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INS v. Aguirre-Aguirre: The Absence of a Political Crime Standard for Withholding of Deportation

Chad Alan Earnst

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CASE NOTE

INS v. AGUIRRE-AGUIRRE: THE ABSENCE OF A POLITICAL CRIME STANDARD FOR WITHHOLDING OF DEPORTATION

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I. INTRODUCTION

In a country wrought with governmental corruption, citizens who protested the government kept disappearing and were never found. The government's refusal to investigate led many outraged citizens to believe that the government was murdering political activists. Adding to the citizen's revulsion, the government repeatedly raised the bus fares—an expense that already constituted an enormous portion the citizens' annual living expense—thereby making it difficult for the citizens to assemble. The government's suspected criminal and oppressive behavior ultimately sparked protests by many student groups, one of which set empty government-owned buses on fire and trashed stores. These acts finally succeeded in drawing a response from the government via television broadcasts. Soon, however, the student leaders began receiving death threats similar to those received by the previous activists who had disappeared. One student leader, fearing for his life, fled to the United States where he later learned that several other leaders had been killed. Having entered the United States without inspection, he faced deportation back to his home country unless he could convince the U.S. government that his demonstrations were political crimes.¹

In a different country, a political group worked to further its goals of social amelioration. A faction of that group, however, grew to despise their peaceful methods and thus broke off into a clandestine terrorist group which recognized only itself as the source of law and order. Funded by thousands of armed robberies, they bombed both civilian and government institutions and murdered those who disagreed with them. Even the ranks of the organization were violent; discipline meant crushing the knees of members or murdering them. One long-time member failed to kidnap an American for ransom. Fearing the group's discipline, he forged a visa and entered the United States. Due to his crimes and fraudulent entry, he faced deportation unless he could convince the U.S. government that his terrorist acts were political crimes.²

1. These are essentially the facts of *Immigration & Naturalization Service v. Aguirre-Aguirre*, 121 F.3d 521 (9th Cir. 1997), *rev'd* 119 S.Ct. 1439 (1999).

2. These are essentially the facts of *McMullen v. INS*, 788 F.2d 776 (9th Cir. 1986).

Comparison of these two drastically different situations demonstrates the need for a clear political crime standard that can distinguish between aliens deserving protection and common criminals. A clear political crime standard would also prevent the Attorney General from having to make the determination completely based on diplomatic considerations.

Recently, the Supreme Court decided *INS v. Aguirre-Aguirre*,³ an appeal from a Ninth Circuit decision addressing the political crime standard promulgated by the Board of Immigration Appeals (BIA) for purposes of the "serious non-political crime" exception to withholding of deportation.⁴ The facts of *Aguirre-Aguirre* were those described in the first scenario above. Aguirre-Aguirre, the student leader, had testified before an Immigration Judge that his crimes against the Guatemalan government were political crimes and that if returned to Guatemala he would face death or persecution because of his acts.⁵ The Immigration Judge wholly believed Aguirre-Aguirre and withheld his deportation.⁶ The Board of Immigration Appeals (BIA) reversed, however, holding that Aguirre-Aguirre's acts were not political crimes because their criminal nature "outweigh[ed] their political nature."⁷

Presented with only this vague political crime standard, the Ninth Circuit reversed the BIA, finding that the BIA should have considered the character of Aguirre-Aguirre's crimes in relation to his political objectives and balanced the severity of his crime with the persecution feared.⁸ "Aguirre could well be found to be in danger of losing his life if returned to Guatemala and therefore should be excluded for his crimes only for the most serious reasons."⁹ Accordingly, the Ninth Circuit remanded the case.¹⁰

3. 121 F.3d 521 (9th Cir. 1997), *rev'd* 119 S.Ct. 1439 (1999).

4. See Immigration and Nationality Act § 241, 8 U.S.C. § 1231(b)(3)(B)(iii) (1998) [hereinafter INA]. In 1996, Congress rewrote several sections of the Immigration and Nationality Act. One revision was the substitution of the term "removal" for "deportation." For consistency with the cases, this case note will continue to use the term "deportation."

5. See *Aguirre-Aguirre*, 121 F.3d at 522.

6. See *id.*

7. *Id.* (quoting the unpublished BIA decision).

8. See *id.* at 523-24.

9. *Id.* at 524 (citing GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 107 (2nd ed. 1996) (internal quotation marks omitted)).

10. There is a difference in remedies among the Second and Ninth Circuits where the courts "conclude that the BIA's denial of a request for asylum and withholding of

The Supreme Court rejected the Ninth Circuit's clarifications due to the principles of *Chevron* deference.¹¹ Potential "diplomatic repercussions" arising from a determination by the Attorney General that a violent offense committed in another country is a political crime prevented the Court from expounding on the BIA's standard.¹²

The *Aguirre-Aguirre* decision evidences the need for the BIA to clarify its political crime standard. This article will address the Ninth Circuit's attempt to require the political nature of a crime to be determined from the perspective of the country in which it was committed.¹³ This article will also discuss the Ninth Circuit's attempt to reintroduce a balancing test which weighs the severity of the crime against the degree of persecution feared. The previous rejection of this test was premised on a false conflict between protecting the U.S. populace from criminals or protecting the aliens from persecution. This article will highlight this false conflict because proper application of the "serious non-political crime" exception is frequently dispositive of an alien's entire application to remain in the United States.¹⁴

deportation was based on the application of an incorrect standard." *Dwomoh v. Sava*, 696 F. Supp. 970, 980 (S.D.N.Y. 1988). The Second Circuit remands the case because "it is the responsibility of the immigration judge and the BIA to assess the proof in light of the correct test." *Id.* (citing *Brice v. United States Dep't of Justice*, 806 F.2d 415, 418 (2d Cir. 1986); *Carcamo-Flores v. INS*, 805 F.2d 60, 68 (2d Cir. 1986)). The Ninth Circuit, however, may first "establish . . . eligibility for asylum," and then "remand[] for the discretionary grant or denial of asylum," and for a determination of eligibility for withholding of deportation. *Id.* at 980 n.13 (citing *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1288 (9th Cir. 1984); *Damaize-Job v. INS*, 787 F.2d 1332, 1338 (9th Cir. 1986); *Del Valle v. INS*, 776 F.2d 1407, 1409, 1414 (9th Cir. 1985)) (parentheticals omitted).

