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Problems of Interpretation in Asylum and Withholding of Deportation Proceedings Under the Immigration and Nationality Act

ELWIN GRIFFITH*

I. INTRODUCTION

Early immigration statutes recognized the need to protect aliens from persecution. In 1875, Congress excluded criminals from the lenient U.S. immigration policy but created an exception for aliens convicted of political crimes.¹ Although this exception protected only a select group, it set the stage for Congress to develop the concept of political asylum.

In 1950, Congress passed the Internal Security Act,² which prevented deportation of an alien to any country where the alien would be subject to physical persecution. In 1952, Congress passed the Immigration and Nationality Act (INA),³ which authorized the U.S. Attorney General to withhold the deportation of an alien who was subject to physical persecution in his homeland. Although INA section 243(h) applied only in deportation proceedings, the Immigration and Naturalization Service (INS) could use its parole power to grant relief to aliens in *exclusion* proceedings.⁴

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1. 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.*

2. Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010.

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

4. The parole procedure provided an emergency device to allow aliens to enter the United States, particularly when no INA section covered the specific situation. Because an alien who received parole did not actually "enter" the United States, the parole

In 1968, the United States acceded to the Protocol Relating to the Status of Refugees.⁵ As a result, the United States bound itself to Articles 2 through 34 of the Convention Relating to the Status of Refugees (Convention).⁶ Because Article 33 of the Convention prevents the return of a refugee to any country where the refugee's life or freedom is threatened, this accession imposed new obligations on the United States.⁷ This withdrew the U.S. Attorney General's discretion to grant relief from deportation.

The Refugee Act of 1980 (Refugee Act)⁸ amended INA section 243(h) to mandate the withholding of deportation. Additionally, this section applied to exclusion proceedings.⁹ Specifically, 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."¹⁰ Thus, the language of amended section 243(h) substantially reflected the "*non-refoulement* provision" in Article 33 of the Convention. The Refugee Act further granted "asylum status"¹¹ to those aliens who could show a "well-founded fear of

procedure failed to adequately address an alien's request for asylum. Moreover, the Refugee Act allowed the parole of refugees only for "compelling reasons in the public interest." Refugee Act of 1980, Pub. L. No. 96-212, § 203(f), 94 Stat. 102, 107 (amending INA § 212(d)(5)) [hereinafter Refugee Act].

5. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol].

6. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Convention]. 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 5.

7. Article 33.1 provides as follows:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Convention, *supra* note 6, art. 33.1.

8. Refugee Act, *supra* note 4.

9. *Id.* § 203(e). The legislative history indicates that Congress intended to require the withholding of deportation of aliens in "exclusion as well as deportation, proceedings." H. R. REP. NO. 608, 96th Cong., 1st Sess. 30 (1979).

10. The language "alien's life or freedom would be threatened" replaced the previous language "would be subject to persecution." Additionally, Congress expanded the grounds for relief to include "nationality" and "membership in a particular group." *Id.*

11. The asylum section provides in part as follows:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such

persecution," thus qualifying them as refugees.¹² Unlike section 243(h), however, asylum relief under section 208 was within the U.S. Attorney General's discretion.¹³

Section 243(h) does not grant permanent relief to an alien whose deportation has been withheld. Unlike an alien granted asylum,¹⁴ an alien cannot adjust his status under section 243(h).¹⁵ Furthermore, despite the mandatory nature of this section, an alien seeking withholding of deportation bears a heavier burden regarding his persecution claim.¹⁶ Additionally, if an alien faces persecution in his homeland, INA section 243(a) allows the United States to deport him to a country that will accept him.¹⁷

The Refugee Act further amended section 243(h) to cover

alien is a refugee within the meaning of section 101(a)(42)(A).

Refugee Act, *supra* note 4, § 201(b), 94 Stat. at 105 (current version at 8 U.S.C. § 1158(a) (1994)).

12. INA § 101(a)(42) provides in part:

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular group, or political opinion

8 U.S.C. § 1101(a)(42)(A) (1994).'

13. An alien who is denied asylum may still qualify for relief under section 243(h) if he can show it is more likely than not he would face persecution. *INS v. Stevic*, 467 U.S. 407, 429-30 (1984). This is a higher standard than that required for asylum. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 421 (1987). An asylum application is also considered an application for withholding deportation. 8 C.F.R. § 208-3(b) (1995).

14. An alien granted asylum may adjust his status to that of a lawful permanent resident if he has been physically present in the United States for at least one year after receiving asylum. 8 C.F.R. § 209.2(a)(ii) (1995). The alien's admission for permanent residence is recorded as of the date one year before approval of the alien's application. *Id.* § 209.2(f).

15. Unlike an alien granted asylum, an alien whose deportation is withheld cannot adjust his status. *See id.* § 209.2(a). Thus, the withholding of deportation does not lead to permanent residence and the Attorney General can revoke the withholding if conditions have changed in the country to which deportation was directed. *Id.* § 208.24(b)(1).

16. *Compare INS v. Stevic*, 467 U.S. 407, 425 (1984) (holding that an alien must show clear probability of persecution) *with INS v. Cardoza-Fonseca*, 480 U.S. 421, 445 (1987) (holding that an alien is not required to prove clear probability of persecution to satisfy "well-founded fear" test).

17. With certain exceptions, the alien can designate the country to which he wishes to be deported. If that country rejects the alien, the U.S. Attorney General may deport the alien to his country of citizenship. If this is unsuccessful, the statute sets out other alternatives. INA § 243(a), 8 U.S.C. § 1253(a) (1994). The U.S. Attorney General, however, cannot deport an alien to a country where the alien's life or freedom would be threatened. *Id.* § 243(h)(1), 8 U.S.C. § 1253(h)(1).

exclusion proceedings.¹⁸ Deportation proceedings seek an alien's removal from the United States, whereas exclusion proceedings seek to bar his entry;¹⁹ in both proceedings, however, the United States considers an alien within its territorial jurisdiction. The application of section 243(h) to exclusion proceedings has stirred little controversy.

In *Sale v. Haitian Centers Council*,²⁰ the U.S. Supreme Court considered the extraterritorial application of section 243(h). The United States defended its interdiction of Haitians on the ground that section 243(h) did not apply to aliens on the high seas. This position, however, conflicts with U.S. obligations under the Protocol Relating to the Status of Refugees,²¹ which requires the United States to conform to Article 33 of the Convention.

In light of the continuing interdiction problems, Part II of this Article evaluates the notion of *non-refoulement* and the relationship between INA section 243(h)²² and Article 33 of the Conven-

18. The Act no longer requires that "the alien would be subject to persecution," but that the "alien's life or freedom would be threatened." It also added "nationality" and "membership in a particular social group, or political opinion" as possible grounds for relief. Refugee Act, *supra* note 4, at § 243(h)(1).

19. *Deportable* aliens comprise five classes. Deportation may be based on the following: (1) excludability at time of entry, adjustment of status, or violation of status; (2) conviction of a crime; (3) failure to register and falsification of documents; (4) security and related grounds; and (5) becoming a public charge. INA § 241(a), 8 U.S.C. § 1251(a) (1994).

Excludable aliens comprise nine classes. The following grounds justify exclusion: (1) health, (2) criminal, (3) security, (4) public charge, (5) lack of a labor certification and lack of qualifications for certain immigrants, (6) illegal entry, (7) failure to meet documentary requirements, (8) ineligibility for citizenship, and (9) miscellaneous grounds. *Id.* § 212(a), 8 U.S.C. § 1182(a). See also THOMAS A. ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY 339-41, 535-42 (3d ed. 1995); STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 311-12, 410-14 (1991).

Aliens who have "entered" the United States are entitled to deportation proceedings, whereas those who have not "entered" are entitled to exclusion proceedings. An entry occurs when there has been "(1) a crossing into the territorial limits of the United States, i.e., physical presence; plus (2) inspection and admission by an immigration officer, or (3) actual and intentional evasion of inspection at the nearest inspection point, coupled with (4) freedom from restraint." *In re Pierre*, 14 I. & N. Dec. 467, 468 (BIA 1973).

20. 113 S. Ct. 2549, 2552 (1993).

21. Article 1 of the Protocol requires the parties to apply Articles 2 through 34 of the Convention to refugees. Protocol, *supra* note 5.

22. Section 243(h)(1) provides:

The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

tion. Part II concludes that one may interpret both provisions to prevent interdiction of aliens on the high seas.

Part III critically examines the INA section that denies relief to an alien who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States."²³ The provision does not clarify whether separate findings are required for the alien's conviction *and* his danger to the community.²⁴ Contrary to holdings of the Board of Immigration Appeals (BIA)²⁵ and U.S. courts,²⁶ this Article suggests that the courts should require separate findings of the alien's conviction and of the alien's dangerousness.

Part IV discusses the "political opinion" doctrine. The BIA and the courts have applied this doctrine inconsistently.²⁷ In *INS*

INA § 243(h)(1), 8 U.S.C. § 1253(h)(1) (1994).

23. *Id.* § 243(h)(2)(B), 8 U.S.C. § 1253(h)(2)(B). Additionally, section 243(h) denies an alien relief if he or she: (1) persecuted others; (2) committed a serious nonpolitical crime in another country before entering the United States, and is a danger to the security of the United States. *Id.* § 243(h)(2)(A), (C), (D), 8 U.S.C. § 1253(h)(2)(A), (C), (D).

24. The language of INA § 243(h)(2)(B), (D) parallels that of Article 33.2 of the Convention. The Convention provides:

The benefit of [Article 33.1] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Convention, *supra* note 6, art. 33.2.

25. See *In re Carballé*, 19 I. & N. Dec. 357 (1986) (deciding there is no separate finding required that alien pose a danger to the community). The BIA is within the Department of Justice and is under the general supervision of the Director of Executive Office for Immigration Review. The BIA consists of a chairman and eight other members; however, the chairman may divide the BIA into three-member panels. A majority of the permanent BIA members constitutes a quorum for sitting en banc. 8 C.F.R. § 3.1(a)(1) (1995). The BIA has jurisdiction to hear appeals from immigration judges in exclusion and deportation cases. *Id.* § 3.1(b).

26. See *Al-Salehi v. INS*, 47 F.3d 390 (10th Cir. 1995) (finding aggravated felony conviction conclusively disqualifies alien from section 243(h) relief); *Martins v. INS*, 972 F.2d 657 (5th Cir. 1992) (affirming requirement of only one finding based on legislative history); *Arauz v. Rivkand*, 845 F.2d 271 (11th Cir. 1988) (deciding statute's cause and effect relationship between conviction and dangerousness requires only a finding of conviction).

27. See, e.g., *Perlera-Escobar v. Executive Office for Immigration*, 894 F.2d 1292 (11th Cir. 1990) (finding neutrality does not constitute political opinion); *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1985) (holding neutrality is political opinion under the Refugee Act); *In re Maldonado-Cruz*, 19 I. & N. Dec. 509 (BIA 1988) (determining alien must hold a principled position of neutrality to have a political opinion); *In re Vigil*, 19 I. & N. Dec. 572 (BIA 1988) (denying alien relief because he did not express neutrality to anyone).

v. *Elias-Zacarias*,²⁸ the U.S. Supreme Court addressed this conflict but did not define the scope of the "political opinion" doctrine.

An alien's neutrality becomes an issue when there is a struggle between guerrillas and the legitimate government in the alien's homeland. An alien may express his neutrality by announcing that he is not taking sides²⁹ or by refusing to join a particular faction.³⁰ In *INS v. Elias-Zacarias*,³¹ the U.S. Supreme Court rejected the Ninth Circuit's attempt to vitalize the term "political opinion."³² When an alien cannot successfully show a political opinion, the Ninth Circuit adopts the concept of "imputed political opinion."³³ Other courts have followed the Ninth Circuit's approach in relying on this concept to grant an alien relief.³⁴

Part V concludes that it remains unclear whether the imputed political opinion doctrine applies when the persecutor cynically attributes a political opinion to an alien.³⁵ In light of the rationale behind the doctrine, courts should not apply the imputation theory

28. 502 U.S. 478 (1992). The Supreme Court's intervention was predictable. The Eleventh Circuit in *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498 (11th Cir.), cert. denied, 502 U.S. 1122 (1992), agreed that section 243(h) applies only when the alien is physically within the U.S. territory. In *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350 (2d Cir. 1992), the Second Circuit applied the statute extraterritorially.

29. See *Bolanos-Hernandez*, 767 F.2d at 1286; *Argueta v. INS*, 759 F.2d 1395 (9th Cir. 1985).

30. See *Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989); *Del Valle v. INS*, 776 F.2d 1407 (9th Cir. 1985).

31. 502 U.S. 478 (1992). The Court rejected the Ninth Circuit's view that the guerrillas' attempt to conscript the alien into its military forces necessarily constituted persecution on account of political opinion. *Id.* at 481.

32. *Nasser v. Moschorak*, 34 F.3d 723 (9th Cir. 1994); *Zacarias v. INS*, 921 F.2d 844 (9th Cir. 1990), rev'd sub nom., *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Ramirez Rivas v. INS*, 899 F.2d 864 (9th Cir. 1990); *Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988); *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

33. See *Ramirez Rivas*, 899 F.2d at 867; *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988); *Lazo-Majano*, 813 F.2d at 1435; *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985). In *Elias-Zacarias*, the Supreme Court neither rejected nor approved the theory. 502 U.S. at 482. In *Canas-Segovia v. INS*, 970 F.2d 599, 602 (9th Cir. 1992), the Ninth Circuit assured the parties that "[i]mputed political opinion is still a valid basis for relief after *Elias-Zacarias*."

34. See, e.g., *Ravindran v. INS*, 976 F.2d 754, 760 (1st Cir. 1992); *Alvarez-Flores v. INS*, 909 F.2d 1 (1st Cir. 1990); *Rajaratnam v. Moyer*, 832 F. Supp. 1219 (N.D. Ill. 1993).

35. In *Lazo-Majano*, the court found that a sergeant in the Salvadoran military had cynically imputed an opinion to the alien. 813 F.2d at 1435. The court noted: "Zuniga knows that Olympia is only a poor domestic and washerwoman. She does not participate in politics." *Id.* The court then sanctioned the cynical imputation: "Even if she had no political opinion and was innocent of a single reflection on the government of her country, the cynical imputation of political opinion to her is what counts." *Id.*

to such circumstances.³⁶ Courts should apply the political opinion criterion more liberally to allow an alien the opportunity to show a threat of persecution.

II. *NON-REFOULEMENT* AND THE ALIEN

A. *Section 243(h) of the INA*

After the United States ratified the United Nations Protocol,³⁷ INA section 243(h) conflicted with Article 33 of the Convention.³⁸ Section 243(h) granted the U.S. Attorney General discretion to withhold deportation, whereas the Convention made relief mandatory. The Refugee Act amended section 243(h) to conform to Article 33.³⁹ Section 243(h) now fully recognizes the Convention's *non-refoulement* provision.⁴⁰ The Refugee Act further created a statutory procedure for granting refugees true asylum status, even if such relief was within the Attorney General's discretion.⁴¹ This procedure improved the previous administrative

36. In *Ramirez Rivas v. INS*, 899 F.2d 864, 867 (9th Cir. 1990), the court noted: "It is at least as arbitrary and unjust for a government to persecute persons falsely accused of being ideological enemies as it is for a government to persecute real ideological enemies." This differs from the insincere attribution accepted in *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987). The cynical imputation blurs the distinction between a personal dispute and government persecution on account of political opinion. See Mark G. Artlip, *Neutrality as Political Opinion: A New Asylum Standard for a Post-Elias-Zacarias World*, 61 U. CHI. L. REV. 559, 584 (1994).

37. Protocol, *supra* note 5.

38. *Id.* art. 1.1.

39. Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (1980) (codified as amended in 8 U.S.C. §1253(h) (1994)).

40. The Supreme Court acknowledged that

[i]f one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees to which the United States acceded in 1968."

INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987). See Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 437 (1992); Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 43 (1994); David A. Martin, *The Refugee Act of 1980: Its Past and Future*, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 91, 109 (MICH. Y.B. INT'L LEGAL STUD. ed., 1982); Katherine L. Vaughns, *Taming the Asylum Adjudication Process: An Agenda for the Twenty-First Century*, 30 SAN DIEGO L. REV. 1, 22 (1993).

41. Amended INA § 208 now specifically covers asylum. 8 U.S.C. § 1158 (1994). In any fiscal year, no more than 10,000 asylees may adjust their status to that of a lawful permanent resident. INA § 209(b), 8 U.S.C. § 1159(b) (1994).

mechanism.⁴²

Prior to section 243(h)'s amendment, the U.S. Attorney General could withhold the deportation of aliens within the United States.⁴³ Courts interpreted the phrase "within the United States" to apply only to aliens who actually entered the United States.⁴⁴ Thus, under the statute, an alien paroled into the United States or seeking admission at the border did not qualify for relief.⁴⁵ Following its amendment, section 243(h) further protected aliens by prohibiting the United States from returning an alien to any place where he would be persecuted.⁴⁶ The amendment deleted the language "within the United States."

