Aguirre-Aguirre* Court was precluded from giving deference to the BIA.<sup>199</sup> According to *Bowen*, the deference explained in *Chevron* should not be given when an agency’s interpretation is presented for the first time.<sup>200</sup> Eliminating fear of persecution as a factor in determining the “serious nonpolitical crime” exception constitutes an interpretation presented for the first time.<sup>201</sup> First, the interpretation is unsupported by regulations.<sup>202</sup> The statutory “serious nonpolitical crime” exception does not provide the factors that should be relied upon in determining such an exception.<sup>203</sup> Second, the interpretation is not supported by rulings of the BIA.<sup>204</sup> The closest the BIA has come in eliminating the fear of persecution as a factor was in *Rodriguez-Coto*.<sup>205</sup> That case, however, did not deal with a “serious nonpolitical crime” issue.<sup>206</sup> Third, the interpretation is not supported by administrative practice.<sup>207</sup> Evidence of this is the INS’s own publication, which accepts a totality of circumstances standard in interpreting the “serious nonpolitical crime” exception.<sup>208</sup> Since *Bowen* explained that a litigation position that is

<sup>198</sup> *See id.*

<sup>199</sup> 119 S. Ct. 1446.

<sup>199</sup> 119 S. Ct. 1446.

<sup>200</sup> 488 U.S. at 212-13.

<sup>201</sup> *See supra* notes 206-13 and accompanying text.

<sup>202</sup> Pub. L. 104-208, *supra* note 51 and accompanying text.

<sup>203</sup> *See id.*

<sup>204</sup> *See cases cited supra* notes 79-85 and accompanying text.

<sup>205</sup> *See id.*

<sup>206</sup> *See infra* pp.24-25.

<sup>206</sup> *See infra* pp.24-25.

<sup>207</sup> *See infra* note 87-88 and accompanying text.

<sup>208</sup> *See id.*

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presented for the first time is one that is unsupported by regulations, rulings, or administrative practice, eliminating fear of persecution should have also been considered as a first time litigation position.<sup>209</sup> As a result, the *Aguirre-Aguirre* Court should not have deferred to the BIA.<sup>210</sup>

Instead, the Court should have determined the definition of a “serious nonpolitical crime.”<sup>211</sup> This should have been done following the reasoning of the Court in *Cardoza-Fonseca*.<sup>212</sup> In its statutory construction, the *Aguirre-Aguirre* Court should have first looked to any express language.<sup>213</sup> If the express language was ambiguous, then the *Aguirre-Aguirre* Court should have looked to extraneous evidence, such as the legislative history of the statute.<sup>214</sup> By deferring to the BIA, the *Aguirre-Aguirre* Court did not conform with its prior holdings in *Bowen* and *Cardoza-Fonseca*.<sup>215</sup>

In addition, the *Aguirre-Aguirre* Court failed to use atrociousness as a factor in determining a “serious nonpolitical crime.”<sup>216</sup> Although the Court deferred to the BIA with regard to fear of persecution, it did not do so with regard to atrociousness.<sup>217</sup> The *McMullen*

<sup>209</sup> 488 U.S. 212-213.

<sup>209</sup> 488 U.S. 212-213.

<sup>210</sup> 119 S. Ct. 1446.

<sup>211</sup> See Hathaway, *supra* notes 62-63 and accompanying text; see also Grahl-Madsen, *supra* note 64 and accompanying text.

<sup>212</sup> 480 U.S. 446; see also *supra* note 112 and accompanying text.

<sup>213</sup> See *id.*

<sup>214</sup> See *id.*

<sup>214</sup> See *id.*

<sup>215</sup> 488 U.S. 212-13.

<sup>215</sup> 488 U.S. 212-13.

<sup>216</sup> See Handbook, *supra* note 27. Paragraph 152 (explaining that atrociousness is a factor in determining a “serious nonpolitical crime”).