11. See *Aguirre-Aguirre*, 119 S.Ct. at 1445 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)).

12. See *id.*

13. See *Aguirre-Aguirre*, 121 F.3d at 523-24.

14. For instance, if the INS believes this exception applies to an alien, then "the government is not required to give [the] alien an asylum hearing." *In re Extradition of Sandhu*, 886 F. Supp. 318, 323 n.6 (S.D.N.Y. 1993) (citing *Azzouka v. Sava*, 777 F.2d 68, 73 (2d Cir. 1985)). This result was codified in 1996 when Congress created similar "particularly serious crime" and "serious non-political crime" exceptions to the asylum provisions, thereby revoking the Attorney General's discretionary authority in those contexts. See Immigration and Nationality Act § 208, 8 U.S.C. §§ 1158(b)(2)(A)(ii)-(iii) (1998). Prior to this codification, both the BIA and the Eleventh Circuit rejected the "practice of pretermitt[ing] asylum applications in cases involving aliens convicted of particularly serious crimes." *In re Gonzalez*, 19 I. & N. Dec. 682, 685 (B.I.A. 1988) (citing *Arauz v. Rivkind*, 845 F.2d 271 (11th Cir. 1988)).

Part II will begin by describing the legal context in which *Aguirre-Aguirre* was decided including the sources of the "serious non-political crime" exception and the development of the political crime standard. Part III will then discuss the advantages of the home country perspective and explain the proper application of the balancing test. The article concludes in Part IV, that, although not binding on the BIA, the Ninth Circuit's refinements of the political crime standard are best able to handle problematic issues that will arise. While this article discusses the proper application of an existing remedy available to criminal aliens, it does not argue that additional protection is needed or that Aguirre-Aguirre's crimes are valid political crimes.

II. LEGAL CONTEXT

A. Federal Law

The Immigration and Nationality Act¹⁵ (INA) allows aliens who are physically present in the United States, and threatened with persecution on the grounds of race, religion, nationality, group affiliation, or political opinion, to seek protection under federal law by filing either an application for asylum,¹⁶ withholding of deportation,¹⁷ or both.¹⁸

15. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952), 8 U.S.C. §§ 1101-1503 (1998).

16. *See id.* 8 U.S.C. § 1158.

17. *See id.* 8 U.S.C. § 1231.

18. Under certain circumstances, an application for asylum will also be regarded as an application for withholding of deportation. *See* 8 C.F.R. § 208.3(b) (1998).

Although "completely separate," both asylum and withholding of deportation "are designed to provide relief to aliens who fear political persecution in their native countries." *Young v. INS*, 759 F.2d 450, 455 (5th Cir. 1985). Withholding of deportation, however, is a much narrower remedy than asylum. *See e.g., Mosquera-Perez v. INS*, 3 F.3d 553, 554 n.3 (1st Cir. 1993). For instance, the alien's burden of proof is more stringent for withholding than asylum. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987). Additionally, asylum only requires a well-founded fear of persecution, but withholding requires a clear probability of persecution, meaning "more likely than not." *INS v. Stevic*, 467 U.S. 407, 424 (1984).

The alien's future in the United States also differs between the two remedies. "Withholding of deportation is 'country-specific,' in the sense that deportation to a 'hospitable' country is not precluded." *Mosquera-Perez*, 3 F.3d at 554. Only "an alien granted asylum may become a lawful permanent resident." *Id.*

Despite its disadvantages, the withholding remedy is advantageous due to the

Regarding withholding of deportation, the INA provides:

[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.¹⁹

"An alien who meets this standard of eligibility, and who does not fall under a statutory exception, is *entitled* to withholding of deportation"²⁰

One of the five statutory exceptions to this entitlement denies withholding of deportation to aliens who have committed a "serious non-political crime" outside the United States prior to their arrival.²¹

B. International Agreements

1. The Convention and Protocol

The international community responded to the growing refugee problem by assuming responsibility for, protecting, and assisting refugees.²² It was at this time that the United Nations drafted the Convention Relating to the Status of Refugees²³ and the Protocol Relating to the Status of Refugees²⁴ which determine

mandatory language added by the Refugee Act of 1980. See *Carvajal-Munoz v. INS*, 743 F.2d 562, 568 (7th Cir. 1984) ("Prior to the passage of the Refugee Act, the withholding of deportation was at the discretion of the Attorney General."). Whereas "the Attorney General *may* grant asylum," Immigration and Nationality Act § 208(b)(1), 8 U.S.C. § 1158(b)(1) (1998) (emphasis added), "the Attorney General *may not* remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country." *Id.* § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (1998) (emphasis added).

19. Immigration and Nationality Act § 241(b)(3)(A).

20. *Choeum v. INS*, 129 F.3d 29, 40 (1st Cir. 1997) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987)).

21. See 8 U.S.C. § 1231(b)(3)(B)(iii) (1998).

22. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGES ¶ 1 (Geneva 1979) revised by U.N. Doc. HCR/IP/4/Eng/Rev.1 (Geneva 1992) [hereinafter Handbook].

23. Convention Relating to the Status of Refugees of 28 July 1951, entered into force April 22, 1954, 606 U.N.T.S. 268 [hereinafter Convention].