Prior to this amendment, the U.S. Supreme Court in *Leng May Ma v. Barber*⁴⁷ held that section 243(h) did not protect a parolee⁴⁸ who, although physically in U.S. territory, was not "within the United States."⁴⁹ *Leng May Ma* was an alien who,

42. For a discussion of the asylum mechanism, see 2 CHARLES GORDON & STANLEY MALMAN, *IMMIGRATION LAW AND PROCEDURE* § 33.01 (rev. ed. 1993); Martin, *supra* note 40, at 109-10; Vaughns, *supra* note 40, at 16-18.

43. The pre-1980 version read as follows: "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems necessary for such reason." INA, ch. 477, § 243(h), 66 Stat. 163, 214 (1952).

44. *Leng May Ma v. Barber*, 357 U.S. 185 (1958). Although the alien was physically present in the United States, she was not "within the United States" because of her parole status. *Id.* at 186.

45. *Id.* The term "within the United States" referred to the alien's legal status, not his location. *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549, 2561 (1993).

46. Congress intended to cover exclusion as well as deportation proceedings. The House Report reflected that intent by indicating that the changes required "the Attorney General to withhold deportation of aliens who qualify as refugees and who are in exclusion as well as deportation proceedings." H.R. REP. NO. 608, 96th Cong., 2d Sess. 30 (1979). The Senate Report also indicated that section 243(h) required "the Attorney General to withhold the deportation of aliens who seek asylum in exclusion, as well as deportation proceedings." S. REP. NO. 256, 96th Cong., 2d Sess. 17 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 157. The Conference Report indicated that the revised statute was based on the Protocol's language and should be construed consistently with the Protocol. H.R. CONF. REP. NO. 781, 96th Cong., 2d Sess. 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 141, 161.

47. 357 U.S. 185 (1958).

48. A parolee is an alien whom the U.S. Attorney General has temporarily allowed into the United States. This temporary status is not regarded as an admission of the alien. INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) (1994). "The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted." *Leng May Ma*, 357 U.S. at 190.

49. *Leng May Ma*, 357 U.S. at 189-90. The Court relied on its previous decision in *Kaplan v. Tod*, 267 U.S. 228 (1925), where it addressed whether the parolee was "dwelling in the United States" for purposes of the naturalization statute and whether the parolee

although excludable, was paroled into the United States. Because his parole status did not grant him legal entry, the Court considered him "outside the country."

The issue arose whether the alien was "within the United States"⁵⁰ because section 243(h) protected only aliens legally within the United States. By omitting the language "within the United States" from the Refugee Act, Congress extended protection to aliens legally outside the United States. Perhaps Congress intended to include aliens subject to exclusion proceedings and any non-admitted aliens who were in custody but not legally within the United States.⁵¹

Congress has specifically identified when physical presence is a prerequisite for a statutory remedy.⁵² Thus, if Congress intended to protect only those aliens physically present in, but not admitted to, the United States, the Refugee Act would have

"entered or [was] found in the United States" for purposes of the statute of limitations on deportation. The Court in *Kaplan* gave a parolee the same status as an alien who had been stopped at the border. *Id.* at 230. In *Leng May Ma*, Justice Douglas dissented, expressing his concern with the majority's characterization of a parolee's status: "How an alien can be paroled 'into the United States' and yet not be 'within the United States' remains a mystery." 357 U.S. at 192. He further noted that while the parolee in *Kaplan* sought to enlarge "the prerogatives of a parolee," the parolee in *Leng May Ma* sought to avoid persecution. *Id.*

50. Although physically within the United States, an alien who is in custody pending a determination of admissibility is not "within the United States." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). The alien's parole status does not grant him admission to the United States; rather, he is "to be dealt with in the same manner as that of any other applicant for admission to the United States." *Leng May Ma*, 357 U.S. at 188 (quoting 8 U.S.C. § 1182(d)(5)).

51. In *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549 (1993), the Supreme Court noted that section 243(h) specifically restricts the U.S. Attorney General's power to act only within the United States in deportation and exclusion proceedings. Thus, section 243(h) did not apply to the President's action against aliens on the high seas. *Id.* at 2559-60. Because Congress intended the Refugee Act to conform to the U.N. Protocol, section 243(h)(1) should affect the President's action. See Harold H. Koh, *The Human Face of the Haitian Interdiction Program*, 33 VA. J. INT'L L. 483, 486-87 (1993); Thomas D. Jones, *International Decisions*, 88 AM. J. INT'L L. 114, 123 (1994); Andrew I. Schoenholtz, *Aiding and Abetting Persecutors: The Seizure and Return of Haitian Refugees in Violation of the U.N. Refugee Convention and Protocol*, 7 GEO. IMMIGR. L.J. 67, 70 (1993).

52. *Sale*, 113 S. Ct. at 2575-76 n.15 (Blackmun, J., dissenting). The physical presence requirement is mentioned throughout the INA. See INA § 208(a), 8 U.S.C. § 1158(a) (1994) (asylum procedure); § 209(a)(1)(B), 8 U.S.C. § 1159(a)(1)(B) (adjustment of status of refugees); § 244(a)(1)-(2), 8 U.S.C. § 1254(a)(1)-(2) (suspension of deportation); § 245A(a)(3)(A), 8 U.S.C. § 1255a(A)(3)(A) (adjustment of status of certain entrants before January 1, 1982); § 301(d), (e), (g), 8 U.S.C. § 1401(d), (e), (g) (nationals and citizens of United States at birth); § 309(c), 8 U.S.C. § 1409(c) (children born out of wedlock); § 360(b), 8 U.S.C. § 1503(b) (application for certificate of identity).

expressly imposed such a restriction.⁵³ Section 243(h), however, does not contain such a restriction. The Refugee Act provided a procedure for overseas refugees and asylees "physically present in the United States or at a land border or port of entry."⁵⁴ In comparison, however, section 243(h) does not establish a requirement beyond "any alien."⁵⁵ Curiously, Congress qualified any alien subject to persecution for relief under section 243(h) while simultaneously providing possible relief for aliens located elsewhere.⁵⁶

In *Sale v. Haitian Centers Council*, the U.S. Supreme Court confronted the forced repatriation of Haitians and concluded that the Refugee Act covers excludable and deportable aliens, both of whom were presumed to be "within the United States."⁵⁷ Thus, the Court viewed Congress' omission of the language "within the United States" as an attempt to broaden the scope of section 243(h) beyond deportation proceedings.

If Congress intended to limit the "withholding of deportation" to aliens within the United States, it would not have deleted this limitation when it amended the Refugee Act.⁵⁸ Arguably, if the word "return" in section 243(h) applies only to exclusion, deleting the existing language was unnecessary.⁵⁹ Perhaps the language "within the United States" was redundant. If so, Congress should be forgiven for another redundancy if, by inserting "return," it in-

53. See Harold H. Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV INT'L L.J. 1, 15 (1994).

54. Refugee Act, *supra* note 4, § 201(b), 94 Stat. at 105 (current version at 8 U.S.C. § 1158 (1994)).

55. INA §.243(h), 8 U.S.C. § 1253(h) (1994); Brief for Respondent at 66, *McNary v. Haitian Centers Council* (*decided sub. nom. Sale v. Haitian Centers Council*), 113 S. Ct. 2549 (1993), (No. 92-344), *reprinted in* 35 HARV INT'L L.J. 21, 28 (1994).

56. See Koh, *supra* note 53, at 15.

57. 113 S. Ct. at 2562. Justice Blackmun noted in his dissent that "[t]o read into § 243(h)'s mandate a territorial restriction is to restore the very language that Congress removed." *Id.* at 2574. President Bush's Kennebunkport Order, issued in 1992, provided that vessels be returned to the country of origin and did not obligate the United States to return aliens outside its territory. See Exec. Order No. 12807, 57 Fed. Reg. 23,133 (1992).

58. If deportation relates only to aliens who actually enter the United States, then the phrase "within the United States" belonged to both the pre-1980 and post-1980 versions of section 243(h). The current version covers "withholding of deportation or return." INA § 243(h), 8 U.S.C. § 1253(h) (1994). Thus, the statute merely added an alternative procedure to deportation.

59. The deletion of the language "within the United States" raises the question whether only aliens involved in exclusion proceedings are not "within the United States." See *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549, 2575 (1993) (Blackmun, J., dissenting).

tended to apply the statute to all aliens.

If Congress wished to prevent the return of aliens to their homelands, regardless of their location, it would not have included the word "deport" in section 243(h). Having already addressed deportation in the original statute, Congress broadened the scope of the Refugee Act to cover aliens in other contexts.⁶⁰ Inserting the word "return" enabled Congress to apply the statute outside the deportation context. This approach is also consistent with the deletion of the reference to the alien's location.⁶¹

Clarifying this confusion depends upon the interpretation of "return." Extraterritorial application of section 243(h) better serves the legislation's humanitarian goals.⁶² Furthermore, by avoiding the term "exclude," Congress may have intended that the statute not apply only to the *exclusion* of aliens who face persecution abroad.⁶³ Perhaps Congress wanted to be faithful to the

60. When the United States was considering accession to the Protocol, a State Department representative stated the following to the Senate Committee on Foreign Relations:

Both the President and Secretary Rusk have pointed out that the prohibition against the return of refugees to countries where they would face persecution is of foremost importance among the Protocol's provisions. Refugees flee from persecution and oppression. In most cases, the oppressive state exerts itself to secure the return of these nationals whose flight and refusal to return serve as first-hand testimony to the arbitrary and oppressive policies of the government of their homeland.

Hearing on Protocol Relating to the Status of Refugees Before the Senate Comm. on Foreign Relations, S. EXEC. REP. NO. 14 app., 90th Cong., 2d Sess. 6 (1968) (statement of Laurence A. Dawson, Acting Deputy Director, Office of Refugee and Migration Affairs, U.S. Department of State).

In 1968, INA § 243(h) applied only to deportation and Mr. Dawson did not refer to the word "expel" in Article 33 of the Convention. It is unclear whether he was equating the term "return" with the INA's "withholding of deportation."

61. See Thomas D. Jones, *The Haitian Refugee Crisis: A Quest for Human Rights*, 15 MICH. J. INT'L L. 77, 114-15 (1993); Koh, *supra* note 53, at 15.

62. The Refugee Act was founded on "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." S. REP. NO. 590, 96th Cong., 2d Sess. 16 (1980). The Act withdrew the Attorney General's discretion by making the provisions of § 243(h) mandatory. Four exceptions to the grant of relief were consistent with the U.N. Convention. H.R. REP. NO. 608, 96th Cong., 1st Sess. 18 (1979). For a historical review of the Refugee Act, see Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 1 (1981); Martin, *supra* note 40, at 91.

63. INA § 236, 8 U.S.C. § 1226 (1994) addresses exclusion proceedings and INA § 242, 8 U.S.C. § 1252 (1994) addresses deportation proceedings. Immigration judges have exclusive jurisdiction over aliens who are in exclusion proceedings and aliens who have been served with an order to show cause in deportation proceedings. 8 C.F.R. 208.2(b) (1995). Neither the statute nor the regulations use the terms "exclude" and "return"

Convention's language.⁶⁴ Congress did not adopt the Convention's exact language, however, as demonstrated by its use of the terms "deport or return" rather than the Convention's terms "expel or return ('refouler')."⁶⁵ Its keenness in adopting the Convention's terminology ceased after it substituted "deport" for "expel." Congress clearly expressed its intent regarding aliens already within the United States. If the term "return" had a specific meaning domestically, Congress should have assured clarity by substituting the term "exclude" for "return."⁶⁶ This substitution would have clarified Congress' actions and intent.

If the restriction was necessary, Congress should not have been reluctant to make both substitutions. One need only look at the

with the language of other sections that states exclusion proceedings precede the alien's deportation. For example, in exclusion proceedings, the judge must determine whether "an arriving alien shall be allowed to enter or shall be excluded and deported." *Id.* § 236(a), 8 U.S.C. § 1226(a).

64. The Conference Reports on S. 643 indicate the reasoning behind the withholding of deportation provision: "The Conference substitute adopts the House provision with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." H.R. CONF REP. NO. 781, 96th Cong., 2d Sess 20 (1980); S. CONF REP. NO. 590, 96th Cong., 2d Sess 20 (1980).

65. Convention, *supra* note 6, art. 33.1. See also *Sale v. Haitian Ctrs. Council*, where the Court did not stress the difference between "expel" in the Convention and "deport" in the INA. 113 S. Ct. 2549, 2551 (1993). Rather, it viewed the term "return" as applying to exclusion proceedings. *Id.* Justice Blackmun in his dissent considered the plain statutory meaning and noted that Congress's deletion of the language "within the United States" suggests that the term "return" should be interpreted broadly. *Id.* at 2574-75. Nonetheless, the Court reverted to legislative history to interpret this seemingly unambiguous language. See *Jones, supra* note 61, at 114.

Despite the Court's opinion that the term "return" under INA § 243(h) applied only to exclusion proceedings, President Bush's Kennebunkport Order commanded the Coast Guard to "return" Haitian vessels and passengers to Haiti. See Exec. Order No. 12807, § 2(c)(3), 3 C.F.R. 303, 304 (1992), reprinted in 8 U.S.C. § 1182. Because the Coast Guard operation occurred on the high seas, the President's actions did not constitute exclusion proceedings, and thus exceeded the scope of the Court's definition of "return." See generally *Koh, supra* note 53, at 15.

66. "[T]he narrow concept of exclusion [does not] relate in any obvious way to the amendment's broad phrase 'return any alien.'" *Sale*, 113 S. Ct. at 2575 (Blackmun, J., dissenting). The INA employs the term "return" in various contexts. For example, INA § 242, 8 U.S.C. § 1252(a)(1)(C) (1994), states that an alien may be "returned" to custody if he violates his bond; § 283, 8 U.S.C. § 1353, provides that employees are eligible for certain expenses upon voluntary retirement and "return" to the United States; and § 212(c), 8 U.S.C. § 1182(c), relieves a permanent resident from exclusion if he is "returning" to a lawful unrelinquished domicile of seven years. If Congress intended to subject the term "return" to different meanings, it would have specifically defined it in each context.

other statutory references to exclusion.⁶⁷ INA section 212(a) unambiguously identifies the grounds for exclusion.⁶⁸ An alien at a port of entry risks being excluded if he does not qualify for admission.⁶⁹

The problem arises if Congress intended the term "return" in section 243(h) to cover exclusion only. Arguably, the change in language suggests that Congress not only intended to prevent the exclusion of aliens seeking admission at a port of entry⁷⁰ but also to protect them beyond the exclusion and deportation contexts.⁷¹

The presumption against extraterritorial application helps the United States avoid conflicts with foreign states.⁷² When inter-

67. Certain classes of aliens are ineligible to receive visas and are "excluded" from the United States. INA § 212(a), 8 U.S.C. § 1182(a) (1994). An alien who appears to an immigration officer to be excludable shall be temporarily "excluded." *Id.* § 235(c), 8 U.S.C. § 1225(c). In exclusion proceedings, the judge determines whether he will allow an alien who has been detained for further inquiry under INA § 235 to enter or be "excluded" and deported. *Id.* § 236(a), 8 U.S.C. § 1226(a).

68. There are nine categories of excludable aliens. *See supra* note 19; INA § 212(a)(1)-(9), 8 U.S.C. § 1182(a)(1)-(9) (1994).

69. INA § 212(a)(1)-(9), 8 U.S.C. § 1182 (a)(1)-(9) (1994).

70. If the alien's life or freedom is threatened on one of the statutory grounds, INA § 243(h) prohibits the U.S. Attorney General from *deporting* an alien who is in deportation proceedings. Section 243(h) also prohibits the "return" of an alien who is in exclusion proceedings under certain circumstances. Otherwise, the alien shall be "excluded and deported." INA § 236(a), 8 U.S.C. § 1226(a) (1994). Congress should have phrased the statute to prohibit the U.S. Attorney General from *deporting* a deportable alien or from *excluding and deporting* an excludable alien. The term "return" in § 243(h) lends itself to various interpretations. In *Sale v. Haitian Ctrs. Council*, the Court rejected the contention that "return" referred solely to that destination where the alien was to be removed. 113 S. Ct. 2549, 2560 (1993). The Court reasoned that the term "deport" would be redundant if "return" prevented *all* aliens from being sent back to their oppressors. *Id.* Congress, however, may have wanted to preserve the deportation reference while extending protection to other aliens outside the deportation context. *See Jones, supra* note 61, at 114-115.

71. Justice Blackmun's dissent in *Sale* suggested this possibility. He considered the deletion of the language "within the United States" from § 243(h) to be significant. 113 S. Ct. at 2574. The deletion of this language also affected § 243(h)'s extraterritorial application. *See Koh, supra* note 53, at 15.

