No. 97-1754

In the Supreme Court of the United States

OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JUAN ANIBAL AGUIRRE-AGUIRRE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in reversing the decision of the Board of Immigration Appeals, which held that respondent is barred from eligibility for the relief of withholding of deportation because there are "serious reasons for considering" that, prior to his arrival in the United States, respondent "committed a serious nonpolitical crime," within the meaning of Section 243(h)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. 1253(h)(2)(C) (1994).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions and treaties involved	2
Statement	2
Summary of argument	14
Argument:	
The Board of Immigration Appeals correctly interpreted and applied the "serious nonpolitical crime" exception, 8 U.S.C. 1253(h)(2)(C), to deny respondent withholding of deportation	18
A. The Attorney General's interpretation of the serious nonpolitical crime exception merits substantial deference	19
B. The Board of Immigration Appeals reasonably concluded that the risk of persecution upon return is not relevant in determining whether the alien committed a serious nonpolitical crime	22
C. The Board reasonably concluded that respondent's offenses constituted serious nonpolitical crimes even though they were not "atrocious" in character	33
D. The Board reasonably concluded that respondent's offenses were serious nonpolitical crimes based on their nature and character, not their perceived necessity or success	38
E. Substantial evidence supported the Board's determination that respondent's violence constituted serious nonpolitical crimes	41
Conclusion	46
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Arauz v. *Rivkind*, 845 F.2d 271 (11th Cir. 1988) 25
Bailey v. *United States*, 516 U.S. 137 (1995) 34
Bertrand v. *Sava*, 684 F.2d 204 (2d Cir. 1982) 27
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 19, 20, 22
Choeum v. *INS*, 129 F.3d 29 (1st Cir. 1997) 32
Deportation Proceedings for Joseph Patrick Thomas Doherty, 13 Opin. Legal Counsel 1 (1989), rev'd on other grounds, *Doherty* v. *INS*, 908 F.2d 1108 (2d Cir. 1990), rev'd, 502 U.S. 314 (1992) 21, 33, 35
Deportation Proceedings of Joseph Doherty, 12 Opin. Off. Legal Counsel 1 (1988) 35
Doherty v. *INS*, 908 F.2d 1108 (2d Cir. 1990), rev'd on other grounds, 502 U.S. 314 (1992) 25
Eain v. *Wilkes*, 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981) 36, 40
Fiallo v. *Bell*, 430 U.S. 787 (1977) 21
Garcia-Mir v. *Smith*, 766 F.2d 1478 (11th Cir. 1985), cert. denied, 475 U.S. 1022 (1986) 23
Haitian Refugee Ctr., Inc. v. *Baker*, 953 F.2d 1498 (11th Cir.), cert. denied, 502 U.S. 1122 (1992) 27
INS v. *Abudu*, 485 U.S. 94 (1988) 21, 46
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 3, 5, 19, 20, 28
INS v. *Doherty*, 502 U.S. 314 (1992) 46
INS v. *Elias-Zacarias*, 502 U.S. 478 (1992) 42
INS v. *Rios-Pineda*, 471 U.S. 444 (1985) 22, 39
INS v. *Stevic*, 467 U.S. 407 (1984) 2, 6, 40
INS v. *Wang*, 450 U.S. 139 (1981) 21
McMullen, In re, 19 I. & N. Dec. 90 (BIA 1984), aff'd, 788 F.2d 591 (9th Cir. 1986) 18, 35
McMullen v. *INS*, 788 F.2d 591 (9th Cir. 1986) 13, 20, 33, 35, 36, 40, 43
Meunier, In re, 2 Q.B. 415 (1894) 35