24. Protocol Relating to the Status of Refugees of 31 January 1967, entered into force October 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol].

“the legal status of refugees.”²⁵ These agreements define a “refugee” as any person who,

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²⁶

By acceding to the Protocol in 1968,²⁷ the United States agreed “to comply with the substantive provisions . . . of the [Convention].”²⁸

Although the Convention and Protocol define “refugee,” neither agreement requires the contracting states to grant asylum to refugees.²⁹ Nonetheless, the Convention and Protocol do prohibit the expulsion of a refugee to territories where his life or freedom would be threatened on account of his race, religion, nationality, group affiliation, or political opinion.³⁰ This prohibition is “a crucial one in refugee law, and adherence to it by states is considered essential for the protection of refugees.”³¹

Similar to the INA, the Convention denies this protection to aliens guilty of serious non-political crimes committed abroad.³²

25. Handbook, *supra* note 22, ¶ 5.

26. Convention, *supra* note 23, art. 1(A)(2), 606 U.N.T.S. at 268; Protocol, *supra* note 24, art. 1(2), 19 U.S.T. at 6223, 606 U.N.T.S. at 267. Due to “the passage of time and emergence of new refugee situations,” the Protocol made the Convention applicable to all refugees by eliminating the Convention’s requirement that the well-founded fear be “a result of events occurring before 1 January 1951.” Handbook, *supra* note 22, ¶ 8. See also Convention, *supra* note 23, art. 1(A)(2), 606 U.N.T.S. at 268; Protocol, *supra* note 24, pmb1., 19 U.S.T. at 6223, 606 U.N.T.S. at 267.

27. The United States became a party to the protocol by accession on November 1, 1968. See Protocol, *supra* note 24, app., 19 U.S.T. at 6223, 606 U.N.T.S. at 267.

28. *INS v. Stevic*, 467 U.S. 407, 416 (1984). See also Protocol, *supra* note 24, art. 1(1), 606 U.N.T.S. at 268.

29. See *infra* note 38.

30. See Convention, *supra* note 23, art. 33(1), 606 U.N.T.S. at 268; Protocol, *supra* note 24, art. 1(1), 19 U.S.T. at 6223, 606 U.N.T.S. at 267 (“The States Parties . . . undertake to apply Articles 2 to 34 inclusive of the Convention.”)

31. Evangeline G. Abriel, *Presumed Ineligible: The Effect of Criminal Convictions on Applications or Asylum and Withholding of Deportation Under Section 515 of the Immigration Act of 1990*, 6 GEO. IMMIGR. L.J. 27, 31 (1992).

32. See Convention, *supra* note 23, art. 1(F)(b), 606 U.N.T.S. at 268.

This exception does not apply to "particularly serious crimes" committed inside the host country, however.³³

2. The Handbook

The United Nations High Commissioner for Refugees (UNHCR) provides international protection to refugees under the guidance of the United Nations.³⁴ The UNHCR was established by the United Nations General Assembly precisely to supervise the application of "international conventions for the protection of refugees."³⁵ In fulfilling this duty, the UNHCR issued the Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees as a guide for the practice of refugee law.³⁶

By acceding to the Protocol, the United States agreed "to cooperate with the [UNHCR] . . . in the exercise of its functions" and to "facilitate its duty of supervising the application of the provisions of the present Protocol."³⁷ The U.S. Supreme Court has held that even in circumstances where the Handbook expressly disclaims the force of law,³⁸ "the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform."³⁹ Thus, although the Handbook is

33. See *id.* at art. 33(2), 606 U.N.T.S. at 268. That the "particular serious crime" exception applies only to crimes committed inside the host country is evidenced by the requirement that the alien be convicted by a "final judgment," proof of which is easily obtainable within the host country. The exception for "serious non-political crimes" committed outside the host country does not require formal proof of previous foreign penal prosecution, which may not be obtainable. See Handbook, *supra* note 22, ¶ 149. This exception only requires "serious reasons for considering" that the alien is guilty.

34. See *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), U.N. SCHR, 5th Sess., ch. 1(1), U.N. Doc. ST/HR (1950).

35. *Id.* ch. 8(a).

36. See Handbook, *supra* note 22, Foreword (IV)-(V).

37. Protocol, *supra* note 24, art. 2, 19 U.S.T. at 6223, 606 U.N.T.S. at 267. The Convention contains identical language except the term "Convention" is used instead of "Protocol." See Convention, *supra* note 23, art. 35(1), 606 U.N.T.S. at 268. Additionally, the Statute of the High Commissioner's Office adopted by the General Assembly also requires "co-operation between Governments and the High Commissioner's Office in dealing with refugee problems." Handbook, *supra* note 22, ¶ 18.

38. The Handbook does not "bind[] the INS with reference to the asylum provisions" of the INA because "the determination of refugee status under the 1951 Convention and 1967 Protocol" is left to the contracting states. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (citing Handbook, *supra* note 22, Foreword (II)).

39. *Id.* See also *Hernandez-Ortiz v. INS*, 777 F.2d 509, 514 n.3 (9th Cir. 1985) ("The

not binding upon the BIA or the courts, it is "an authoritative commentary on the Convention and Protocol" and as such is due great deference in withholding of deportation decisions.⁴⁰

C. Construction of the "Serious Non-political Crime" Standard

1. "Serious" Defined

The INA, Convention, and Protocol are all silent on what constitutes a "serious" crime. Courts have therefore looked to factors such as "the alien's description of the crime, the turpitudinous nature of the crime according to our precedents, the value of any property involved, the length of sentence imposed and served, and the usual punishments imposed for comparable offenses in the United States."⁴¹ "Heinous" crimes such as murder are easy cases.⁴² Courts have distinguished between crimes against property versus crimes against persons, the latter being more serious.⁴³

The Handbook acknowledges that it is difficult to define serious non-political crimes. "[F]or the purposes of this exclusion clause," the Handbook states, "a 'serious' crime must be a capital crime or a very grave punishable act."⁴⁴ Thus the Handbook balances the nature of the offense with the degree of persecution such that "a crime must be very grave in order to exclude" the alien.⁴⁵

The BIA, however, has rejected "any interpretation of the phrase[] 'serious nonpolitical crime' . . . which would vary with

Handbook contains standards for interpreting the United Nations Protocol Relating to the Status of Refugees, . . . to which the United States acceded . . . , and which informed Congress' actions when it passed the Refugee Act in 1980.".)