72. The presumption against extraterritorial application applies only when Congress does not express its intent. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). It operates to avoid potential international conflicts. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). Congress should have considered the Refugee Act's implications because it protected aliens who sought to avoid persecution. Nevertheless, the potential for embarrassment in the international context is far-fetched in the case of action on the high seas, as with Haitian interdiction. *See Sale*, 113 S. at 2576-77 (Blackmun, J., dissenting); *Jones, supra* note 61, at 112. Applying U.S. law in international waters should not pose a problem if that law does not conflict with that of any other state. *See The Supreme Court, 1992 Term—Leading Cases*, 107 HARV L. REV. 352, 357 (1993).

vention occurs on the high seas, rather than in a foreign jurisdiction, a conflict is unlikely. A conflict may arise, however, when another country—perhaps the persecuting country—objects to the United States' refusal to return aliens who will face punishment. Although Congress generally legislates with domestic concerns in mind, it is questionable whether the protection of aliens serves only such concerns. Because the statute's primary purpose is to protect human rights, such protection should be available even on the high seas.⁷³ The statute prohibits rather than requires certain action, thus it is easier to appreciate the legislative goal of ensuring that the state is not in complicity with persecutors abroad.⁷⁴

The statute's extraterritorial effect should not be restricted. A country should restrict the deportation or exclusion of aliens who face danger at home, but also should be sensitive to the plight of aliens on the high seas.⁷⁵ A country should not tolerate human rights violations merely because they occur outside its jurisdiction. Although Congress did not expressly address this issue, it intended to conform section 243(h) to the Convention⁷⁶ and to the United

73. President Carter indicated the legislation's impact when he signed S. 643 into law: "The Refugee Act reflects our long tradition as a haven for people uprooted by persecution and political turmoil. In recent years, the number of refugees has increased greatly. Their suffering touches all and challenges us to help them, often under difficult circumstances." Refugee Act of 1980; Statement on Signing S. 643 into Law, 16 WEEKLY COMP. OF PRES. DOCS. 503 (March 18, 1980).

74. Reflecting on the breadth of section 243(h), Justice Scalia recalled: "The imperative language of this provision is not an accident [T]he nondiscretionary duty imposed by § 243(h) parallels the United States' mandatory nonrefoulement obligations under Article 33.1 of the United Nations Convention Relating to the Status of Refugees." *INS v. Doherty*, 502 U.S. 314, 331 (1992) (Scalia, J., concurring in part and dissenting in part).

75. In *Sale*, the Court reasoned that the Coast Guard was not "returning" the Haitians within the meaning of § 243(h). 113 S. Ct. 2549, 2560 (1993). President Bush's Kennebunkport Order directed the Coast Guard to "return" Haitian vessels and their passengers to Haiti. Exec. Order No. 12807, 3 C.F.R. 303-04 (1992). Yet INA § 243(h) prohibits this type of conduct. If the Coast Guard was not enforcing the same section 243(h) through its interdiction activities on the high seas, then its actions must be viewed as *ultra vires*. See Harold Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2415 (1994).

76. In *INS v. Doherty*, 502 U.S. 314 (1992), Justice Scalia noted:

We presumed in *Cardoza-Fonseca*, however, that after 1968, when the United States acceded to this provision of the Convention, the Attorney General "honored the dictates" of Article 33.1 in administering § 243(h). In 1980, Congress removed all doubt concerning the matter by substituting the permissive language of § 243(h), the current mandatory provision, basically conforming it to the language of Article 33 [of the Convention].

Id. at 330 (Scalia, J., concurring in part and dissenting in part).

States' international obligations.⁷⁷ Thus, the notion that the United States restricts the deportation and exclusion of aliens who face persecution, while returning aliens outside its jurisdiction to face similar treatment, is inconsistent with congressional intent.⁷⁸

If the prohibition against returning aliens to face persecution applied only to aliens within a country's jurisdiction, the terms "return" and "exclude" would be synonymous.⁷⁹ Additionally, a country would have an incentive to intercept aliens on the high seas to ensure they could not demand protection when they reached a port of entry.⁸⁰ Jurisdictional grounds should not deprive an alien of an opportunity to present his persecution claim. Congress withdrew the U.S. Attorney General's discretion and deleted the language "within the United States" to afford

77. The extent of such obligations may be gleaned from conventional and customary international law:

The binding obligations associated with the principle of *non-refoulement* are derived from conventional and customary international law. While the principle may not necessarily entail asylum, admission, residence, or indeed any particular solution, it does enjoin any action on the part of a state which returns or has the effect of returning refugees to territories where their lives or freedom may be threatened.

Guy S. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 VA. J. INT'L L. 897, 902-03 (1986).

78. The United States based its authority to interdict Haitian vessels on the high seas on an agreement with Haiti. Agreement Effectuated by Exchange of Notes, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559. Whether such an agreement could be sanctioned under Article 33 of the Convention is questionable because it would allow the United States to agree with persecuting nations to return aliens to their homeland as long as such aliens were intercepted on the high seas.

79. In *Sale*, the Court gave a narrower meaning to the term "return." 113 S. Ct. at 2563. Nonetheless, President Bush's Kennebunkport Order authorized the Coast Guard to "return" Haitians to Haiti. Exec. Order No. 12807, 3 C.F.R. 303-04 (1992). French newspapers commented on the U.S. decision to return the refugees: "La décision du président Bush d'ordonner à la garde côtière américaine de refouler les boat-people haitiens a suscité 'la surprise et l'inquiétude' du haut-commissaire des Nations unies pour les réfugiés." [President Bush's decision to order the U.S. Coast Guard to return the Haitian boat people surprised and troubled the United Nations High Commissioner for Refugees]. See Jean-Michel Caroit, *Haiti: en dépit des mesures prises par les Etats-Unis, l'exode continue* [*Haiti: Despite measures taken by the United States, the exodus continues*], LE MONDE (Paris), May 29, 1992, at 4. See also Koh, *supra* note 75, at 2414.

80. In *Sale*, Justice Blackmun's dissent reminded the Court that the Convention's purpose is to protect fleeing refugees who could no longer look to their own governments. 113 S. Ct. 2549, 2577 (1993) (Blackmun, J., dissenting). Nevertheless, the Court's construction of the treaty protected the United States' actions towards the Haitian refugees, despite the fact that "such actions may even violate the spirit of Article 33." *Id.* at 2565. Although these refugees were merely seeking *non-refoulement* until the situation in Haiti calmed down, the mass of Haitians who may reach U.S. shores may have concerned the U.S. government. See Koh, *supra* note 75, at 2418.

maximum protection to an alien threatened with persecution.⁸¹ It is unlikely that Congress intended to withdraw this protection for aliens on the high seas. The extraterritorial application fully recognizes an alien's status and makes section 243(h) consistent with the United States' international obligations.

2. Article 33 of the Convention

After the United States acceded to the Protocol, the Refugee Act appeared to solidify refugees' rights and reflect U.S. treaty obligations.⁸² The Protocol clarified any doubts about a specific domestic provision.

In *Sale v. Haitian Centers Council*, the U.S. Supreme Court attempted to reconcile INA section 243(h) with Article 33.1 of the Convention. The Convention provides that "[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."⁸³ Congress reflected the Convention's terminology by using the language "deport or return" in INA section 243(h).⁸⁴ The Court had to determine whether the terms "return" and "*refouler*" in Article 33.1 of the Convention differed in meaning.

The U.S. Supreme Court upheld the government's interdiction program on the high seas, noting that the Convention adopted a narrow meaning of "return,"⁸⁵ which the Convention's use of "*refouler*" confirmed. The connotation was a "defensive act of resistance," rather than merely returning an alien to a particular place.⁸⁶ During the 1951 United Nations Conference of Plenipotentiaries, the Swiss delegate argued that the term "*refoulement*" did not apply to a refugee who had not yet entered a country's territory.⁸⁷ The Netherlands delegate argued that under this interpretation, his country owed no obligation to permit

81. The Court in *INS v. Stevic*, 467 U.S. 407, 430 (1987), adopted this clear probability standard. See *ALEINIKOFF ET AL.*, *supra* note 19, at 770-73.

82. See *supra* note 40 and accompanying text.

83. Convention, *supra* note 6, art. 33.1.

84. INA § 243(h), 8 U.S.C. § 1253(h) (1994), provides that "[t]he Attorney General shall not deport or return any alien."

85. *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549, 2563-64 (1993).

86. *Id.* at 2563.

87. *U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, Summary Record of the 16th mtg. at 6, U.N. Doc. A/CONF.2/SR.16 (1951) [hereinafter *Conference of Plenipotentiaries-16th meeting*].

the mass influx migrations of aliens⁸⁸ and sought reassurance that Article 33 did not prohibit states from preventing such incursions. Unfortunately, the conference president placed the Netherlands delegate's interpretation on record because no one challenged it.⁸⁹ Although the interpretation needed clarification, the other delegates' silence suggested concurrence with the president's ruling.

This passive reaction to the Netherlands delegate's interpretation did not resolve the underlying issue. Although the interpretation protected the states from a mass of refugees, it was unclear whether it prevented the admission of aliens or enforced the return of aliens within a country's borders.⁹⁰ The term "*non-refoulement*" refers not to admission into a country but to a country's obligation not to return refugees to any place that threatens an alien's life or freedom.⁹¹ Convention delegates were more concerned with refugees at their countries' borders than with

88. The report of that meeting states as follows:

Baron van BOETZELAER (Netherlands) recalled that at the first reading the Swiss representative had expressed the opinion that the word "expulsion" related to a refugee already admitted into a country, whereas the word "return" ("*refoulement*") related to a refugee already within the territory but not yet resident there. According to that interpretation, article 28 would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations.

U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of 35th mtg. at 21, U.N. Doc. A/CONF.2/SR.35 (1951) [hereinafter *Conference of Plenipotentiaries-35th meeting*].

He reverted to that point because the Netherlands government attached great importance to the scope of the provision now contained in Article 33. The Netherlands could not accept any legal obligations regarding a mass of refugees seeking access to its territory. *Id.*

89. *See id.* The difficulty lies in recognizing the difference between "agreeing" to or "adopting" an interpretation and merely placing it on the record. Agreement or adoption would be the normal course if an interpretation is binding. *See, e.g., id.* at 33-34 ("It was agreed" to adopt Article 45 as the President interpreted it). *See also* Schoenholtz, *supra* note 51, at 83.

90. The delegate's concern about large groups of refugees entering a country's territory differed from the country's responsibility towards refugees who are beyond that country's borders. The French delegate noted the possibility of returning a genuine refugee: "[A]ny possibility, even in exceptional circumstances, of a genuine refugee being returned to his country of origin would not only be absolutely inhuman, but was contrary to the very purpose of the Convention." *Ad Hoc Committee on Statelessness and Related Problems*, Summary Record of 40th mtg., 2d Sess. at 33, U.N. Doc. E/AC.32/SR40 (1950).

91. *See* Guy S. Goodwin-Gill, *The Haitian Refoulement Case: A Comment*, 6 INT'L J. REFUGEE L. 103, 106 (1994); Schoenholtz, *supra* note 51, at 78 & n.40.

promoting extraterritorial repatriations.⁹² Perhaps they wished to reaffirm that *non-refoulement* applies to individuals, not groups, in order to avoid masses of people seeking admission. Although their concern is legitimate, the fundamental notion remains that refugees should not be returned to a dangerous environment.⁹³ Even if a country denies an alien's plea for admission, returning an alien to a country where his life or freedom would be threatened should not be an alternative. There is a significant difference between refusing admission at a country's borders and returning refugees on the high seas to their persecutors.⁹⁴

Although the Convention does not specifically address the admission of refugees,⁹⁵ one may interpret Article 33 as preventing the return of an alien who presents himself at a frontier to a country of persecution.⁹⁶ This interpretation is consistent with the purpose of Article 33 and with the principle that a state need not

92. *Conference of Plenipotentiaries-35th meeting*, *supra* note 88, at 21. THE REFUGEE CONVENTION 1951, at 331, 335 (Paul Weis ed. 1995).

93. When the Ad Hoc Committee on Statelessness and Related Problems discussed the issue that there was no obligation to admit refugees, the U.S. delegate noted:

It did not, however, follow that the convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties. Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for, if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp.

Ad Hoc Committee on Statelessness and Related Problems, Summary Record of 20th mtg. at 11-12, U.N. Doc. E/AC. 32/SR 20 (1950):

94. In *Sale*, the Court acknowledged that such action "may even violate the spirit of Article 33." 113 S. Ct. 2549, 2565 (1993). Justice Stevens, who wrote the majority opinion in *Sale*, previously dissented in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). In *Alvarez-Machain*, the Court held that a U.S.-Mexico extradition treaty had not been violated when U.S. agents abducted a Mexican national in Mexico because the treaty was silent regarding the obligations of the parties not to abduct persons from the other country's territory. 504 U.S. at 666. Justice Stevens believed that interpreting the treaty's silence as allowing the kidnapping made the treaty's provisions mere verbiage. *Id.* at 673 (Stevens, J., dissenting). Nevertheless, the Court in *Sale* did exactly what Justice Stevens found so disdainful in *Alvarez-Machain*. See Blackmun, *supra* note 40, at 44.

95. See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 74 (1983); THE REFUGEE CONVENTION, *supra* note 92, at 325, 327; *Ad Hoc Committee on Statelessness and Related Problems*, *supra* note 93, at 11.

96. See C.A. Pompe, *The Convention of 28 July 1951 and the International Protection of Refugees* 19, U.N. Doc. HCR/INF/42 (1958); GUNNEL STENBERG, *NON-EXPULSION AND NON-REFOULEMENT* 178 (1989).

grant an alien asylum. Furthermore, the country of refuge may remove the alien to another safe haven.⁹⁷ A country violates Article 33 only if it sends the alien to a country where he will be persecuted.⁹⁸

A country's obligation to protect the alien from persecution is even more compelling if mass immigration does not threaten its borders. This may explain why the Convention delegates did not encourage intercepting refugees at sea and returning them to their homeland. Article 33 requires states to protect refugees *unless* their protection compromises the sovereignty of contracting states. Therefore, a state should not force an alien into persecution if it can temporarily accommodate him until alleviation of the danger.⁹⁹

In *Haitian Centers Council*, the agreement between Haiti and the United States allowing for the interdiction of vessels on the high seas must have bolstered the U.S. Supreme Court's confidence in its own findings.¹⁰⁰ If the Convention had no extraterritorial application, this agreement would be valid.¹⁰¹ Unfortunately, the United States' position is inconsistent because it defended the principle of *non-refoulement* both during and after consideration of the Refugee Act.¹⁰² Surprisingly, although the Haitian

97. See STENBERG, *supra* note 96, at 178; Pompe, *supra* note 96, at 20.

98. Even if the *travaux préparatoires* do not clearly answer whether Article 33 protects only refugees in the territory of a state, it is instructive to contemplate the other possibility. Paul Weis observed the coverage of Article 33 of the Convention:

It should be pointed out that if Article 33 read in conjunction with Article 31 is not taken to prohibit the return of refugees who present themselves at the frontier, this would mean that the extent to which a refugee is protected—in accordance with the humanitarian aims of the Convention—against return to a country in which he fears persecution would depend upon the fortuitous circumstance whether he has succeeded in penetrating the territory of a Contracting State.

Paul Weis, *Territorial Asylum*, 6 INDIAN J. INT'L L. 173, 183-84 (1966) (footnote omitted).

99. See STENBERG, *supra* note 96, at 178.

100. Agreement Effected by Exchange of Notes, *supra* note 78.

101. The Agreement reflected the "need for international cooperation regarding law enforcement measures taken with respect to vessels on the high seas and the international obligations mandated in the Protocol Relating to the Status of Refugees." *Id.* at 3559. Furthermore, it was understood that the U.S. government did not intend "to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status." *Id.* at 3560. Because this action was to occur on the high seas, there was no question of extraterritoriality.

102. An example of this occurred on November 25, 1974, when the U.S. Representative on the Third Committee of the U.N. General Assembly made a comment on the Annual Report of the U.N. High Commissioner for Refugees (UNHCR):

government was the alleged persecutor, the Court tolerated the vessels' interdiction and the Haitians' return to Haiti. If the interception had occurred within the United States, no question would arise regarding the Convention's proscription against returning the aliens. The argument against extraterritorial application of *non-refoulement* allowed Haiti and the United States to deprive refugees of protection solely by virtue of their location.¹⁰³ Whether the Convention delegates intended to provide such a delicate exception to the principle of *non-refoulement* is questionable. This gap in coverage could permit states to skirt the strictures of the Convention by intercepting refugees outside of their jurisdiction.