<sup>217</sup> 119 S. Ct. 1448.

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court recognized that the BIA found atrociousness to be a relevant factor in its determination of a “serious nonpolitical crime.”<sup>218</sup> However, the *Aguirre-Aguirre* Court held that the BIA was not required to factor atrociousness in every “serious nonpolitical crime” case.<sup>219</sup> The Court’s reasoning was that a criminal element of an offense may outweigh its political aspect even if none of the acts are atrocious.<sup>220</sup> The flaw in this reasoning lies with the BIA when it established atrociousness as a relevant factor in *Matter of McMullen*.<sup>221</sup> Therefore, the Supreme Court should have deferred, according to *Chevron*, to the BIA on the use of atrociousness.<sup>222</sup> Further, the BIA in *McMullen* realized that it had to qualify the word “serious” in “serious nonpolitical crime.”<sup>223</sup> According to the *Aguirre-Aguirre* Court’s reasoning, any nonpolitical crime may be an exception to withholding of deportation regardless of its seriousness.<sup>224</sup>

Lastly, the *Aguirre-Aguirre* Court missed the opportunity to utilize the Handbook when interpreting “serious nonpolitical crimes” in withholding of deportation cases.<sup>225</sup> Although the

<sup>218</sup> 788 F.2d 596-97.

<sup>219</sup> 119 S. Ct. 1448.

<sup>220</sup> *See id.*

<sup>221</sup> 19 I & N Dec. 90.

<sup>221</sup> 19 I & N Dec. 90.

<sup>222</sup> 467 U.S. 837.

<sup>223</sup> 19 I & N Dec. 90.

<sup>224</sup> 119 S. Ct. 1448.

<sup>225</sup> *See Jineki, supra* note 27 (noting the Ninth Circuit’s use of the UN Handbook). The United States has an additional responsibility as a UNHCR representative stated: “[the] UNHCR looks to the United States for leadership. It is the U.S. we count on being able to cite as a model, not just for funding, but for thinking of new ways to respond or expanding old methods.” *See Abuzayd, supra* note 26; *see also* statements of Bishop DiMarzio, *supra* note 2 (stating that “[W]hen the United States accepts refugees, we protect those involved, reduce the chances that first-asylum countries will send refugees back to their prosecutors involuntarily, and provide the leadership necessary to encourage other wealthy nations to accept refugees. By so doing, we also reaffirm a tradition of compassion that separates us from much of the world.”).

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Handbook does not have the force of law, it is, nonetheless, an important guide.<sup>226</sup> As an initial matter, the utilization of the Handbook's interpretation would instruct and clarify the BIA's inconsistent interpretations.<sup>227</sup> In addition, the utilization of the Handbook would allow the "serious nonpolitical crime" to be evaluated equally with other matters for which the BIA defers to the Handbook.<sup>228</sup> Also, the utilization of the Handbook provisions would have further aided its consistent use in other countries.<sup>229</sup>

## V. Conclusion

The *Aguirre-Aguirre* Court failed to consider the Handbook's "well-founded" fear of persecution and atrociousness factors in determining whether Aguirre-Aguirre's acts warranted an exclusion of withholding of deportation. By not doing so, the Court did not adhere to the spirit of the *Cardoza-Fonseca* decision. Furthermore, although the Court hinged its decision on BIA deference, it ignored several BIA decisions. Moreover, where decisions were contradictory,

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<sup>226</sup> 480 U.S. 439; *see also* Olson, *supra* note 154.

<sup>227</sup> *See infra* pp. 17-18.

<sup>228</sup> *See supra* note 148 (listing recent BIA decisions which have used the Handbook).

<sup>229</sup> *See supra* text accompanying note 156; *see also* Chahal, *supra* note 158.

the *Aguirre-Aguirre* Court simply chose which one it wanted to use. The fact that BIA decisions should be given greater deference than other agency proceedings does not translate into complete deference.