40. *Aguirre-Aguirre v. INS*, 121 F.3d 521, 523 (9th Cir. 1997).

41. *In re Ballester-Garcia*, 17 I. & N. Dec. 592, 595 (B.I.A. 1980). See also *In re Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982) (defining a "particularly serious" crime).

42. The United States District Court for the District of New Jersey held, "Murder is so grave as to warrant extradition" even though the Handbook "admoni[shes] that 'the exclusion clauses should be applied in a restrictive manner.'" *In re Extradition of Singh*, 1988 WL 151438, 19 (D.N.J.) (quoting Handbook, *supra* note 22, ¶ 180).

43. See *In re Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982) ("Crimes against persons are more likely to be categorized as 'particularly serious crimes.'").

44. Handbook, *supra* note 22, ¶ 155.

45. *Id.*

the nature of the evidence of persecution."⁴⁶ Partially relying on the BIA's reasoning, the Ninth Circuit also previously rejected the balancing test.⁴⁷ The only other circuit to address the issue is the Eleventh Circuit.⁴⁸ In a short footnote, the Eleventh Circuit rejected the argument that a stay of exclusionary proceedings is proper when there has not yet been an opportunity to balance the degree of persecution feared against the nature of the alien's past crimes.⁴⁹ This was a "mistaken belief," the Eleventh Circuit held, as "both this court and the INS have previously rejected this balancing test."⁵⁰

2. "Non-political" Defined

Nowhere has the BIA clearly articulated its standard for political crimes. The standard for which the Supreme Court required deference in *Aguirre-Aguirre* was extracted from the following statement by the BIA in *In re McMullen*:

In evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature.⁵¹

The Supreme Court explained that this test is comprised of "a general standard (whether the political aspect of an offense outweighs its common-law character) and then provides two more specific inquiries that may be used in applying the rule: whether there is a gross disproportion between means and ends, and whether atrocious acts are involved."⁵² Despite the Court's attempt to characterize the BIA's standard as a clear standard,

46. *In re Rodriguez-Coto*, 19 I. & N. Dec. 208 (B.I.A. 1985).

47. *See Ramirez-Ramos v. INS*, 814 F.2d 1394, 1398 (9th Cir. 1987).

48. *See Garcia-Mir v. Smith*, 766 F.2d 1478 n.10 (11th Cir. 1985).

49. *See id.*

50. *Id.* (citing *Fernandez-Roque v. Smith*, No. 84-8993 slip op. (11th Cir. Jan. 24, 1985); *In re Rodriguez-Coto*, 19 I. & N. Dec. 208 (B.I.A. 1985)). Although the court refers to "past criminal activity," it is unclear whether the court rejected the balancing test as it applied to the exception for serious non-political crimes committed *abroad* or the exception for particularly serious crimes committed *in* the host country because the crimes could have been committed in the United States during the five year period between the alien's arrival and the Eleventh Circuit's decision. *See id.* at 1478, 1480, 1487 n.10.

51. *In re McMullen*, 19 I. & N. Dec. 90 (B.I.A. 1984).

52. *INS v. Aguirre-Aguirre*, 119 S.Ct. 1439, 1448 (1999).

the Court grappled with other inquiries that the Attorney General "suggested" may be relevant such as whether "there is a close and direct causal link between the crime committed and its alleged political purpose and object."⁵³

It was under this confusion that the Ninth Circuit, in *McMullen v. INS*,⁵⁴ first analyzed the BIA's political crime standard for its consistency with both the Convention and congressional intent. The Ninth Circuit elaborated on the BIA's standard and stated it as a four-part test: (1) the alien must have been motivated by political reasons; (2) the alien must have had a political objective; (2) there must have been a close and direct causal link between the crime committed and its alleged political purpose and object; (4) the crime must be proportional to the political objective.⁵⁵ Based on this understanding of the standard, the Ninth Circuit affirmed the BIA's decision and held that it better recognizes "crimes that have both common law criminal aspects and political aspects."⁵⁶

Applying this standard to *McMullen*, the Ninth Circuit held that his crimes were "beyond the pale of a protectable political offense" because "indiscriminate bombing campaigns, murder, torture, and the maiming of innocent civilians" are crimes that are barbarous, atrocious, and "not sufficiently linked to their political objective."⁵⁷

Since its decision in *In re McMullen*, the BIA has made no further attempts to clarify its standard, although it has held, *inter alia*, that burglary of a clothing store is "clearly nonpolitical."⁵⁸ The precedential value of cases applying (but not elaborating on) this standard is limited because "[w]hether crimes are of a political character is primarily a question of

53. *Id.* at 1449.

54. 788 F.2d 591 (9th Cir. 1986).

55. *See id.* at 597. The court rejected *McMullen*'s argument that an act is "considered a political offense when (1) there was an insurrection or rebellion at the time the criminal acts were committed, and (2) the criminal acts were incident to or in furtherance of that rebellion." *Id.* at 596. "This formulation is consistent with the traditional definition of a political offense for extradition purposes." *Id.*

56. *Id.* at 596. Unlike "pure" political crimes "such as sedition, treason, and espionage," "relative" political crimes have both common law and criminal aspects. *Id.* (citing *Eain v. Wilkes*, 641 F.2d 504, 512 (7th Cir. 1981)).