This type of interception is not a matter of inhibiting the refugees' progress on the high seas, but of deliberately attempting to intercept and return them to the place of danger. Article 33.1 does not address the refugee's location but merely prohibits the refugee's return; other articles consider a refugee's location when

As the Committee knows Article 33 of the Convention contains an unequivocal prohibition upon contracting states against the *refoulement* of refugees "in any manner whatsoever" to territories where their life or freedom would be threatened

My government joins with the High Commissioner in condemning the inhumane practice of *refoulement*. The principle that refugees must not be repatriated against their will, and the right of a refugee to seek and secure asylum, have become ever more firmly embedded in international law.

ARTHUR W ROVINE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1974, at 111 (1975); see also *Proposed Interdiction of Haitian Flag Vessels*, 5 OP. OFF. LEGAL COUNSEL 242, 248 (1981) (individuals claiming persecution must have opportunity to substantiate claims); *Executive Committee of the High Commissioner's Programme*, Summary Record of 415th mtg., 38th Sess. at 5, U.N. Doc. A/AC. 96/SR. 415 (1987). U.S. delegate, Mr. Moore stated:

Considering that the most important element of a refugee's protection was the obligation of *non-refoulement*, it was tragic that refugees had been forced to return to their countries against their will and without assurances that they would not face persecution on their return, especially when such violations were committed by, or with the concurrence of, States parties to international instruments prohibiting such acts.

Id.

103. Article 33.1 does not refer to a refugee's location; however, other provisions in the Convention make explicit reference. See, e.g., Convention, *supra* note 6, art. 2 (refugee's duties to the country in which "he finds himself"); *id.* art. 4 (Contracting States shall accord to refugees "within their territories "); *id.* art. 15 ("Contracting States shall accord to refugees lawfully staying in their territory "); *id.* art. 17 ("[t]he Contracting States shall accord to refugees lawfully staying in their territory "). Furthermore, the only geographical limitation applicable to the definition of "refugee" is that the person be outside the country of persecution. *Id.* art. 1(A).

it is relevant.¹⁰⁴ One Convention delegate referred to a refugee's location when discussing the possibility of mass migrations. That reference, however, dealt more with the delegate's fear of confronting large numbers of refugees than with the application of *non-refoulement*.¹⁰⁵ Viewed in this light, the refugee's location does not detract from the fundamental notion that a state should not send back a refugee to a particular place.

Article 33.2 does not protect a refugee who is a "danger to [his] community." Some argue, therefore, that *non-refoulement* does not apply to a refugee on the high seas because such a refugee is not in a "community."¹⁰⁶ This argument, however, takes for granted Article 33.2's inclusion of all refugees to whom *non-refoulement* applies. In addition, Congress would not have referred specifically to undesirable refugees unless Article 33.2 covered them. The goals of the Convention are prohibiting the return of refugees against their will while protecting the state from certain undesirable aliens seeking to enter its territory.¹⁰⁷ The draftsmen may have found it expedient to restrict the exception to refugees on the high seas who do not pose an immediate threat to any territory. Thus, security for refugees on the high seas would be unnecessary because such refugees are not in any "community"¹⁰⁸ and no need exists to resort to emergency

104. Article 32 prohibits Contracting States from expelling a refugee "lawfully in their territory" except on the basis of national security or public order. *Id.* art. 32. Article 33.1 forbids a Contracting State to "expel or return" a refugee in "any manner whatsoever." *Id.* art. 33.1. In both articles, the term "expel" should have the same meaning in referring to refugees lawfully within the country of refuge.

105. See *U.N. Conference of Plenipotentiaries-35th meeting, supra* note 88, at 21; THE REFUGEE CONVENTION, *supra* note 92, at 331; Schoenholtz, *supra* note 51, at 83-84.

106. See *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549, 2563 (1993).

107. Under Article 1(F) of the Convention, a person who has committed a serious, non-political crime outside the country of refuge is not a "refugee." Therefore, Article 33.2's territorial limitation only covers events arising subsequent to the alien's arrival in the country of refuge. The Convention delegates were concerned with the alien's threat to the community or to national security following the alien's admission to status. In any event, the delegates intended that Article 33.2 protect states against those aliens convicted of "particularly serious crimes." THE REFUGEE CONVENTION, *supra* note 92, at 336.

108. Article 33.2 covers aliens who are really a subset of those covered under Article 33.1. The former are already within the country of refuge, whereas the latter are both inside and outside the country of refuge. Article 33.1 requires contracting parties to protect refugees regardless of their location. Article 33.2 exceptions apply only to refugees who pose a threat to the country of refuge. See Schoenholtz, *supra* note 51, at 79; THE REFUGEE CONVENTION, *supra* note 92, at 336.

The French representative at the Conference of Plenipotentiaries noted that while the right of asylum was sacred, people should not be allowed to abuse it. The French and

strategies. Not surprisingly, the draftsmen wanted to apply the doctrine of *non-refoulement* while still protecting against undesirable elements. An alien who has not entered a territory, and who may never do so, does not pose an immediate threat to the community.

Article 33's "expel or return (*refouler*)" language deserves attention. Similar language in the 1933 Convention Relating to the International Status of Refugees (1933 Convention) required states to refrain from the "application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*)."¹⁰⁹ In the classic case, expulsions apply to refugees who are lawfully within a nation's territory. Article 32 of the 1951 Convention confirms this application by providing various procedural requirements before a state may expel a refugee.¹¹⁰ This leaves us to consider the context in which a state should not return an alien to face persecution.

If one defines "*refouler*" as rejection at the border, the "expel or return" language is easier to reconcile. The term "*refoulement*" originated in Belgium and France.¹¹¹ It concerned rejection of aliens at the border and police action against non-resident aliens within a state.¹¹² Although many delegates at the Conference of

United Kingdom delegations submitted their amendment to enable States to pursue that right by punishing activities that threatened national security or endangered the community. *U.N. Conference of Plenipotentiaries-16th meeting, supra* note 87, at 7.

109. Article 3 of the 1933 Convention provides as follows:

Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order.

It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin.

It reserves the right to apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorisations and visas permitting them to proceed to another country.

159 L.N.T.S. 205 (1933) (official text in French and translated by the Secretariat of League of Nations).

110. Article 32 of the Convention provides that "[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order." Convention, *supra* note 6, art. 32.

111. See GOODWIN-GILL, *supra* note 95, at 69; Pompe, *supra* note 96, at 19; STENBERG, *supra* note 96, at 200.

112. See GOODWIN-GILL, *supra* note 95, at 69; Pompe, *supra* note 96, at 19; STENBERG, *supra* note 96, at 200.

Plenipotentiaries found this principle strange, delegates accepted it in the final draft of the Convention.¹¹³ It was unwise to include both “*refouler*” and “return” in Article 33. In *Sale v. Haitian Centers Council*, the Court interpreted the scheme as restricting “return” to a narrow legal meaning,¹¹⁴ citing to authoritative French dictionaries that omitted “return” from the definition of “*refouler*”¹¹⁵ Nevertheless, President Bush’s Kennebunkport Order¹¹⁶ authorized the U.S. Coast Guard to “return” the fleeing aliens to Haiti. By “returning” the Haitians, the United States violated the Convention’s prohibitions.¹¹⁷

The 1951 Convention delegates might have considered a dictionary’s definition more seriously had they anticipated it would play such a significant role in interpreting Article 33. The delegates were unaware of the problems that would arise in reconciling “return” with “*refouler*” The inability to find a resolution in the dictionaries frustrated the U.S. Supreme Court in *Sale*, and the Court was reluctant to accept the ordinary meaning of the terms. Although the Court was unable to reconcile the two terms,¹¹⁸ it eventually defined “return” as a “defensive act of resistance or exclusion at a border rather than an act of transpor-

113. The United Kingdom delegate concluded as follows:

[T]he notion of “*refoulement*” could apply to (a) refugees seeking admission, (b) refugees illegally present in a country, and (c) refugees admitted temporarily or conditionally. Referring to the practice followed in his own country, [the delegate] stated that refugees who had been allowed to enter the United Kingdom could be sent out of the country only by expulsion or deportation. There was no concept in these cases corresponding to that of “*refoulement*.”

Ad Hoc Committee on Statelessness and Related Problems, Summary Record of 21st mtg. at 5, U.N. Doc. E/AC.32/SR.21 (1950).

114. 113 S. Ct. 2549, 2563-64 (1993).

115. *Id.* at 2564.

116. Exec. Order No. 12807, § 2(c)(3), 3 C.F.R. 303, 304 (1992), reprinted in 8 U.S.C. § 1182. The Executive Order also gave the U.S. Attorney General discretion to prohibit the return of a refugee without his consent. *Id.* (emphasis added).

117. Although the Vienna Convention on the Law of Treaties requires that treaties be construed according to their ordinary meaning, the Court in *Sale v. Haitian Ctrs. Council* appears to have intentionally ignored the Convention’s objective and purpose. Vienna Convention on the Law of Treaties, May 29, 1969, art. 31, 1155 U.N.T.S. 331. Justice Stevens admitted that the actions of the United States “may even violate the spirit of Article 33,” but nonetheless construed Article 33 inconsistently with the treaty’s objective and purpose. 113 S. Ct. at 2565. Article 32 of the Vienna Convention on Treaties also regards a treaty’s negotiating history as an aid of last resort. Nevertheless, the Court emphasized the delegates’ comments not adopted by the Conference. See *id.* at 2565-66.

118. *Sale*, 113 S.Ct. at 2564.

ting someone to a particular destination."¹¹⁹ This definition did not conflict with the Convention delegates' intent because they did not oppose a country's "resistance" or "rejection" of a refugee at the border.¹²⁰ The delegates did oppose, however, the refugee's *return* to the environment from which the refugee fled; thus, the problem arose once a particular country was not disposed to offer admission. Therefore, a link exists between the word "return" and the language "to the frontiers of territories where [the refugee's] life or freedom would be threatened."¹²¹ The relationship between both parts of Article 33 is essential to the provision's proper interpretation.

A traditional interpretation of the term "return" would prohibit a state from sending a threatened refugee back to a country from which he fled, but would permit it to send a refugee to a country where he had never been because it would not be "returning" the refugee in the literal sense of that term. Article 33, however, prevents a state from sending the refugee back to the danger from which he fled or to any other country which poses a threat.¹²² Thus, the provision's definition of "return" is understandable because it does not seek to protect the refugee from any particular country but rather from the perilous circumstances that precipitated his flight.

During the Convention's drafting stage, the French delegate explained that in France and Belgium, *refoulement* meant "either deportation as a police measure or non-admittance at the frontier."¹²³ This explanation assuaged the British delegate, who concluded that *refoulement* affected refugees seeking admission.¹²⁴ This interpretation of the term during the Convention's

119. *Id.*

120. The Court in *Sale* limited itself to the English translations supported by the two dictionaries consulted. *Id.*

121. As Professor Goodwin-Gill observed, "[N]on-*refoulement* is not so much about admission to a State, as about not returning refugees to where their lives or freedom may be endangered." GOODWIN-GILL, *supra* note 95, at 106. Furthermore, *non-refoulement* prohibits the return of refugees "in any manner whatsoever" to countries where they may face persecution. Therefore, Article 33 regulates state action, whether it occurs "internally, at the border, or through its agents outside territorial jurisdiction." *Id.* at 105.

122. See *Sale*, 113 S. Ct. at 2564 n.39; NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION 161 (1953).

123. *Ad Hoc Committee on Statelessness and Related Problems*, *supra* note 113, at 4-5.

124. *Id.* at 5.

drafting stages is consistent with contemporary usage. One report of the Haitian interdiction commented on the *refoulement* of refugees heading to the United States.¹²⁵ Apparently, the reporters of this episode did not compare the terminology of Article 33 with their projected usage of the language in their articles. That the terminology tracked the Convention's approach would be a remarkable coincidence if *refoulement* was not intended to apply to interdiction on the high seas.

The distinction between expulsion and return (*refoulement*) is more apparent if one views Article 33 as imposing two restrictions on the treatment of refugees. The expulsion restriction prohibits the removal of an alien from a contracting state,¹²⁶ whereas the "return" restriction prohibits the return of an alien at or outside the border back to the place of danger.¹²⁷ Because expulsion can only occur if a refugee is within a country's borders, the draftsmen were concerned that a state might return a refugee to a country of persecution, even if the refugee was never within the state's borders.

If Article 33 mandated that no state should expel *and* return (*refouler*) a refugee to a place of persecution, then an interpretation that restricted the principle of *non-refoulement* to refugees within the borders of a contracting state would be justified. Such an interpretation would require the state's action to originate from within and only prohibit the return of a refugee who had first been expelled.¹²⁸ The present formulation, however,

125. See *Sale v. Haitian Centers Council*, 113 S. Ct. 2549, 2569 (1993) (Blackmun, J. dissenting) (quoting *Le boubrier haïtien*, LE MONDE (Paris), June 1, 1992).

126. Both Articles 32 and 33 of the Convention use the term "expel." Article 32 directs Contracting States not to "expel a refugee lawfully in their territory." *Id.* Article 33 provides that no Contracting State shall "expel a refugee in any manner whatsoever." *Id.* Therefore, neither article's prohibition on expulsion leaves any ambiguity as to the refugee's status and location.

127. Aside from refugees lawfully within a territory (Article 32), other refugees may be categorized as unlawfully within or outside a state's territory. *Refoulement* is directed to the latter category. Professor Goodwin-Gill defines it as "summary reconduction to the frontier of those discovered to have entered illegally and summary refusal of admission of those without valid papers." GOODWIN-GILL, *supra* note 95, at 69 (footnote omitted). See also Pompe, *supra* note 96, at 20.

128. The INA proceedings require that an alien be allowed entry before being "excluded and deported." INA § 236(a), 8 U.S.C. § 1226(a) (1994). Deportation is the physical act following the exclusion decision. If Article 33 imposed a similar limitation on the term "return," excluding action on the high seas may be justified because the alien's "return" would result from the alien's expulsion.

prevents a state from expelling *or* returning a refugee, suggesting that *non-refoulement* differs from expulsion. In light of the Convention's purpose to provide fundamental protection to refugees wholly apart from the grant of asylum,¹²⁹ one should interpret Article 33 according to its plain meaning, which grants aliens protection upon meeting refugee status. Recognizing this status before protecting the refugee is unnecessary.¹³⁰ Therefore, expulsion is not the only reason for the application of Article 33.

Similarly, Article 33's prohibition against expulsion or return "in any manner whatsoever" suggests that the draftsmen intended to accord refugees full protection.¹³¹ Those favoring a narrow interpretation would argue that this phrase merely refers to the physical means of removing the refugee, and that the prohibition still would not apply to a refugee on the high seas. A more liberal interpretation, however, would suggest that the draftsmen's ultimate objective was to grant refugees "the widest possible exercise of fundamental rights and freedoms," and to ensure that states do not interfere with this objective.¹³² The scope of this provision is certainly broad enough to protect a refugee regardless of his location or the state's disposition and to prevent two contracting states from agreeing to return refugees to face persecution. If states avoid the mandate of Article 33 by arguing that the refugees are outside their borders, they dilute the meaning of "return in any manner whatsoever."¹³³ The draftsmen

129. See Brief of the Office of the United Nations High Commissioner for Refugees at 7, *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549 (1993) (No. 92-344) (as *Amicus Curiae* in support of Respondents), *reprinted in* 6 INT'L J. REF. L. 85, 92 (1994) [hereinafter Brief of UNHCR]; GOODWIN-GILL, *supra* note 95, at 109; Koh, *supra* note 75, at 2416-17.

130. GOODWIN-GILL, *supra* note 95, at 73; LAWYERS COMMITTEE FOR HUMAN RIGHTS, REFUGEE REFOULEMENT: THE FORCED RETURN OF HAITIANS UNDER THE U.S.-HAITIAN INTERDICTION AGREEMENT 56 (1990); OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS para. 28 (1988) [hereinafter UNHCR HANDBOOK].

131. One could restrictively construe the language "in any manner whatsoever" to exempt any return of refugees that did not include removal from a Contracting State's territory. See Brief of UNHCR, *supra* note 129, at 7, *reprinted in* 6 INT'L J. REF. L. 85, 91 (1994). Others have suggested that "so far as the words 'in any manner whatsoever' are regarded a textual analysis does not exclude even measures of extradition from the purview of Article 33." STENBERG, *supra* note 96, at 201; THE REFUGEE CONVENTION, *supra* note 92, at 342.

132. See Convention, *supra* note 6, pmbl.

133. The liberal interpretation of this language covers situations where a state sends a refugee to a place where he is not threatened, knowing that another state eventually will return the refugee to the persecuting state.

intended to broaden, not restrict, the refugees' protection. Denying such protection to aliens on the high seas is inconsistent with the Convention's mandate that states not return refugees to a hostile environment.