57. *McMullen*, 788 F.2d at 597-98 (internal quotation marks omitted).

58. *In re Doural*, 18 I. & N. Dec. 37, 38 (B.I.A. 1981).

fact."⁵⁹ In dictum, the Ninth Circuit has enumerated "arson, murder, and armed robbery" as "clearly the sort of crimes contemplated by the Convention as both 'serious' and 'nonpolitical.'"⁶⁰

III. ANALYSIS

Federal refugee law lacks a clear political crime standard. Although the Supreme Court has now ruled that the vague standard set forth by the BIA in *McMullen* is consistent with the INA,⁶¹ the BIA's standard too general to be useful. Until clarified by the BIA, any BIA decisions in this regard are virtually unappealable because the courts have been signaled not to make a detailed analysis or risk violating *Chevron* principles.⁶²

The relevant concern arising from admitting criminal aliens being criminal recidivism within the United States, a clear political crime standard is critical for distinguishing between political criminals and common criminals. Political criminals are not likely to repeat their crimes in the United States because, here, there are peaceful means to petition the government. Such persons will not be forced to resort to crime as their only means to end governmental injustices.

The Ninth Circuit's decisions in *McMullen v. INS* and *Aguirre-Aguirre v. INS* may no longer be of precedential value, but the Circuit's attempts to focus the standard can offer guidance for the BIA's future development of a more useable standard. Of the refinements to the standard made by the Ninth Circuit, two are of the particular importance because they address issues otherwise unresolved by the BIA's standard. The first refinement is that the political nature of a crime must be determined from the perspective of the country in which it was committed. This clarification makes the standard more applicable to cases where the political versus common-law aspects of the crime are less clear. The second refinement is the proper application of the balancing test. When applied to non-

59. *In re McMullen*, 19 I. & N. Dec. 90 (B.I.A. 1984).

60. *McMullen*, 788 F.2d at 597 (citing GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 58-65 (1983)).

61. See *INS v. Aguirre-Aguirre*, 119 S.Ct. 1439, 1446 (1999).

62. See *id.*

political crimes, the use of the balancing test brings federal refugee law into accord with the Convention and Protocol.

A. *Home Country Perspective*

The political nature of a crime must be determined from the perspective of the country in which it was committed. This is because political crimes are a function of the political environment in which they are committed. This principle has long been recognized in extradition law where the "incidence test" requires a determination of whether "there was an insurrection or rebellion at the time the criminal act was committed."⁶³

Although the home country perspective has an effect on all four elements of the Ninth Circuit's statement of the political crime standard (motive, objective, causation, and proportionality), it especially affects the proportionality element. Under the proportionality test, a crime is analyzed for antisocial behavior that cannot be attributed solely to the alien's political motives. This would indicate that the alien committed a common crime and thus presents a higher recidivism risk.

The difficulty with the BIA's vague proportionality standard (which merely requires that the crime not be grossly disproportionate to the political objective) is its manipulability. The result is primarily dependent upon how the court characterizes the crime and what the court believes were the alien's motives. In some ways, applying this test can essentially amount to the court's second-guessing the alien's choice of crime.

Aguirre-Aguirre presents an example of how crimes can be manipulated to achieve the desired result. The Ninth Circuit majority characterized *Aguirre-Aguirre's* crimes as "crimes against property (the burning of the buses and the throwing of store merchandise on the floor) and minor assaults and batteries (the means taken to get reluctant bus passengers off the buses before their destruction)."⁶⁴ The dissent, however, characterized

63. *McMullen v. INS*, 788 F.2d 591, 596 (9th Cir. 1986). In an 1890 extradition case, the Queen's Bench defined a political offense as one that: (1) occurs during an insurrection or rebellion, and (2) is incident to or in furtherance of that insurrection or rebellion. See *In re Castioni*, 1 Q.B. 149, 155-56 (1890).

64. *Aguirre-Aguirre*, 121 F.3d at 523.

these same crimes very differently. What the majority called crimes against property, the dissent called crimes against people (the shopkeepers).⁶⁵ What the majority called minor assaults and batteries, the dissent characterized as beating people with baseball bats and stoning them with bricks.⁶⁶

The danger in defining political crimes categorically based solely upon their common law traits is also evident in *Aguirre-Aguirre*. In a prior case, the Ninth Circuit stated in dictum that "arson, murder, and armed robbery . . . are clearly the sort of crimes contemplated by the Convention as . . . 'nonpolitical.'"⁶⁷ *Aguirre-Aguirre*, however, presents an example of where arson could arguably be a protectable political offense (assuming *arguendo* *Aguirre-Aguirre* was motivated by more than bus fares). Despite the difficulty in a case-by-case adjudication of the political nature of crimes, doing so better ensures that "the exclusion clauses [are] applied in a restrictive manner" as prescribed by the Handbook.⁶⁸

1. The Political Necessity of a Crime

The Ninth Circuit attempted to limit the manipulability of the BIA's proportionality test by considering the "political necessity" of the crime.⁶⁹ This refinement requires the crime to be evaluated from the perspective of the alien's home country and not solely based upon its common-law characteristics.⁷⁰ The Ninth Circuit held that the BIA erred by not considering the conditions in Guatemala even though there was reason to suspect the Guatemalan government was murdering its own citizens.⁷¹ "When you are dealing with a government which is an accomplice or an accessory to terroristic methods of government you need to use forceful measures to draw the government's attention to your protest; your political objective is a governmental response, you

65. See *id.* at 525 (Kleinfeld, J. dissenting) ("The shopkeepers, not their inanimate inventory, were the victims of having their stores trashed.").