The draftsmen must have intended that the phrase "in any manner whatsoever" serve a specific purpose. Perhaps in using such broad language, they wanted to prevent the return of refugees to the country of persecution, even if an unanticipated procedural oversight arises. Regardless of the draftsmen's motivation in using such broad language, there is no evidence that they wanted to ignore those refugees outside the offending state's territory.

III. PARTICULARLY SERIOUS CRIMES AND DANGER TO THE COMMUNITY

A. *Nature of INA § 243(h)(2)(B)*

Section 243(h)(2)(B) of the INA denies relief to an alien if the U.S. Attorney General determines that "the alien, having been convicted of a particularly serious crime, constitutes a danger to the community of the United States."¹³⁴ The issue arises whether authorities should base deportation solely upon an alien's conviction without a separate finding of the alien's danger to the community.

In *In re Frentescu*,¹³⁵ the BIA provided guidance regarding which crimes are particularly serious. Although some crimes are inherently "particularly serious," others require an assessment of several factors. The BIA suggested that important considerations include "the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and whether the type and circumstances of the crime indicate that the alien will be a danger to the community."¹³⁶ Congress included the phrase "danger to the community" as an aid in determining the seriousness of the crime.¹³⁷ In *Frentescu*, the BIA suggested that this element of dangerousness is only one of several factors that a court should consider in determining whether

134. INA § 243(h)(2)(B), 8 U.S.C. § 1253(h)(2)(B) (1994).

135. 18 I. & N. Dec. 244 (1982).

136. *Id.* at 247.

137. *Id.* See also *In re Carballe*, 19 I. & N. Dec. 357 (1986).

a crime is "particularly serious."¹³⁸

The BIA's formulation in *Frentescu* properly invited a consideration of the alien's relationship with the community. Such a consideration was necessary to determine whether the alien had committed a particularly serious crime and not merely whether the alien was a danger to others.¹³⁹ The BIA looked at the "totality of the circumstances" in determining the seriousness of the alien's crime.¹⁴⁰

In *In re Carballe*,¹⁴¹ however, the BIA indicated that the element of dangerousness is an "essential key" and not merely one of several factors in determining whether the alien committed a particularly serious crime.¹⁴² Perhaps the BIA was emphasizing that the alien must be a danger to the community if he has committed a particularly serious crime. The BIA confirmed this interpretation, noting that "[i]f it is determined that the crime was a 'particularly serious' one, the question of whether the alien is a danger to the community of the United States is answered in the affirmative."¹⁴³ The phrase "danger to the community" explains only the effect of the alien's conviction and does not require two separate findings for withholding deportation.¹⁴⁴

In *In re Carballe*, the BIA focused on the nature of the crime in determining the alien's dangerousness.¹⁴⁵ Arguably, however, an assessment of the crime is relevant only for determining whether a person falls within the statutory category. Once authorities have identified an alien as having previously committed a crime, courts must determine whether the alien currently constitutes a danger to the community under section 243(h)(2)(B).¹⁴⁶

138. See 18 I. & N. Dec. at 247.

139. If the BIA was concerned only with an alien's danger to others, it would not have conceded that a crime against property may sometimes be considered a particularly serious crime. See *id.*

140. *In re Frentescu*, 18 I. & N. Dec. 244, 247 (1982).

141. 19 I. & N. 357, 357 (1986).

142. *Id.* at 360.

143. *Id.*

144. *Id.* (citing *Crespo-Gomez v. Richard*, 780 F.2d 932 (11th Cir. 1986); *Zardui-Quintana v. Richard*, 768 F.2d 1213 (11th Cir. 1985) (Vance, J., concurring)).

145. *Id.*

146. In *Carballe*, the BIA noted that neither it nor the courts should determine whether an alien will be a recidivist. 19 I. & N. Dec. 357, 360 (1986). The BIA would have to make such a determination, however, if dangerousness is relevant to defining the term "particularly serious crime." *Id.* The BIA must make this judgment either when

Because the statute requires courts to determine the alien's dangerousness at the time of the alien's application for relief,¹⁴⁷ courts should not make an automatic decision about the alien's eligibility for relief when the conviction occurred in the distant past. A finding regarding the crime's seriousness does not answer whether the alien presently constitutes a danger to the community. The U.S. Attorney General should first determine that the alien has been convicted of a particularly serious crime before concluding that the alien constitutes a danger to the community.¹⁴⁸ The phrase "convicted of a particularly serious crime" should only define those aliens to whom the U.S. Attorney General applies her judgment. Section 243(h)(2)(B) does not apply to an alien who is a danger to the community but who has not been convicted of any crime.¹⁴⁹

The reference to dangerousness is unnecessary if Congress merely intended to impose a permanent ban on the type of criminals identified in the statute. Thus, the fact that Congress

determining whether the alien committed a "particularly serious crime," or when fulfilling the dual finding requirement. *Id.*

147. According to the statute, relief is unavailable if the convicted alien "constitutes a danger to the community of the United States." INA § 243(h)(2)(B), 8 U.S.C. § 1253(h)(2)(B) (1994) (emphasis added). In *In re K*, Int. Dec. No. 3163, at 1 (BIA 1991), the BIA rejected the immigration judge's view that a convicted felon would not always be a danger to the community and, thus, should not be forever barred. *Id.* at 7-8.

148. In *Mosquera-Perez v. INS*, 3 F.3d 553, 555-56 n.6 (1st Cir. 1993), the court did not accept this argument because the Attorney General is required in every case to determine whether an alien has been convicted and whether the conviction is final. This is implicit in the statutory language because the U.S. Attorney General could not be expected to make a determination about an alien who has not been convicted.

149. In *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987), the court agreed that the provision in § 243(h)(2)(B) dealing with an alien's conviction modifies the word "alien," thus limiting the category of dangerous aliens to convicted aliens. Nonetheless, the court found that Congress could have required a dual finding of conviction and dangerousness by simply inserting "and" between the clauses. *Id.* Limiting the category to convicted aliens does not necessarily resolve the issue regarding the dual finding requirement.

The court in *Mosquera-Perez v. INS*, 3 F.3d 553, 556 (1st Cir. 1993), found "considerable logical force" in the alien's argument in favor of separate determinations. In *Martins v. INS*, 972 F.2d 657 (5th Cir. 1992), the alien believed that congressional intent supported his position. The Fifth Circuit relied on the House Judiciary Committee Report in clarifying the issue, noting that the "Report clearly states that the act intended to make those aliens, 'who have been convicted of a particularly serious crime which makes them a danger to the community', ineligible for a withholding of deportation." *Id.* at 661 (citing H.R. REP. NO. 608, 96th Cong., 1st Sess. 18 (1979)). A fair reading of this language suggests that the disqualifying feature is whether the crime renders an alien dangerous, thus narrowing the breadth of particularly serious crimes.

included the additional language suggests that the statute requires separate findings of the seriousness of the crime and of the alien's danger to the community. The argument that the alien's conviction for a particularly serious crime is sufficient—without a finding of the alien's present danger—presents an unexplained redundancy that Congress would be inclined to avoid.

When Congress amended section 243(h) in 1980,¹⁵⁰ the House Judiciary Committee Report noted that a statutory exception exists for "aliens who have been convicted of particularly serious crimes which make them a danger to the community of the United States."¹⁵¹ The Report's language suggests that not *all* "particularly serious crimes" would deny an alien relief, but only those that rendered an alien dangerous to the community.¹⁵² If the Report only referred to "particularly serious crimes," a mere finding of a conviction would suffice. Additionally, Congress would find it unnecessary to qualify the types of crimes falling within the exception if "particularly serious crimes" were equivalent to the alien constituting a danger to the community.¹⁵³

Congress did not clarify this issue when it enacted the Immigration Act of 1990. In amending section 243(h)(2) to include an aggravated felony as a particularly serious crime,¹⁵⁴ Congress did not resolve the basic question concerning the alien's dangerousness. Despite challenges to its interpretation, by 1990 courts had construed section 243(h)(2)(B) as barring relief to aliens convicted of particularly serious crimes without requiring further findings.¹⁵⁵

150. Refugee Act, *supra* note 4, at § 203(e), 94 Stat. 107 (codified as amended at 8 U.S.C. § 1253(h) (1994)).

151. H.R. REP. NO. 608, 96th Cong., 1st Sess. 18 (1979).

152. In *Al-Salehi v. INS*, 47 F.3d 390 (10th Cir. 1995), the court cited with approval the House Judiciary Committee Report without discussing its actual language. As did the Fifth Circuit in *Martins v. INS*, 972 F.2d 657 (5th Cir. 1992), the Tenth Circuit automatically denied relief to an alien who had been convicted of a particularly serious crime, relying on the legislative history of the Refugee Act of 1980. *Al-Salehi*, 47 F.3d at 394-96.

153. A statute should be construed in a manner that does not render any part of it meaningless and redundant. *Pennsylvania Dep't of Pub. Welfare v. U.S. Dep't of Health & Human Servs.*, 928 F.2d 1378, 1385 (3d Cir. 1991); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 758 (1st Cir. 1985); 2A NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 46.05 (5th ed. 1992).

154. Immigration Act of 1990, Pub. L. No. 101-649, § 515(a)(2), 104 Stat. 4978, 5053 (codified as amended at 8 U.S.C. § 1253(h)(2) 1994) [hereinafter Immigration Act of 1990].

155. See *Arauz v. Rivkind*, 845 F.2d 271, 275 (11th Cir. 1988); *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987).

Congress' reluctance to amend the language of section 243(h)(2)(B) would be less problematic if, in the same section of the Immigration Act of 1990, it had not denied asylum relief to a person convicted of an aggravated felony.¹⁵⁶ Congress failed to provide a similar bar to withholding of deportation proceedings for such persons. As a result, the asylum provision now contains an absolute bar to aliens convicted of aggravated felonies, whereas the withholding provision is open to interpretation.

In *Garcia v. INS*,¹⁵⁷ the Seventh Circuit accepted the BIA's explanation in *In re K* that Congress did not wish to disturb the structure of section 243(h) by tampering with the language of subsection (2)(B).¹⁵⁸ The BIA has consistently interpreted section 243(h)(2)(B) as not requiring a separate finding of dangerousness.¹⁵⁹ In *In re K*,¹⁶⁰ the BIA recognized Congress' desire to include aggravated felonies as particularly serious crimes and, thus, to exclude such felons from withholding of deportation. It is questionable, however, whether Congress merely clarified the existing ban on eligibility in section 243(h)(2)(B) or added "a wholly independent bar based on conviction for an aggravated felony."¹⁶¹

Although the *Garcia* court noted congressional strictness against criminals, Congress allowed an aggravated felon to avoid deportation¹⁶² if he could show that he posed no threat to others pending a resolution of his exclusion or deportation problems.¹⁶³ Given the gravity of the situation envisaged in section 243(h)(2)(B), Congress may not have wished to return serious criminals to face persecution unless they threatened the community.¹⁶⁴ In that event, the categorization of aggravated felons

156. Immigration Act of 1990, *supra* note 154, § 515(a)(1) (codified as amended at 8 U.S.C. § 1158(d) (1994)).

157. 7 F.3d 1320 (7th Cir. 1993).

158. *Id.* at 1322-23 (citing *In re K*, Int. Dec. No. 3163 (BIA 1991)).

159. *In re U-M*, Int. Dec. No. 3152, 5 (BIA 1991); *In re Gonzalez*, 19 I. & N. Dec. 682 (BIA 1988); *In re Carballe*, 19 I. & N. Dec. 357, 360 (1986).

160. Int. Dec. No. 3163, 1, 8-9 (BIA 1991).

161. *See id.* at 10. Congress left the issue unresolved in its 1990 amendment when it included aggravated felons within the statutory category of criminals.

162. *Garcia v. INS*, 7 F.3d 1320, 1324 (7th Cir. 1993) (citing 8 U.S.C. § 1226 (1988 & Supp. II 1990)) (releasing an alien who has committed an aggravated felony but is not a danger to others).

163. *See id.*

164. The U.S. Attorney General has no discretion to deny relief to an alien who meets the "clear probability" standard enunciated in *INS v. Stevic*, 467 U.S. 407 (1984). This

as aliens who have committed particularly serious crimes would be consistent with a grant of relief.

B. *Aggravated Felonies in the INA*

Some allege that imposing a two-step process would lead to extensive hearings involving psychological findings and expert testimony.¹⁶⁵ Under subsection (2)(B), the alien's conviction guides the U.S. Attorney General's determination of an alien's danger to the community; under subsection (2)(D), however, the U.S. Attorney General must rely on reasonableness to determine an alien's threat to security.¹⁶⁶ The U.S. Attorney General's determination under either provision would not cause any problem in the final analysis, regardless of whether it is based on a conviction or on reasonableness.

If a conviction triggers an automatic finding of dangerousness under section 243(h)(2)(B), the U.S. Attorney General should explain the release of an alien who shows that he does not represent a threat to the community during deportation.¹⁶⁷ Courts should not treat an aggravated felony differently under the deportation provision if the crime constitutes a particularly serious crime under section 243(h)(2)(B).¹⁶⁸ Consequently, under the deportation section, an aggravated felony conviction should not prevent the alien from showing that he does not represent a threat to the community.

The statute accords similar deference to the U.S. Attorney

standard is higher than the well-founded fear of persecution set out in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

165. *Martins v. INS*, 972 F.2d 657, 661 (5th Cir. 1992) (citing *Zardui-Quintana v. Richards*, 768 F.2d 1213, 1222-23 (11th Cir. 1985) (Vance, J., concurring)).

166. Subsection (2)(B) requires the Attorney General to deny relief if "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." INA § 243(h)(2)(B), 8 U.S.C. § 1253(h)(2)(B) (1994). Subsection (2)(D) requires the Attorney General to deny relief if "there are reasonable grounds for regarding the alien as a danger to the security of the United States." *Id.* § 243(h)(2)(D), 8 U.S.C. § 1253(h)(2)(D). It is equally difficult to determine dangerousness in subsections (2)(B) and (2)(D).

167. Section 242(a)(2)(B) provides: "The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a *threat to the community*." *Id.* § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (1994) (emphasis added).

168. The Immigration Act of 1990 recognized an alien who has been convicted of an aggravated felony as an alien who has committed a particularly serious crime. *See supra* note 154, § 515(a)(2) (codified as amended at 8 U.S.C. § 1253(h)(2) (1994)).

General in the exclusion context. Section 236(e)(3)(C) allows the U.S. Attorney General to release an alien felon if the alien does not represent a "danger to the safety of other persons or to property."¹⁶⁹ Although this language differs slightly from section 243(h)(2)(B), both sections address the alien's danger to others¹⁷⁰ and invite the U.S. Attorney General to make the necessary judgment in light of the alien's questionable background.

Interestingly, section 236(e)(3)(C) parallels section 243(h)(2)(B). Under section 236(e)(3)(C), if the U.S. Attorney General wants to send an alien back to a country that does not want to accept him, the U.S. Attorney General must hold that alien in custody unless the alien meets certain requirements. One requirement is that the alien felon will not constitute a danger to the safety of others. The U.S. Attorney General must find that the alien has been convicted of an aggravated felony *and* is not dangerous.¹⁷¹ Thus, section 236(e)(3)(C) provides an exception to the requirement that the U.S. Attorney General hold the alien felon in custody if he is unable to return the alien to the alien's homeland.¹⁷² Similarly, under section 243(h)(2)(B), if the U.S. Attorney General is unable to return the alien because the alien's life or freedom would be threatened, the alien should remain if previously convicted of an aggravated felony (and thus of a particularly serious crime) *and* the alien does not represent a danger to the community.

Both the courts¹⁷³ and the BIA¹⁷⁴ have held that aliens convicted of particularly serious crimes constitute a danger to the

169. INA § 236(e)(3)(C), 8 U.S.C. § 1226(e)(3)(C) (1994).

170. Section 243(h)(2)(B) states "danger to the community," whereas section 236(e)(3)(c) states "danger to the safety of other persons or to property." *Id.* §§ 243(h)(2)(B), 8 U.S.C. § 1253(h)(2)(B); 236(e)(3)(C), 8 U.S.C. § 1226(e)(3)(C).

171. Section 236(e) refers only to "any alien convicted of an aggravated felony." INA § 236(e)(1), 8 U.S.C. § 1226(e)(1) (1994). The U.S. Attorney General's determination concerns "such alien." *Id.* § 236(e)(3), 8 U.S.C. § 1226(e)(3).

172. Section 236(e)(2) allows the U.S. Attorney General to release the excludable alien if the alien's country will not accept him. INA § 236(e)(2), 8 U.S.C. § 1226(e)(2) (1994). The U.S. Attorney General must first determine, however, that the alien will not pose a danger to the safety of others or to property. *Id.* § 236(e)(3)(C), 8 U.S.C. § 1226(e)(3)(C).