66. See *id.*

67. *McMullen*, 788 F.2d at 597 (citing GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 58-65 (1983)).

68. Handbook, *supra* note 22, ¶ 180.

69. See *Aguirre-Aguirre*, 121 F.3d at 524.

70. See *id.* at 523.

71. See *id.* at 523. The Guatemalan government "was certainly an accomplice in such murder by its failure to investigate the homicides and prosecute them." *Id.*

look for a sensitive area."⁷² To define a political crime based upon its common-law characteristics in the *host* country ignores the concept that the alien is reacting to his *home* country's environment.

Both the Handbook and the INS already rely on home country conditions. The Handbook admonishes that an applicant's statements "must be viewed in the context of the relevant background situation."⁷³ The INS cites to State Department Country Reports on Human Rights Practices to rebut claims of feared persecution.⁷⁴ If home country conditions are relevant to whether an alien can show a clear probability of persecution, then they must also be relevant to whether his crime was "political" because persecuted persons are surely more likely to protest than those who are not persecuted.

Considering the political necessity of a crime, and thereby the conditions of the country in which it was committed, is critical because the choice of context (home or host country) controls the outcome. For example, burning busses in the United States to protest solely an increase in bus fares is not a political crime because there are alternative methods available for influencing the government. However, this crime may be a political crime when committed in a country where busses are the primary mode of transportation, the fares comprise the greatest annual living expense of the citizens, and the government's motivation for raising the fares was to prevent its citizens from assembling and protesting its blatant participation in the illegal killing of innocent citizens.

72. *Id.* at 524.

73. Handbook, *supra* note 22, ¶ 42. While making these observations, the courts need not "pass judgment on conditions in the applicant's country of origin." *Id.* It is not "appropriate to make qualitative judgments regarding foreign government or a struggle designed to alter that government" since such judgments are political and are thus "not within the judicial role." *Quinn v. Robinson*, 783 F.2d 776, 804 (9th Cir. 1986) (plurality opinion) (Reinhardt, J.) *Cf. Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), U.N. SCHR, 5th Sess., ch. 1(2), U.N. Doc. ST/HR (1950) ("The work of the High Commissioner shall be of an entirely non-political character.")

74. *See, e.g., Ratnam v. INS*, 154 F.3d 990, 993 (9th Cir. 1998). "[T]he U.S. State Department . . . is the most appropriate and perhaps the best resource the Board could look to in order to obtain information on political situations in foreign nations." *Rojas v. INS*, 937 F.2d 186, 190 n.1 (5th Cir. 1991).

2. The Fear of Political Tactics and of Politics

Although a host country's relevant concern is criminal recidivism occurring inside its borders, there are two other fears that bear on the issue of whether the term "political" should be defined from the perspective of the home or host country. They are a fear of the alien's political *tactics* and a fear of the alien's *politics*.

The fear that an alien may bring political tactics to bear in the host country that were appropriate at home but not in the host country is allayed by the political necessity requirement added by the Ninth Circuit.⁷⁵ For instance, setting fire to buses for no other reason than displeasure with the current fare will not be considered a political crime from the perspective of any country. This crime is disproportionate to the objective and consequently falls within the "serious non-political crime" exception to the withholding remedy. This result cannot be manipulated by the alien claiming that he or she was motivated by more than just bus fares because, in addition to subjective motivation, the conditions in the alien's home country at the time of the crime are also considered under the Ninth Circuit's analysis.⁷⁶ The question is not simply, "Why did the alien burn the bus?" The question further asks, "Was the alien's home country in such a state that burning a bus for this purpose was politically justified?"

The second fear, affecting whether the political nature of a crime should be determined from the perspective of the home or host country, is a fear of the alien's politics. Theoretically, an individual's politics should not be feared at all in a country that encourages the free exchange of ideas. Nonetheless, a fear of the alien's political objectives undeniably exists on some level and therefore certain crimes, by virtue of their radical objectives, may be considered non-political even though the crime otherwise satisfies the political crime standard.

Authority for this unspoken limitation on political motives may arguably be found in the same article of the Convention that denies protection to aliens guilty of serious non-political crimes. Article 1(F)(c) of the Convention provides that the "Convention

75. See *Aguirre-Aguirre*, 121 F.3d at 524.

76. See *id.*

shall not apply to any person with respect to whom there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations."⁷⁷ According to the Handbook, "[t]here are hardly any precedents on record for the application of this clause."⁷⁸ One possible interpretation is that even political crimes are subject to the remaining exclusionary clauses and therefore must not violate the purposes and principles of the United Nations. In other words, a politically motivated crime that is proportionate to its objective will nonetheless bar an alien from withholding of deportation if the alien's political motivations violate "fundamental human rights."⁷⁹

Although the Convention's "purposes and principles" exception is not present in the INA's exceptions to withholding of deportation, neither is a definition of a political crime. Courts must therefore look to other sources such as the Convention and Protocol.⁸⁰ Denying protection based upon a fear of an alien's political ideas may not be statutory or even theoretically sound, but it may nonetheless underlie judgments of whether a crime is political. This can only be explained by the reason that aliens cannot offend the very authority (the host country) that grants them protection.

Regardless of whether the host country's values may influence a court's decision, the relevant fear is that the aliens will repeat their crimes within the host country. Therefore, to determine whether an alien will repeat an allegedly political crime requires an understanding of what caused the alien to commit the crime in the first place. The Ninth Circuit attempted to clarify that this can only be done from the perspective of the country in which the crime was committed.⁸¹

77. Convention, *supra* note 23, art. 1(F)(c), 606 U.N.T.S. at 268.

78. Handbook, *supra* note 22, ¶ 163.

79. U.N. Charter pmbl., art. 1 para 3.

80. The Ninth Circuit's analysis in *McMullen v. INS* was rooted in the Convention and Protocol because the court found the legislative history to be "particularly sparse." 788 F.2d 591, 595 (9th Cir. 1986)

81. See *Aguirre-Aguirre*, 121 F.3d at 523-24.

B. *The Misunderstood Balancing Test*

The balancing test originated out of the United Nation's attempt to balance the "fundamental rights and freedoms" of refugees with the "unduly heavy burdens" on host countries from admitting refugees.⁸² One of these burdens is "the danger of admitting a refugee who has committed a serious common crime."⁸³ The Convention eases this burden by denying both refugee status and deportation protection "to any person with respect to whom there are serious reasons for considering that he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."⁸⁴

While easing the burden on host countries, the Convention "also seeks to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature."⁸⁵ The United Nations High Commissioner therefore requires a balance to be struck "between the nature of the offence . . . and the degree of persecution feared" before all protection is revoked.⁸⁶ Thus, where a non-political crime is minor, or the degree of persecution feared is great, the host country's fear of admitting criminal aliens must yield to the humanitarian concerns of the Convention and Protocol.

Neither the interest of aliens or host countries must yield in the context of political crimes, however. Aliens who have committed political crimes in their home countries are not harbored in the United States because of the lofty goal of valuing humanitarianism over national security. Rather, these aliens are allowed to remain in the United States because, unlike common criminals, they were forced to resort to crime as their only way of protesting governmental injustices. These criminals have no reason to repeat their crimes when harbored in the United States. This fine distinction between common and political crimes is illuminating because it is difficult for a host country to ever justify protecting aliens guilty of any type of crime if doing so is viewed as a sacrifice of community safety.

82. Convention, *supra* note 23, art. 1(A)(2), 606 U.N.T.S. at 268.

83. Handbook, *supra* note 22, ¶ 151.

84. Convention, *supra* note 23, art. 1(F)(b), 606 U.N.T.S. at 268. See discussion *supra* note 91.

85. Handbook, *supra* note 22, ¶ 151.

86. *Id.* ¶ 156.

The fact that political crimes do not present conflicting interests, as do common crimes, means that the balancing test only becomes relevant if the political crime standard is not satisfied. Only after a crime has been deemed to be a non-political (or common) crime must the host country choose between either protecting the alien from persecution or protecting its citizens from criminal aliens. In making this choice, the Handbook requires host countries to balance of the severity of the crime against the degree of persecution the feared by the alien. In this regard, affirming the Ninth Circuit's reintroduction of the balancing test would have been a welcome turn towards bringing federal immigration law into accord with the Convention and Protocol, to which the United States is signatory.⁸⁷ Nonetheless, the point critical to the future development of the political crime standard is that the balancing test does not apply to political crimes.

The previous rejections of the balancing test by the BIA,⁸⁸ the Ninth Circuit,⁸⁹ and the Eleventh Circuit⁹⁰ were not rejections at all from the perspective of the Convention and Protocol.⁹¹ The balancing test only applies to non-political crimes committed *outside* the host country.⁹² Both the Convention and the Handbook make it clear that if an alien commits a particularly serious crime *inside* the host country, the host country's concerns override the humanitarian aspects of refugee law and the host country may expel the alien without balancing the interests.⁹³

87. The INA does not provide for the balancing test in the context of the "serious non-political crime" exception to withholding of deportation. See 8 U.S.C. § 1231(b)(3)(B)(iii) (1998). One writer notes that the Immigration Act of 1990 is also "inconsistent with the United States' obligations" under the Convention and Protocol because of "the unavailability . . . of any method of balancing the applicant's criminal conviction against other factors." Abriel, *supra* note 31, at 29.

88. See *In re Rodriguez-Coto*, 19 I. & N. Dec. 208 (B.I.A. 1985).

89. See *Ramirez-Ramos v. INS*, 814 F.2d 1394 (9th Cir. 1987).

90. See *Garcia-Mir v. Smith*, 766 F.2d 1478 (11th Cir. 1985).

91. One writer asserts that "[i]t cannot be strongly argued that the BIA's rejection" of the balancing test in withholding decisions is wrong because the Handbook only requires the balancing in determining "whether a person is excluded from refugee status under Article 1(F) of the Convention." See Abriel, *supra* note 31, at 56. This assertion does not reconcile with Article 1(F) of the Convention that provides that *all* provisions, including both the expulsion *and* refugee status provisions, do not apply to aliens guilty of serious non-political crimes. See Convention, *supra* note 23, art. 1(F), 606 U.N.T.S. at 268.

92. See Handbook, *supra* note 22, ¶ 156.

93. See Convention, *supra* note 23, art. 33(2), 606 U.N.T.S. at 268. Compare Handbook, *supra* note 22, ¶ 154, with ¶ 156 (providing a balancing test only for the

All of the cases where the balancing test was rejected involve crimes committed inside the United States.⁹⁴ The over broad reasoning in these cases, however, led to the rejection of the test for crimes committed abroad as well. For instance, the BIA's decision in *In re Rodriguez-Coto*,⁹⁵ involved an alien who had committed armed robbery in California.⁹⁶ Although the balancing test never applied to that alien, the BIA reasoned that it must reject the balancing test otherwise they would "transform a statutory exclusionary clause into a discretionary consideration."⁹⁷

The Ninth Circuit flirted with a limitation on the BIA's reasoning in *Ramirez-Ramos v. INS*,⁹⁸ a case where an alien was convicted of selling heroin in California. The court properly recognized that the balancing does not apply to "a final conviction of a serious crime *in* the United States" as it does "where there is reason to believe an alien committed a crime *outside* the United States."⁹⁹ The court, however, immediately returned to the BIA's overly broad analysis and rejected the balancing test on the additional ground that "Congress already struck the balance when it phrased the exception to withholding eligibility in mandatory rather than discretionary language."¹⁰⁰ Contrary to the courts reasoning, only the withholding remedy is phrased in mandatory language.¹⁰¹ The exceptions have always been subject to a determination by the Attorney General.¹⁰²

Underlying the BIA's use of a grammar cannon to reject the balancing test may have been concern with granting relief to an

exception for crimes committed outside the host country).