173. See *Al-Salehi v. INS*, 47 F.3d 390 (10th Cir. 1995); *Garcia v. INS*, 7 F.3d 1320 (7th Cir. 1993); *Mosquera-Perez v. INS*, 3 F.3d 553 (1st Cir. 1993); *Martins v. INS*, 972 F.2d 657 (5th Cir. 1992); *Arauz v. Rivkind*, 845 F.2d 271 (11th Cir. 1988); *Ramos v. INS*, 814 F.2d 1394 (9th Cir. 1987).

174. See *In re U-M*, Int. Dec. No. 3152 (BIA 1991); *In re K*, Int. Dec. No. 3163 (BIA 1991); *In re Carballe*, 19 I. & N. Dec. 357 (BIA 1986).

community. If this conclusion is valid, it must apply under all INA provisions. Congress has permitted an alien to show that he is not dangerous, thus indicating that an aggravated felony conviction does not foreclose consideration of the alien's dangerousness. Although Congress has allowed an alien to show that he is not a threat, it strongly opposes aliens convicted of aggravated felonies.¹⁷⁵ Congress has not mandated, however, that such aliens should always be treated similarly.¹⁷⁶

Evidently, Congress does not consider an aggravated felon *per se* dangerous.¹⁷⁷ This issue deserves consideration despite the courts' scant attention to it.¹⁷⁸ If an aggravated felony is a particularly serious crime rendering the alien dangerous, relief should not be available in other statutory contexts on the ground that he is not dangerous. Congress, however, has provided an avenue for relief, in effect suggesting that not all aggravated felons are dangerous.

The Immigration Act of 1990 introduced a clear prohibition against granting asylum to an alien convicted of an aggravated

175. Congress streamlined procedures for the deportation of aggravated felons in INA § 242(a)(2), 8 U.S.C. § 1252(a)(2) (1994) (mandatory detention of aliens convicted of aggravated felony); *id.* § 242(a)(3)(A), 8 U.S.C. § 1252(a)(3)(A) (24-hour availability of INS resources to determine whether individuals arrested for aggravated felonies are aliens); *id.* § 242(i), 8 U.S.C. § 1252 (expedited procedures for deportation of aliens convicted of aggravated felonies).

176. The Immigration Act of 1990 denied exclusion relief to a returning lawful resident who was convicted of an aggravated felony and served a term of at least five years imprisonment. Immigration Act of 1990, *supra* note 154 (current version at 8 U.S.C. § 1182(c) (1994)). Therefore, a mere conviction was insufficient to deny relief. Despite the congressional toughness against aliens with aggravated felony convictions, Congress has not precluded other considerations. *See, e.g.*, INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (1994) (alien felon may be released from custody if he can convince the Attorney General that he is not a threat to the community).

177. The asylum provision does not mention dangerousness: "An alien who has been convicted of an aggravated felony may not apply for or be granted asylum." INA § 208(d), 8 U.S.C. § 1158(d) (1994). A mere conviction precludes an alien from consideration for relief. INA § 236(e) allows the U.S. Attorney General to release an alien convicted of an aggravated felony pending a determination of excludability if the alien will not pose a danger to others. *Id.* § 236(e)(3)(C), 8 U.S.C. § 1226(e)(3)(C). Under sections 243(h)(2)(B) and 208(d), an alien convicted of an aggravated felony is automatically deemed dangerous; yet section 236(e)(3)(C) requires the U.S. Attorney General to determine an aggravated felon's dangerousness.

178. For example, in *Garcia v. INS*, 7 F.3d 1320, 1323 (7th Cir. 1993), the Seventh Circuit acknowledged that Congress knew how to condition relief on an alien's dangerousness. The court did not attempt to reconcile the automatic finding of dangerousness in section 243(h)(2)(B) with the alien's ability to show lack of dangerousness in other INA sections.

felony¹⁷⁹ but merely clarified that such a felony is a "particularly serious crime" for withholding of deportation.¹⁸⁰ In *In re K*,¹⁸¹ the BIA did not view the 1990 Act as requiring a separate finding of dangerousness because the Act left section 243(h)(2)(B) otherwise intact. In *In re Carballe*,¹⁸² the BIA indicated that the focus should be on the serious nature of the crime rather than the probability of future misconduct. The strong congressional stance against serious crimes seems consistent with the BIA's approach. Nevertheless, Congress did not automatically reject leniency for all aliens convicted of aggravated felonies. For example, an alien felon is completely barred from a waiver of exclusion only if the alien has served at least five years of imprisonment.¹⁸³ Congress would not have imposed this imprisonment requirement if it intended to deny relief for a mere felony conviction. This waiver provision grants relief to returning lawful residents who are otherwise excludable.

An alien felon may attempt to convince the U.S. Attorney General to exercise discretion in his favor under section 212(c). Congress may have had a similar idea in enacting section 243(h) when a clear probability of persecution exists upon the alien's return to a certain country.¹⁸⁴ Both sections 212(c) and 243(h) impose additional requirements beyond mere conviction before a court may deny an alien relief.¹⁸⁵ Thus, the congressional will to tighten immigration procedures against criminals did not disqualify aggravated felons from consideration in all cases.

If Congress retained remedies for such aliens, the concern is more compelling for those aliens who may face death upon their return.¹⁸⁶ The matter involves making an informed judgment

179. Immigration Act of 1990, *supra* note 154, § 515(a)(1) (codified as amended at 8 U.S.C. § 1158(d) (1994)).

180. *Id.* § 515(a)(2) (codified as amended in 8 U.S.C. § 1253(h)(2) (1994)).

181. Int. Dec. No. 3163 (BIA 1991).

182. 19 I. & N. Dec. 357, 359 (BIA 1986).

183. INA § 212(c), 8 U.S.C. § 1182(c) (1994).

184. In the withholding of deportation context, even greater pressure exists when the alien proves that he will be persecuted. Under section 212(c), however, no problem of persecution arises. *Id.* § 212(c), 8 U.S.C. § 1182(c).

185. Section 212(c) requires at least a five-year term of imprisonment, whereas section 243(h) requires a determination of the alien's dangerousness.

186. Congress intended the withholding provision to be consistent with article 33.2 of the Convention. In interpreting article 33.2, some have suggested that "[t]he principle of proportionality has to be observed, that is, whether the danger entailed to the refugee by expulsion or return outweighs the menace to public security that would arise if he were

about the alien's danger to the community. Arguing that the language, which requires a consideration of dangerousness, is redundant is inconsistent with the statutory scheme.

C. Article 33.2 of the Convention

Congress may have felt constrained by Article 33.2 of the Convention.¹⁸⁷ The purpose of the Refugee Act was to conform domestic legislation to the Convention. Congress may have intended to recognize the serious nature of an aggravated felony without disturbing this conformity.¹⁸⁸ Nevertheless, adherence to the Convention's language has caused more problems than anticipated.

Although courts recognize the relationship between Article 33.2 of the Convention and section 243(h) of the INA, they have adopted their own interpretation of section 243(h)(2)(B) on the ground that the Convention provides little guidance on the matter.¹⁸⁹ During the Conference of Plenipotentiaries, the delegates from France and the United Kingdom proposed that Article 28 should allow states to punish activities "directed against national security or constituting a danger to the community."¹⁹⁰ The Convention, however, was not inclined to return to persecution of each alien who commits a particularly serious crime.¹⁹¹ One must assess the alien's danger to the community on an individual basis. An alien convicted of a major crime may be a danger to the community, whereas an alien convicted of a capital crime commuted while in a state of emotional distress may not be dangerous.¹⁹² If the alien's crime resulted from an isolated incident, such as self-

permitted to stay." THE REFUGEE CONVENTION, *supra* note 92, at 342 (footnote omitted); see also GOODWIN-GILL, *supra* note 95, at 63.

187. See *Garcia v. INS*, 7 F.3d 1320, 1325 (7th Cir. 1993); Evangeline G. Abriel, *Presumed Ineligible: The Effect of Criminal Convictions on Applications for Asylum and Withholding of Deportation Under Section 515 of the Immigration Act of 1990*, 6 GEO. IMMIGR. L.J. 27, 38 & n.45 (1992).

188. The Senate Conference Report on the Refugee Act confirmed as follows: "The Conference substitute adopts the House provision with the understanding that it is based directly on the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." S. CONF. REP. NO. 590, 96th Cong., 2d Sess. 20 (1980).

189. See *Al-Salehi v. INS*, 47 F.3d 390, 395 (10th Cir. 1995); *Garcia*, 7 F.3d at 1325-26.

190. U.N. Conference of Plenipotentiaries-16th meeting, *supra* note 87, at 7 (remarks of Mr. Rochefort (France)).

191. See STENBERG, *supra* note 96, at 227; THE REFUGEE CONVENTION, *supra* note 92, at 342.

192. STENBERG, *supra* note 96, at 228.

defense or necessity, the alien may not constitute a danger to the community despite the seriousness of the crime.¹⁹³

“[P]rinciples of natural justice and due process of law require something more than mere mechanical application of the exception.”¹⁹⁴ Placing the exception in context, the alien’s crime and danger to the community must be very serious for the state to disregard the consequences of the alien’s return.¹⁹⁵ Article 33.2 deprives the alien of *non-refoulement* when the state may reasonably regard the alien as a danger to security, and it further deprives him of that benefit once he has been convicted of a particularly serious crime making him a danger to the community. Article 33.2 inquires into the reasonableness of an alien’s return by assessing the likelihood of danger to the alien against the danger to security.¹⁹⁶ Similarly, the “particularly serious crime” language provides a reasonable basis for determining an alien’s “danger to the community.” The determination must consider an alien’s impact on the community only if the crime is “particularly serious.”

Although *non-refoulement* is not absolute, Article 33.2 recognizes exceptions only for national security and danger to the community.¹⁹⁷ The Conference of Plenipotentiaries concluded that a mere conviction was insufficient to render an alien a danger to the community.¹⁹⁸ As the United Kingdom delegate suggested, the state must determine whether the danger of expelling or returning the alien outweighs the menace to the community if the state allows the alien to stay.¹⁹⁹

D. Proper Interpretation

The courts have not clearly identified the congressional rationale for including the language “danger to the community.” In *Mansouri v. INS*,²⁰⁰ the alien relied on the legislative history

193. *Id.*, THE REFUGEE CONVENTION, *supra* note 92, at 342; GOODWIN-GILL, *supra* note 95, at 96.

194. GOODWIN-GILL, *supra* note 95, at 96.

195. *Id.*

196. U.N. Conference of Plenipotentiaries-16th meeting, *supra* note 87, at 8.

197. At the Conference of Plenipotentiaries, the French delegate captured the sense of the article’s exceptions when he commented that states would be able to punish activities that were directed against national security or threaten the community. *Id.* at 7. (remarks of Mr. Rochefort (France)).

198. See STENBERG, *supra* note 96, at 227.

199. U.N. Conference of Plenipotentiaries-16th meeting, *supra* note 87, at 8.

200. 32 F.3d 1020 (7th Cir. 1994).

for relief and directed the court's attention to previous bills that denied relief to aliens convicted of aggravated felonies without requiring a finding of dangerousness.²⁰¹ The Seventh Circuit, however, refused to acknowledge any ambiguity in the statutory language.²⁰² Nevertheless, the court must have seen an automatic connection between the alien's conviction and the alien's danger to others. The problem was that the mere conviction rendered the alien a danger to the community.

Section 243(h)(2)(B)'s disabling feature is its determination that an alien convicted of an aggravated felony constitutes a danger. Perhaps the exception requires the U.S. Attorney General to determine first whether an alien committed a particularly serious crime before determining his dangerousness.²⁰³ If the plain meaning of the statute requires only a finding of conviction, the remaining statutory language is gratuitous, and Congress needlessly mentioned the effect of the conviction. The stage, therefore, was set for ambiguity and confusion.

Although the BIA and the courts have required only a finding of conviction,²⁰⁴ some circuit courts have conceded that the issue remains unresolved. In *Mosquera-Perez v. INS*,²⁰⁵ the First Circuit acknowledged that the statutory language was more ambiguous than the alien suggested.²⁰⁶ The court noted the alien's powerful argument that the language "danger to the community" is irrelevant if a mere conviction was dispositive of the alien's eligibility for relief.²⁰⁷ The court, however, found that Congress could have specified its intent to require a dual finding by merely including the word "and" between the clauses in section

201. *Id.* at 1022. One bill would have added the following paragraph to section 243(h)(2) without any reference to dangerousness: "(E) The alien has been convicted of an aggravated felony as defined under section 101(a)(43) of this Act." 136 CONG. REC. S11942 (daily ed. Aug. 2, 1990) (discussing S. 2957). The intent of this amendment was to deny "aliens convicted of murder, drug trafficking, and other aggravated felonies relief." *Id.* (section-by-section analysis).

202. *Mansouri*, 32 F.3d at 1022.

203. In *Garcia v. INS*, 7 F.3d 1320, 1323 (7th Cir. 1993), the court noted that Congress knew how to condition relief on an alien's dangerousness. The question remains why Congress would condition relief on an alien's dangerousness if a mere aggravated felony conviction rendered the alien a danger to the community.

204. See *supra* notes 176-177 and accompanying text.

205. 3 F.3d 553 (1st Cir. 1993).

206. *Id.* at 555-56.

207. *Id.* at 556.

243(h)(2)(B).²⁰⁸ Dissatisfied with the plain meaning approach, the court examined the legislative history but still found no resolution.²⁰⁹ Therefore, the court followed the BIA's interpretation in *Carballe*, holding that it was not "unreasonable, arbitrary, or capricious."²¹⁰

The Tenth Circuit recently agreed that Congress could have avoided confusion by inserting the word "and" between the clauses in section 243(h)(2)(B);²¹¹ it also acknowledged that Congress could have used plain language if it intended that an alien's conviction should satisfy the element of dangerousness.²¹² Confronted with this uncertainty, the Tenth Circuit joined the First Circuit and deferred to the BIA's interpretation.²¹³

In *Garcia v. INS*,²¹⁴ the Seventh Circuit also relied on the statutory text. The court reminded the alien that the Fifth, Ninth, and Eleventh Circuits had rejected a dual finding requirement based on the statute's grammatical structure.²¹⁵ Those courts found a cause and effect relationship between the two clauses of section 243(h)(2)(B).²¹⁶ Both the *Mosquera-Perez*²¹⁷ and *Garcia*²¹⁸ courts, however, recognized the U.S. Attorney General's authority to release an alien from custody pending exclusion if the alien could show that he was not a danger to others.²¹⁹ This possibility exists despite the 1990 Act, which makes an aggravated felony a particularly serious crime. The courts concede that aliens convicted of particularly serious crimes may still prove they are not

208. *Id.* This grammatical solution made an early appearance in *Crespo-Gomez v. Richard*, 780 F.2d 932 (11th Cir. 1986), where the court said: "The statute does not connect its two clauses with a conjunction; rather the statute sets forth a cause and effect relationship: the fact that the alien has committed a particularly serious crime makes the alien dangerous within the meaning of the statute." *Id.* at 934. Other circuits have seen this as a compelling point. See *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987); *Martins v. INS*, 972 F.2d 657, 660 (5th Cir. 1992).

209. *Mosquera-Perez v. INS*, 3 F.3d 553, 558 (1st Cir. 1993).

210. *Id.* at 559.

211. *Al-Salehi v. INS*, 47 F.3d 390, 394 (10th Cir. 1995).

212. *Id.*

213. *Id.* at 396.

214. *Garcia v. INS*, 7 F.3d 1320 (7th Cir. 1993).

215. *Id.* at 1323 (citing *Martins v. INS*, 972 F.2d 657, 660-61 (5th Cir. 1992) (*per curiam*); *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987); *Arauz v. Rivkind*, 845 F.2d 271, 275 (11th Cir. 1985)).

216. *Id.*

217. 3 F.3d 553, 556 & n.7 (1st Cir. 1993).

218. 7 F.3d 1320, 1324 (7th Cir. 1993).

219. INA § 236(e)(3)(C), 8 U.S.C. § 1226(e)(3)(C) (1994).

a threat to the community. This concession blurs the cause and effect relationship between the two clauses in section 243(h)(2)(B) because an automatic finding that an alien convicted of an aggravated felony is dangerous is inconsistent with a finding that the alien does not represent a danger to the community.

IV PERSECUTION ON ACCOUNT OF POLITICAL OPINION

A. *Neutrality*

An alien may obtain relief by showing persecution on account of political opinion.²²⁰ Both the BIA and the courts, however, have found difficulty in interpreting the language "on account of political opinion." The issue frequently arises when an alien seeks relief because his failure to join a guerrilla movement places him in danger. From the BIA's perspective, the alien should qualify for relief "on account of political opinion" only if he expresses a viewpoint that is offensive to the persecutor.²²¹ Resisting a guerrilla movement, therefore, is insufficient to establish a threat of persecution on account of political opinion.