94. See *In re Rodriguez-Coto*, 19 I. & N. Dec. 208 n.1 (B.I.A. 1985) (alien was convicted of armed robbery in California); *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1395 (9th Cir. 1987) (alien was convicted of selling heroin in California).

95. 19 I. & N. Dec. 208 (B.I.A. 1985).

96. See *id.* at 208 n.1.

97. *Id.*

98. 814 F.2d 1394, 1398 (9th Cir. 1987).

99. *Id.*

100. *Id.*

101. See Immigration and Nationality Act § 243(h)(2), 8 U.S.C. § 1253(h)(2) (repealed 1996) ("The Attorney General shall not deport any alien . . ."). In 1996, language having the similar effect was substituted. See Immigration and Nationality Act § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (1998) ("the Attorney General may not remove an alien . . .").

102. See Immigration and Nationality Act, 8 U.S.C. § 1253(h)(2) (repealed 1996) (the exceptions shall not apply "if the Attorney General *determines* that . . .") (emphasis added); Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B) (1998) (the exceptions do not apply "if the Attorney General *decides* that . . .") (emphasis added).

alien who had committed a crime inside the United States. This explains why the BIA was willing to entertain the balancing test in two cases prior to *Rodriguez-Coto*, both of which involved crimes committed abroad.¹⁰³ Being that the Convention and Protocol already provide for the BIA's desired result, a more substantive reason for rejecting the balancing test would have been to construe United States refugee law in accordance with these international agreements. Despite this, the BIA's overly broad textual reasoning in *Rodriguez-Coto* led it to state that balancing test would also be rejected in cases involving serious non-political crimes committed abroad.¹⁰⁴ The Supreme Court has since held that the legislative history of the 1980 Refugee Act indicates "that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol,"¹⁰⁵ therefore, the BIA should reconsider its position on the balancing test in light of its proper application.

IV. CONCLUSION

Although Supreme Court reversed *Aguirre-Aguirre* based on principles of *Chevron* deference,¹⁰⁶ the Ninth Circuit's detailing of the BIA's political crime standard can offer guidance for future development of the political crime standard for the serious non-political crime exception to withholding of deportation. This guidance will hopefully assist in bringing federal refugee law into accord with the Convention, Protocol, and UNHCR with whom the United States agreed to cooperate.¹⁰⁷

New issues will continue to arise in determining what crimes are protectable political offenses because in so doing "[w]e seek to impose on other nations and cultures our own traditional notions

103. See *In re Rodriguez-Palma*, 17 I. & N. Dec. 465, 466 (B.I.A. 1980) ("applicant admitted that he had been arrested and convicted in Cuba on three occasions"); *In re Ballester-Garcia*, 17 I. & N. Dec. 592 (B.I.A. 1980) ("applicant admitted that he had been convicted in Cuba"). Unfortunately, the BIA did not have the opportunity to accept the test in either case because the nature of the offense alone satisfied the serious requirement and outweighed the probable persecution. See *Rodriguez-Palma*, 17 I. & N. Dec. at 469; *Ballester-Garcia*, 17 I. & N. Dec. at 596.

104. See *In re Rodriguez-Coto*, 19 I. & N. Dec. 208, 209 (B.I.A. 1985).

105. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). The BIA also recognized "that Congress' intent . . . was simply to adopt, almost verbatim, the United Nations 1951 Convention and 1967 Protocol." *In re McMullen*, 17 I. & N. Dec. 542, 545 (B.I.A. 1980).

106. See *INS v. Aguirre-Aguirre*, 119 S.Ct. 1439, 1445 (1999).

107. See discussion *supra* Parts II.B.1-2.

of how international political struggles should be conducted."¹⁰⁸ For example, how will we handle a political crime against democracy?¹⁰⁹ To the extent that fundamental human rights are negatively affected, the answer may be that the Convention does not apply to people guilty of acts contrary to the purposes and principles of the United Nations.¹¹⁰ Assuming human rights are not affected however, this provision is not necessarily a solution because the United Nations does not comprise only democratic nations.

With the relevant concern of a host country being criminal recidivism, analyzing a crime from the home country perspective is the best approach for handling such difficult issues without imposing the values of our culture on other countries. If the relevant concern under the proportionality inquiry is the likelihood of criminal aliens repeating their crimes in the United States, then it can be said that an alien guilty of a political crime against democracy is likely to repeat his crime in a democratic host country and therefore should be excluded.

The refugee problem is a global problem and closing the borders is not a solution. Federal refugee law should capitalize on those instances where fundamental human rights can be protected without threat to the country's populace. The Ninth Circuit's *Aguirre-Aguirre* decision offers refinements for determining those instances.

CHAD ALAN EARNST*

108. *Quinn v. Robinson*, 783 F.2d 776, 804 (9th Cir. 1986) (plurality opinion) (Reinhardt, J.).

109. One may ask why a person guilty of a political crime against democracy would be applying for withholding of deportation to remain in the United States? Conceivably, an alien could be persecuted for his anti-democratic beliefs in his home country so intolerably that he prefers to remain in the United States.

110. See Convention, *supra* note 23, art. 1(F)(c), 606 U.N.T.S. at 268.

* Juris Doctor Candidate, May 2000, University of Miami School of Law. The author thanks Professor Patrick O. Gudridge for his comments.