In *In re Vigil*,²²² the BIA distinguished between "politically motivated harm" and harm related to the alien's "offensive political opinion."²²³ The guerrillas preferred to pursue their political goals rather than punish an alien for his individual views.²²⁴ The guerrillas could form a potent political force only if their numbers increased. Thus, the guerrillas' sphere of influence depended upon the success of their recruiting efforts.

The judicial approach to the "political opinion" doctrine has been more favorable to the alien.²²⁵ Courts have interpreted an alien's refusal to join a guerrilla movement as an expression of a political opinion because it impedes the guerrillas' political objectives, thus giving the guerrillas reason to conform the alien to their

220. Section 243(h) provides relief if the alien can show that his "life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or *political opinion*." *Id.* § 243(h)(1), 8 U.S.C. § 1253(h)(1) (emphasis added).

221. *In re Maldonado-Cruz*, 19 I. & N. Dec. 509 (BIA 1988); *In re Acosta*, 19 I. & N. Dec. 211 (BIA 1985).

222. 19 I. & N. Dec. 572 (BIA 1988).

223. *Id.* at 576.

224. *Id.* at 577.

225. See, e.g., *Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989); *Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984).

way of thinking.

The Ninth Circuit has taken the lead in interpreting "political opinion," which has been an important issue when an alien remains neutral in an internal conflict. In *Bolanos-Hernandez v. INS*,²²⁶ the Ninth Circuit sympathized with the alien and held that neutrality was as much a political decision as affiliation with a particular political faction. The alien's motive to remain neutral seemed to constitute a political choice²²⁷ that did not concern the court.²²⁸ The court also found that the guerrillas were not concerned with the alien's reasons for refusing to join the organization but only with the alien's conduct, which reflected a political opinion in opposition to their own.²²⁹ Therefore, the court found that any ensuing persecution resulted from that political opinion and not the alien's motives.²³⁰

Similarly, in *Arteaga v. INS*,²³¹ the court held that it is irrelevant whether guerrillas want to draft an alien into their ranks or punish him for his neutrality.²³² The court acknowledged that the guerrillas' forced recruitment of the alien was politically motivated.²³³ Therefore, once the alien manifested a political opinion, the court assumed that any ensuing persecution was on account of that opinion.

Most recently, in *Maldonado-Cruz v. INS*,²³⁴ the Ninth Circuit recognized that an alien's refusal to stay with a guerrilla group was an expression of political opinion.²³⁵ The alien's refusal frustrated the guerrillas' political objective, thus motivating the guerrillas to punish the alien.²³⁶ Fortunately, the alien did not have to establish a link between the expression of that opinion and the guerrillas' motives. The alien escaped from the guerrillas and did not articulate any political opinion. The court inferred the existence of a political opinion from the alien's conduct and the guerrillas' political motivation for persecuting the alien followed

226. 767 F.2d at 1277.

227. *Id.* at 1286.

228. *Id.* at 1287.

229. *Id.*

230. *Id.* See also *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1985).

231. 836 F.2d 1227 (9th Cir. 1980).

232. *Id.* at 1232 n.8.

233. *Id.* at 1232.

234. 883 F.2d 788 (9th Cir. 1989).

235. *Id.* at 791.

236. *Id.* at 791-92.

from that scenario.

The Eleventh Circuit has not been so accommodating to the alien. In *Perlera-Escobar v. Executive Office for Immigration*,²³⁷ the court rejected the scenario of neutrality that the Ninth Circuit accepted in *Bolanos-Hernandez*. Rather, the court accepted the BIA's view in *Maldonado-Cruz*, where the alien feared the guerrillas because he had deserted the group and not because he had remained neutral.²³⁸ The *Perlera-Escobar* court was unwilling to follow the Ninth Circuit's approach.²³⁹ The court declined to decide the neutrality question, stating that the alien would not have qualified for relief even if neutrality was a political opinion. The alien could neither show that he had openly articulated his political opinion nor that the guerrillas had pursued him because he remained neutral.²⁴⁰ The fact that the guerrillas did not forcibly recruit²⁴¹ the alien may have swayed the court. This factor indicates that the guerrillas were merely interested in returning the alien to the group rather than in harming him on account of his political views. Because a guerrilla operation depends on the loyalty of its participants, the guerrillas' efforts to maintain order and discipline may not always lead to persecution on account of political opinion.

The Fourth Circuit has declined to accept or reject neutrality as a political opinion;²⁴² however, it has suggested that even if it recognized the doctrine, it would follow the Ninth Circuit's approach and require an alien to show that he affirmatively decided to remain neutral.²⁴³ Additionally, the alien must show that he "has received some threat or could be singled out for persecution on account of his" neutrality.²⁴⁴

In *Novoa-Umania v. INS*,²⁴⁵ the First Circuit was more

237. 894 F.2d 1292 (11th Cir. 1990).

238. See *id.* at 1297 & n.4.

239. The court carefully noted that it was not holding that a guerrilla may never show persecution on account of political opinion; however, the former guerrilla must prove that the guerrillas were pursuing him "to overcome a recognized political opinion." *Id.* at 1299.

240. *Id.* at 1298.

241. *Id.* at 1297 n.4.

242. *Cruz-Lopez v. INS*, 802 F.2d 1518, 1520 n.3 (4th Cir. 1986) (finding that "an absence of the requisite probability of persecution" rendered it unnecessary to express an opinion).

243. See *M.A. v. INS*, 899 F.2d 304, 315 (4th Cir. 1990) (en banc).

244. *Id.*

245. 896 F.2d 1 (1st Cir. 1990).

a reasonable person would fear one of the following:

1) that a group with the power to persecute him intends to do so specifically because the group dislikes neutrals, or 2) that such a group intends to persecute him because he will not accept its political point of view, or 3) that one or more such groups intend to persecute him because each (incorrectly) thinks he holds the political views of the other side.²⁴⁶

This test links neutrality to the doctrine of imputed political opinion, which gained favor in the Ninth Circuit when persecutors attributed political beliefs to an alien from the alien's acts or decisions.²⁴⁷

Just when the concept of neutrality seemed to be gaining ground, the U.S. Supreme Court decided *INS v. Elias-Zacarias*.²⁴⁸ In *Elias-Zacarias*, the alien refused to join the guerrilla movement in Guatemala because he feared government retaliation.²⁴⁹ He left Guatemala because he feared that the guerrillas would harm him. The Court addressed the issue "whether a guerrilla organization's attempt to coerce a person into performing military service *necessarily* constitutes 'persecution on account of political opinion.'" ²⁵⁰

The U.S. Supreme Court held that the ordinary meaning of the phrase "persecution on account of political opinion" relates to the victim's, not the persecutor's, political opinion.²⁵¹ The Court considered the alien's contention that his neutrality was itself a political opinion²⁵² and held that it was "not ordinarily so."²⁵³ The Court found it unnecessary to determine whether the alien held a political opinion. The alien first had to prove, through either direct or circumstantial evidence, that he would have been persecuted due to his opinion rather than his refusal to join the guerrillas.²⁵⁴ Although the Court did not rule out neutrality as an expression of political opinion, it did not indicate when neutrality

246. *Id.* at 3.

247. *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988); *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

248. 502 U.S. 478 (1992).

249. *Id.* at 480.

250. *Id.* at 479.

251. *Id.* at 482.

252. *Id.* at 483.

253. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

254. *Id.*

guerrillas.²⁵⁴ Although the Court did not rule out neutrality as an expression of political opinion, it did not indicate when neutrality would constitute grounds for relief.

B. *The Question of Motive*

Aliens have difficulty proving persecution on account of political opinion when they cannot make the causal connection between their opinions and the persecution they face. The BIA has consistently required the alien to show both the effects of persecution and the persecutor's intent to punish the alien because of the alien's beliefs. For example, in *In re Maldonado-Cruz*,²⁵⁵ the alien feared retaliation from the guerrillas for desertion, but the BIA found that the guerrillas were merely imposing military discipline. In *Campos-Guardado v. INS*,²⁵⁶ the Fifth Circuit accepted the BIA's decision to deny relief to an alien who was raped and whose relatives were brutally murdered while visiting her home in El Salvador. Neither the BIA nor the court found that the alien was harmed on account of any actual or imputed political opinion.²⁵⁷

Unlike other circuits, the Ninth Circuit examines both the persecutor's and alien's motives.²⁵⁸ In *Hernandez-Ortiz v. INS*, the court looked to the persecutor's motives.²⁵⁹ The court found that if the alien did not engage in any criminal activity or other conduct that would justify governmental action, then there was a presumption that any persecution was politically motivated.²⁶⁰ This was a step forward for the alien because he did not have to prove the persecutor's motive. The court recognized that the persecutor would not tolerate a difference of opinion between himself and the victim.²⁶¹ The Ninth Circuit also recognized a difference between the conscription efforts of the guerrillas and those of a legitimate government.²⁶² Because guerrilla groups have no legitimate authority to conscript members, the court

254. *Id.*

255. 19 I. & N. Dec. 509 (BIA 1988).

256. 809 F.2d 285 (5th Cir., 1987).

257. *Id.* at 288.

258. See *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985).

259. *Id.* at 517.

260. *Id.* at 516.

261. *Id.* at 517.

262. *Zacarias v. INS*, 908 F.2d 1452, 1455-56 (9th Cir. 1990).

presumed that any resistance constituted an expression of the alien's political opinion.²⁶³ The Ninth Circuit eventually became uncomfortable with this presumption and acknowledged that other reasons may explain an alien's refusal to join a guerrilla group.²⁶⁴

In *I.N.S. v. Elias-Zacarias*, the U.S. Supreme Court held that the guerrillas' attempted conscription of an alien did not necessarily constitute persecution on account of political opinion.²⁶⁵ Therefore, the alien had to prove he met the statutory requirements. First, the alien had to show that he refused to join the guerrillas for personal political reasons. This is significant because the Court was concerned that an alien could resist recruitment for reasons unrelated to his political opinion.²⁶⁶ Second, the alien had to show that the guerrillas persecuted him because of his opinion.²⁶⁷

The Court's decision creates difficulties for an alien who remains neutral by resisting conscription. Resistance alone does not necessarily constitute a political statement. This standard disadvantages an alien, who must ensure that the persecutor knows his political reasons for not joining the guerrilla organization.²⁶⁸ An alien who offers a nonpolitical reason does not enjoy statutory protection.

In *Rivas-Martinez v. INS*,²⁶⁹ the alien had a nonpolitical motive for not joining the guerrilla organization. She rejected the guerrillas because she had to care for her young daughter. The BIA denied her relief because the guerrillas did not know of her political opposition.²⁷⁰ The BIA held that the alien had a nonpolitical reason for not cooperating with the guerrillas and, thus, any resulting persecution was not on account of political opinion.²⁷¹

263. *Id.* at 1456; *Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988).

264. *See Cuadras v. INS*, 910 F.2d 567, 571 (9th Cir. 1990) (holding that the guerrillas' refusal to allow the alien to farm in a particular area does not raise a presumption of persecution on account of political opinion). *See also* *Alonzo v. INS*, 915 F.2d 546, 549 (9th Cir. 1990).

265. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

266. *Id.* at 482.

267. *Id.* at 483.

268. The Court stated that the alien had to show "that the guerrillas [would] persecute him *because of* [his] political opinion, rather than because of his refusal to fight with them." *Id.* (emphasis in original).

269. 997 F.2d 1143 (5th Cir. 1993).

270. *Id.* at 1146.

271. *Id.*

The Fifth Circuit considered the BIA's requirement—that the alien confront armed guerrillas with a political reason for her resistance and put herself in danger—as unrealistic.²⁷² The court understood the alien's unwillingness to confront the guerrillas, and refused to deny relief solely because the alien had a nonpolitical reason for not cooperating with the guerrillas.²⁷³ The court noted that just because an alien communicates a nonpolitical reason to the guerrillas does not necessarily mean that the guerrillas believe her. Thus, the alien could obtain relief by showing that the guerrillas knew the real reason for her reluctance to join the group.²⁷⁴ This enlightened approach puts an alien in a difficult position by requiring him to show that his stated reason was a camouflage and that the guerrillas knew the real reason for her opposition.

The U.S. Supreme Court requires only *some* evidence of the persecutor's motive. The alien must show through direct or circumstantial evidence that the persecutors knew about the alien's political opinion and sought to persecute based on that opinion.²⁷⁵ Where persecution may stem from various causes, the alien must connect the persecution to a protected cause.²⁷⁶ This is particularly problematic when the alien gives a specific reason for opposing the guerrillas. Under the *Elias-Zacarias* test, an alien has a stronger case for asylum when his reasons for resistance are

272. *Id.* at 1147.

273. *Id.*

274. The court followed *Elias-Zacarias* in requiring the alien to prove that she had political motives and was persecuted because of her political opinion. *Rivas-Martinez v. INS*, 997 F.2d 1143, 1147 (5th Cir. 1993) (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)).

275. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). Although the Court did not require direct proof of the persecutor's motives, it did not define "political opinion" or whether the alien held one. *Id.* at 483. See Deborah Anker et al., *The Supreme Court's Decision in INS v. Elias-Zacarias: Is There Any "There" There?*, 69 INTERPRETER RELEASES 285, 287 (1992).

276. In *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992), the court denied relief based on religious persecution, but granted relief based on imputed political opinion. The court interpreted *Elias-Zacarias* as follows:

The Court explained that in those cases in which a persecuted activity could stem from many causes, some protected by the statute and others unprotected, the victim must tie the persecution to a protected cause. To do this, the victim needs to show the persecutor had a protected basis (such as the victim's political opinion) in mind in undertaking the persecution. Although the Court discusses this requirement in light of the narrow "political opinion" grounds for relief, we find no good reason not to apply it in the religious context as well.

Id. at 601.

political rather than nonpolitical.

In *Elias-Zacarias*, the alien failed to prove that persecution would result from his political opinion rather than his failure to join the guerrillas. The Court noted that the alien's evidence must be so compelling that "no reasonable factfinder could fail to find the requisite fear of persecution."²⁷⁷ Therefore, an alien must not merely show that the guerrillas were on a large-scale hunt for recruits but that they had a political motive.²⁷⁸ This new standard disabled the Ninth Circuit's approach of overlooking the nexus between the alien's conduct and the persecutor's motive. Even when no legitimate basis for persecution exists, the court is obligated to consider the persecutor's motive.²⁷⁹ The BIA and the Ninth Circuit have disagreed on this point in the past.²⁸⁰ After the U.S. Supreme Court decided *Elias-Zacarias*, however, the Ninth Circuit lacked support for its approach and acknowledged the BIA's inquiry into political motive.

Other circuits have not necessarily followed the BIA's approach. In *Osorio v. INS*,²⁸¹ the BIA found that the Guatemalan government had persecuted the alien but dismissed the persecutors' political motives as irrelevant.²⁸² The Second Circuit held that the BIA did not accurately interpret the correlation observed in *Elias-Zacarias* between the guerrillas' conscription policies and persecution on account of political opinion.²⁸³ Although the U.S. Supreme Court considered the persecutor's motive an important factor, the alien had to connect that motive

277. *Elias-Zacarias*, 502 U.S. at 484.

278. The Court emphasized the intent element. *Id.* at 483. Although the statute does not mention intent, the Court presumed to rely on the ordinary meaning of the words used. *Id.* at 482. Although the statute and the Protocol have a humanitarian objective, intent would be relevant if the statute punished the persecutors. See Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections From Human Rights Norms*, 15 MICH. J. INT'L L. 1179, 1192 (1994).

279. In *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985), the court presumed that government action is politically motivated when no legitimate basis for government action exists. This presumption enabled the alien to obtain relief.

280. In *In re Maldonado-Cruz*, 19 I. & N. Dec. 509, 515-16 (BIA 1988), the BIA held that no persecution on account of political opinion existed because the guerrillas had no political motive in pursuing the alien. The Ninth Circuit disagreed, however, and held that the alien's refusal to support the guerrillas' cause constituted a political opinion that led to the alien's persecution. *Maldonado-Cruz v. INS*, 883 F.2d 788, 791 (9th Cir. 1989).

281. 18 F.3d 1017 (2d Cir. 1994).

282. *Id.* at 1029.

283. *Id.*

with the ensuing persecution.

The Second Circuit found that the BIA had mischaracterized as an economic dispute the friction between the alien and the government over union activities and workers' rights.²⁸⁴ The court overruled the BIA's decision, holding that Osorio's agitation for higher wages and civil liberties posed a political threat to the government and that it could not simply ignore the alien's position because the alien hoped to produce better conditions for the union members.²⁸⁵ The court noted that, "Osorio's activities clearly evince[d] the political opinion that strikes by municipal workers should be legal and that workers should be given more rights."²⁸⁶ The government sought to suppress the expression of these beliefs because they politically threatened its authority.

An alien need not show that persecution is *solely* on account of political opinion.²⁸⁷ Thus, confusion may arise when different considerations surround the dispute between the persecutor and the alien. In *Osorio*, the mere existence of an economic motive did not necessarily preclude other causes of persecution. Although the dispute appeared to be economically motivated, the alien's political opinions caused the persecution.²⁸⁸ *Elias-Zacarias* does not require an alien to base his claim on only one ground. Thus, the fact that an alien fears persecution on more than one ground should not disqualify him for relief.²⁸⁹

In *Elias-Zacarias*, the U.S. Supreme Court relied on the plain statutory language in requiring the alien to show the persecutor's motive. Although the language "on account of" suggests that the persecution must stem from the alien's political opinion, it does not explicitly require the alien to prove the persecutor's motive.²⁹⁰

284. *Id.* at 1029-30.

285. *Id.* at 1030.

286. *Osorio v. INS*, 18 F.3d 1017, 1030-31 (2d Cir. 1994).

287. *Id.* at 1028.

288. The UNHCR Handbook recognizes the difficulty in isolating the economic from the political elements:

[W]hat appears at first sight to be primarily an economic motive for departure may in reality also involve a political element, and it may be the political opinions of the individual that expose him to serious consequences, rather than his objections to the economic measures themselves.

UNHCR HANDBOOK, *supra* note 130, at para. 64.

289. The Court has made motive "critical" when persecution may result from various reasons. As a result, it will be more difficult for the alien to show the persecutor's motives. See *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

290. *Musalo*, *supra* note 278, at 1194.

This motive requirement is inconsistent with Congress' intent to conform the Refugee Act to the Convention.²⁹¹ The Refugee Act's humanitarian goals suggest a liberal reading of the statute,²⁹² and do not require an alien to prove the persecutor's true motive. Additionally, proving intent becomes especially difficult for an alien who cannot obtain the required documentation against persecutors engaging in mass terrorism.²⁹³

C. *Imputed Political Opinion*

Any persecution must be on account of the alien's political opinion.²⁹⁴ An issue arises whether an alien is eligible for relief when he does not have a political opinion but the persecutor thinks otherwise. Imputed political opinion occurs when a persecutor incorrectly attributes a political opinion to the alien and persecutes the alien based on that false attribution.²⁹⁵

Prior to *Elias-Zacarias*, the Ninth Circuit protected an alien against persecution based on imputed political opinion.²⁹⁶ In *Elias-Zacarias*, the U.S. Supreme Court implied the vitality of the imputed political opinion doctrine in observing that the guerrillas did not erroneously believe that the alien's refusal was politically based.²⁹⁷ The Court, however, did not commit itself to the doctrine's viability. Following *Elias-Zacarias*, the Ninth Circuit confirmed that "imputed political opinion [was] still a valid basis for relief."²⁹⁸ Additionally, in *Canas-Segovia v. INS*,²⁹⁹ the

291. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987); *INS v. Stevic*, 467 U.S. 407, 421 (1984).

292. See T. Alexander Aleinikoff, *The Meaning of "Persecution" in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 11 (1991); Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413, 469; Musalo, *supra* note 278, at 1194.

293. Johnson, *supra* note 292, at 468.

294. The *Elias-Zacarias* Court stated: "The ordinary meaning of the phrase 'persecution on account of political opinion' in § 101(a)(42) is persecution on account of the victim's political opinion, not the persecutor's." *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (emphasis in original).

295. *Ramirez Rivas v. INS*, 899 F.2d 864, 867 (9th Cir. 1990), *vacated on other grounds*, 502 U.S. 1025 (1992); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985); UNHCR HANDBOOK, *supra* note 130, at paras. 80-83.

296. *Desir v. Ilchert*, 840 F.2d 723, 728 (9th Cir. 1988); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987).

297. The Court stated as follows: "Nor is there any indication (assuming, *arguendo*, it would suffice) that the guerrillas erroneously believed that *Elias-Zacarias*' refusal was politically based." 502 U.S. at 482 (1992) (emphasis in original).

298. *Canas-Segovia v. INS*, 970 F.2d 599, 601 (9th Cir. 1992).

court inferred an element of motive in the imputed political opinion doctrine.

The imputed political opinion doctrine requires an inquiry into whether the alien's opinion controls. In the absence of an actual political opinion, the alien must prove that the persecution resulted from an imputed political opinion. Thus, a political motive does not emanate from the alien, but the persecutor attributes a political motive to him.³⁰⁰

The imputation theory obscures the traditional understanding of "political opinion" because the alien's actual belief becomes irrelevant. Even assuming that the imputation theory would suffice, the U.S. Supreme Court in *Elias-Zacarias* asserted that the alien's opinion was the controlling factor and denied the alien relief.

In *Nasseri v. Moschorak*,³⁰¹ the Ninth Circuit applied the imputation theory and did not require the alien to prove that her involvement in a resistance movement motivated her attackers. The alien, however, proved that because of her public support for the National Islamic Front for Afghanistan (NIFA)—a group that advocated the return of a constitutional monarchy—she incurred the wrath of the fundamentalist mujahidin rebels.³⁰² Surprisingly, the court did not rely on the prominence of the alien's NIFA affiliations to support a finding of political persecution. Rather the court relied on the imputation theory because the persecutors inferred that the alien was a political enemy from her activities.³⁰³

An issue arises whether persecution is on account of political opinion when the persecutors primarily seek information from the alien.³⁰⁴ In *Nasseri*, the kidnappers' belief that the alien was

299. *Id.* at 602.

300. See Artlip, *supra* note 36, at 582; Bruce J. Einhorn, *Political Asylum in the Ninth Circuit and the Case of Elias-Zacarias*, 29 SAN DIEGO L. REV. 597, 610-11 (1992).

301. 34 F.3d 723, 730 (9th Cir. 1994).

302. *Id.* at 729.

303. The court believed that the persecutors "were not simply trying to discover whether or not she held certain views but, rather, that they believed she knew something that she wasn't revealing." *Id.* at 730. This raised the question whether the persecutors were more interested in obtaining information regarding Nasseri's colleagues than in persecuting her because of her political opinion.

304. Compare *In re R-*, Int. Dec. No. 3195 (BIA 1992) (holding that intent to extract information about Sikh militants was not persecution on account of political opinion) with *Singh v. Ilchert*, 801 F Supp. 313 (N.D. Cal. 1992) (holding that policemen's interest in getting information from alien did not preclude possibility that policemen wanted to punish alien for supporting militants).

A persecutor's motive for extracting information from an alien does not necessarily preclude a finding of persecution on account of imputed political opinion. In *Singh v. Ilchert*,³⁰⁵ the court properly categorized police action as persecution on account of political opinion because the police believed the alien was 'a supporter of the Sikh terrorists.'³⁰⁶ This generalized political motive did not preclude a finding that the persecution resulted from police perceptions of the alien's position.³⁰⁷ Any elicited information from the alien did not detract from the persecutor's underlying motive.³⁰⁸

In *Shurazi-Parsa v. INS*,³⁰⁹ the Ninth Circuit examined more closely the persecutor's motive. The aliens' contact with the Argentine military caused the Iranian Revolutionary Guard to suspect the aliens of political disloyalty.³¹⁰ The court concluded that Iran's interest in the aliens was "political in nature."³¹¹ The court exemplified true application of the doctrine in stating that: "[w]hether or not Petitioner actually held the beliefs that the regime attributed to him, it is enough that the regime 'falsely attributes an opinion to the victim, and then persecutes the victim because of that mistaken belief about the victim's views.'³¹² Thus the alien's views were irrelevant because the persecutors' suspicion of political disloyalty was enough to invoke the imputation theory.

In *Fisher v. INS*,³¹³ the alien claimed that the regime's interest in her was political because the same regime imprisoned her brother-in-law and searched her house.³¹⁴ The Ninth Circuit accepted this "totality of the circumstances" approach as a viable means of demonstrating persecution on account of imputed

305. 801 F Supp. 313 (N.D. Cal. 1992).

306. *Id.* at 319.

307. See Sachin D. Adarkar, Comment, *Political Asylum and Political Freedom: Moving Towards a Just Definition of "Persecution on Account of Political Opinion" Under the Refugee Act*, 42 UCLA L. REV. 181, 198 (1994).

308. Similarly, in *Desir v. Ilchert*, the court held that the fact that the persecutors demanded money did not preclude a finding of persecution based on imputed political opinion. *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988).

309. 14 F.3d 1424 (9th Cir. 1994).

310. *Id.* at 1426.

311. *Id.* at 1430.

312. *Id.* (citing *Canas-Segovia v. INS*, 970 F.2d 599, 602 (9th Cir. 1992)).

313. 37 F.3d 1371 (9th Cir. 1994).

314. *Id.* at 1383.

In *Fisher v. INS*,³¹³ the alien claimed that the regime's interest in her was political because the same regime imprisoned her brother-in-law and searched her house.³¹⁴ The Ninth Circuit accepted this "totality of the circumstances" approach as a viable means of demonstrating persecution on account of imputed political opinion.³¹⁵ Furthermore, the court recognized that the evidence required to prove that the authorities considered the alien an "enemy of the regime" may differ from that required to prove an intent to persecute the alien for other reasons.³¹⁶ The court reflected on the difference between imputed political opinion and intent to persecute an alien due to a moral code violation.³¹⁷

Imputed political opinion may be easier to establish when a persecutor makes a bona fide attribution to the alien. When the persecutor *knowingly* attributes a false political opinion to the alien, however, it may be more difficult to prove persecution.³¹⁸ This stretches the doctrine of imputed political opinion to bring this scenario within the statute's scope.

*Lazo-Majano v. INS*³¹⁹ involved a Salvadoran military officer who abused and tormented a woman whom he had branded as a subversive. The court noted that political persecution upon a subversive opposing the government was the most compelling example of a political opinion.³²⁰ The court further stated that the relevant issue was the *cynical* imputation of a political opinion to the alien, not whether the alien had a political opinion.³²¹ Thus, persecution on a personal level may be on account of political opinion when the persecutor cynically attributes an

313. 37 F.3d 1371 (9th Cir. 1994).

314. *Id.* at 1383.

315. *Id.* at 1384.

316. *Id.*

317. The court noted that "if the evidence establishes that one of the reasons for the existence and enforcement of a generally applicable law is to oppress those with minority religious views, the existence of the necessary motive is clear." *Id.* at 1383. After the Supreme Court decided *Elias-Zacarias*, the *Fisher* court remanded the case to allow the alien an opportunity to show the persecutor's motive. *See id.*

318. *See* Artlip, *supra* note 36, at 584. *But see* Linda D. Bevis, Comment, "Political Opinions" of Refugees: Interpreting International Sources, 63 WASH. L. REV. 395, 412 n.109 (1988).

319. 813 F.2d 1432 (9th Cir. 1987).

320. *Id.* at 1435.

321. *Id.*

opinion for self-serving reasons.³²² The political opinion is essentially outside the alien's control.

Under the imputed political opinion doctrine, the alien's belief is not an issue. The objective of granting the alien relief when a persecutor genuinely attributes a political opinion to the alien is not furthered when the alien lacks a political opinion.³²³ There is no attempt to punish any political opinion because it does not exist.

V CONCLUSION

Many aliens view asylum or withholding of deportation as their last hope of avoiding suffering back in their homeland. The Refugee Act of 1980 gave meaning to that hope. Congress amended INA section 243(h) to further protect such aliens, making the provision mandatory and applicable to aliens in exclusion proceedings.³²⁴ Although Congress intended to conform the statutory exceptions to those of the Convention,³²⁵ courts have deferred to the BIA's interpretation of section 243(h)(2)(B)'s language linking conviction for a particularly serious crime to the alien's dangerousness. The BIA's interpretation leaves much to be desired in light of the legislation's underlying objectives. Unfortunately, Congress may have further confused the issue by denying asylum relief to an alien convicted of an aggravated felony³²⁶ but defining an aggravated felony as a particularly serious crime in the

322. In *Lazo-Majano*, Judge Poole dissented as follows: "Quite simply, the majority has outdone Lewis Carroll in its application of the term 'political opinion' and in finding that male domination in such a personal relationship constitutes political persecution." *Id.* at 1437.

323. See Artlip, *supra* note 36, at 584.

324. Refugee Act, *supra* note 4, § 203(e), 94 Stat. 102, 107.

325. The Conference Report indicated as follows:

The Senate Bill provided for withholding deportation of aliens to countries where they would face persecution, unless their deportation would be permitted under the U.N. Convention and Protocol Relating to the Status of Refugees.

The House amendment provided a similar withholding procedure unless any of four specific conditions (those set forth in the aforementioned international agreements) were met.

The Conference substitute adopts the House provision with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.

S. CONF REP. NO. 256, 96th Cong., 2d Sess. 161 (1980).

326. "An alien who has been convicted of an aggravated felony may not apply for or be granted asylum." INA § 208(d), 8 U.S.C. § 1158(d) (1994).

withholding provision.³²⁷ Congress can make these provisions consistent; however, it risks inviting further inquiries into the U.S. Attorney General's discretion to release aggravated felons in other contexts.³²⁸ Nonetheless, the U.S. Attorney General should not deport an aggravated felon facing persecution abroad unless that alien constitutes a serious threat to the community.³²⁹

Despite the U.S. Supreme Court's pronouncements in *Sale v. Haitian Centers Council*,³³⁰ the United States can implement a policy complying with the international norm of extraterritorial *non-refoulement*. Considering the Court's decision as relying on domestic rather than international law, authorities may enforce *non-refoulement*, which prohibits the alien's return *in any manner whatsoever*.³³¹ Reaffirming this principle would revitalize the United States' previous commitment to protecting refugees.³³²

327. "For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime." *Id.* § 243(h)(2), 8 U.S.C. § 1253(h)(2).

328. *See id.* § 236(e)(3), 8 U.S.C. § 1226(e)(3).

329. The following commentary is helpful:

As to paragraph 2 it constitutes an exception to the general principle embodied in paragraph 1 and has, like all exceptions, to be interpreted restrictively. As to criminal activities, the word "crimes" is not to be understood in the technical sense of any criminal code but simply signifies a serious criminal offence. Two conditions must be fulfilled: the refugee must have been convicted by final judgment for a particularly serious crime, and he must constitute a danger to the community of the country.

THE REFUGEE CONVENTION, *supra* note 92, at 342.

330. Professor Koh noted that this norm has not only been embodied in the 1951 Convention, but also in INA § 243(h) and the 1981 U.S.-Haiti Agreement. He further stated: "[t]he *Haitian Centers Council* litigation can thus be understood as an unsuccessful attempt by private litigants to convince the Supreme Court to internalize the norm of extraterritorial *nonrefoulement* as United States domestic law." Harold H. Koh, *Refugees, the Courts and the New World Order*, 1994 UTAH L. REV. 999, 1015-16 (1994).

331. *See* GOODWIN-GILL, *supra* note 95, at 105. The U.N. High Commissioner for Refugees considered the U.S. Supreme Court's decision in *Sale v. Haitian Centers Council* a setback in international law. *UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in Sale v. Haitian Centers Council*, 32 I.L.M. 1215, 1215 (1993).

332. U.S. Ambassador Moore's comments at a U.N. meeting in 1987 exemplify this commitment:

Considering that the most important element of a refugee's protection was the obligation of *non-refoulement*, it was tragic that refugees had been forced to return to their countries against their will and without assurances that they would not face persecution on their return, especially when such violations were committed by, or with the concurrence of, States parties to international instruments prohibiting such acts.

Exec. Comm. of the High Commissioner's Programme, U.N. GAOR, 38th Sess., Summary Record of 415th mtg. at 5, U.N. Doc. A/AC.96/SR.415 (1987).

U.S. Ambassador Lafontant, who succeeded Ambassador Moore, expressed similar

One still may solve this problem because *Sale* does not require state action but merely allows the alien's return.

The Court's interpretation in *INS v. Elias-Zacarias*³³³ of persecution "on account of political opinion" puts an alien in a rather difficult position by requiring him to prove why his persecutors would want to act against him. This approach overlooks the fact that persecutors hardly ever act on mere philosophical opposition to an alien's opinions.³³⁴ A plain meaning interpretation in this context runs counter to the Court's previous liberal interpretation in *INS v. Cardoza-Fonseca*.³³⁵ In light of the motive requirement of *Elias-Zacarias*, immigration judges should examine the totality of the circumstances relating to an alien's claim to determine what reasonable inferences they can draw from that context about the persecutor's motive. It is only by doing so that they can take proper account of the political environment that gives rise to the claim of persecution.

sentiments. *Exec. Comm. of the High Commissioner's Programme*, U.N. GAOR, 40th Sess., Summary Record of 437th mtg. at 10-11, U.N. Doc. A/AC.96/SR.437 (1989).

333. 502 U.S. 478 (1992).

334. *See id.* at 489 (Stevens, J., dissenting); Adarkar, *supra* note 307, at 211; Johnson, *supra* note 292, at 468.

335. 480 U.S. 421 (1987).