Cases—Continued: Page

Ming v. *Marks*, 367 F. Supp. 673 (S.D.N.Y 1973), aff'd, 505 F.2d 1170 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975) 6
Motes v. *United States*, 178 U.S. 458 (1900) 42
Ornelas v. *Ruiz*, 161 U.S. 502 (1896) 35-36, 41-42
Pierce v. *Underwood*, 487 U.S. 552 (1988) 21
Ramirez-Ramos v. *INS*, 814 F.2d 1394 (9th Cir. 1987) 25
Reno v. *Koray*, 515 U.S. 50 (1995) 30
Rodriquez-Coto, In re, 19 I. & N. Dec. 208 (BIA 1985) 24
Sale v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) 6, 28, 29
Smith v. *United States*, 508 U.S. 223 (1993) 34
United States v. *Aguilar*, 883 F.2d 662 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991) 27
United States v. *Granderson*, 511 U.S. 39 (1994) 34
United States v. *Monsanto*, 491 U.S. 600 (1989) 24
Webster v. *Doe*, 486 U.S. 592 (1988) 21

Treaties, statutes and regulations:

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, *reprinted in* 6 U.S.T. 3516 37
Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565:
art. 1, 24 U.S.T. at 568 37
art. 4, 24 U.S.T. at 569 37
art. 8, 24 U.S.T. at 571 37
Protocol I Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted June 8, 1977, 16 I.L.M. 1391 37
art. 48, 16 I.L.M. at 1412 36
art. 51(2), 16 I.L.M. at 1413 36

Treaties, statutes and regulations—Continued: Page

Protocol II Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 16 I.L.M. 1442 37

art. 4, 16 I.L.M. at 1444 36-37

art. 13, 16 I.L.M. at 1447 36-37

United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259 .... *passim*

art. I, 19 U.S.T. at 6261 .... 27, 29a

art. I(A)(2), 19 U.S.T. at 6261 .... 6, 30a

art. I(F), 19 U.S.T. at 6261 .... 7, 33a

art. I(F)(a)-(c), 19 U.S.T. at 6263-6264 .... 6-7, 33a

art. 33, 19 U.S.T. at 6276 .... 7, 27, 29, 50a

art. 33(2), 19 U.S.T. at 6276 .... 7, 50a

United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224 .... *passim*

art. I(1), 19 U.S.T. at 6225 .... 6, 17a

art. I(2), 19 U.S.T. at 6225 .... 6, 7, 27, 17a

arts. I-XI, 19 U.S.T. at 6225-6229 .... 6, 17a-23a

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 .... 4, 32

Tit. IV-B, 110 Stat. 1268:

§ 413(f), 110 Stat. 1269 .... 4, 31, 32, 3a

§ 413(g), 110 Stat. 1269-1270 .... 4, 32, 4a

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 .... 4, 5, 30

Div. C:

Tit. III-A, 110 Stat. 3009-575:

§ 305, 110 Stat. 3009-597 .... 4, 5a

§ 309(a), 110 Stat. 3009-625 .... 4, 6a

§ 309(c), 110 Stat. 3009-625 .... 4, 6a

Tit. VI-A, 110 Stat. 3009-689:

§ 604, 110 Stat. 3009-690 .... 5, 9a

§ 604(c), 110 Stat. 3009-694 .... 5, 11a

Statutes and regulations—Continued: Page

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2, 5, 15, 16, 19, 30, 35
§ 101(a)(42), 8 U.S.C. 1101(a)(42)(A) 4, 5
§ 101(a)(43), 8 U.S.C. 1101(a)(43) 43, 12a
§ 101(a)(43)(B), 8 U.S.C. 1101(a)(43)(B) 34, 12a
§ 101(a)(43)(C), 8 U.S.C. 1101(a)(43)(C) 34, 12a
§ 101(a)(43)(D), 8 U.S.C. 1101(a)(43)(D) 34, 12a
§ 101(a)(43)(G), 8 U.S.C. 1101(a)(43)(G) 34, 12a
§ 104(a), 8 U.S.C. 1103(a) (1994 & Supp. II 1996) 19, 20, 28
§ 106a(a)(4), 8 U.S.C. 1105a(a)(4) 42
§ 208(a), 8 U.S.C. 1158(a) 4, 5, 7a, 8a
§ 208(b), 8 U.S.C. 1158(b)(1) (Supp. II 1996) 5, 9a
§ 208(b)(2), 8 U.S.C. 1158(b)(2) (Supp. II 1996) 5, 9a
§ 208(b)(2)(A)(iii), 8 U.S.C. 1158(b)(2)(A)(iii) (Supp. II 1996) 5, 30, 9a
§ 209, 8 U.S.C. 1159 5
§ 212(a)(3)(B)(ii), 8 U.S.C. 1182(a)(3)(B)(ii) 11
§ 241, 8 U.S.C. 1231(b)(3) (Supp. II 1996) 4, 5a
§ 241(a)(1)(B), 8 U.S.C. 1251(a)(1)(B) 9
§ 243, 8 U.S.C. 1253 4
§ 243(h), 8 U.S.C. 1253(h) (1994) 4, 17, 24, 26, 29, 30, 31, 1a, 3a, 5a
§ 243(h)(1), 8 U.S.C. 1253(h)(1) (1994) 2, 7, 24, 1a, 3a
§ 243(h)(2), 8 U.S.C. 1253(h)(2) 3, 7, 16, 20, 31, 34, 1a, 3a
§ 243(h)(2)(A), 8 U.S.C. 1253(h)(2)(A) 25, 1a, 3a
§ 243(h)(2)(B), 8 U.S.C. 1253(h)(2)(B) 25, 32, 34, 43, 1a, 3a
§ 243(h)(2)(C), 8 U.S.C. 1253(h)(2)(C) .... *passim*
§ 243(h)(2)(D), 8 U.S.C. 1253(h)(2)(D) 11, 25, 2a, 3a
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 .... 2, 5, 30, 38
18 U.S.C. 16 43
18 U.S.C. 33 43
18 U.S.C. 81 43
18 U.S.C. 113 43
8 C.F.R. (1998):
Section 2.1 20

Regulations—Continued: Page

Section 3.1 20
Section 208.16(b) 2
Section 208.16(b) (1995) 2
Section 208.16(c)(2) 4, 42
Section 208.16(c)(3) 32
Section 208.16(c)(3) (1995) 4, 42

Miscellaneous:

D. Costello, *International Terrorism and the Development of the Principle Aut Dedere Aut Judicare*, 10 J. Int'l Law & Econ. 483 (1975) 37
Draft Convention on the Law of Treaties, 29 Am. J. Int'l L. Supp. 654 (1935) ....
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H.R. 2816, 96th Cong., 1st Sess. (1979) 31
H.R. Rep. No. 608, 96th Cong., 1st Sess. (1979) 26, 31
New Assault Charges Filed Against 3 in Riot, N.Y. Times, May 29, 1992 44
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S. 643, 96th Cong., 1st Sess. (1979) 31
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S. Rep. No. 256, 96th Cong., 1st Sess. (1979) 26
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Serrano out, de Leon Carpio in, Latin American Weekly Report, June 17, 1993 40
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Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 121 F.3d 521. The opinions of the Board of Immigration Appeals (Pet. App. 12a-18a) and the immigration judge (Pet. App. 19a-32a) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 8, 1997. A timely petition for rehearing was denied on November 26, 1997. Pet. App. 33a. On February 17, 1998, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 26, 1998, and, on March 17, 1998, she further extended the time for filing to and including April 25, 1998 (a Saturday). The petition for a writ of certiorari was filed on April 27, 1998. Certiorari was granted on October 5,

1998. 119 S. Ct. 39. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND TREATIES INVOLVED

The relevant provisions of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*, as amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, that were in effect when this case arose, as well as subsequent amendments to those provisions, appear in the appendix to this brief. That appendix also includes the texts of the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, and the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259.

STATEMENT

1. a. The Refugee Act of 1980 (Refugee Act), Pub. L. No. 96-212, 94 Stat. 102, amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to provide two statutory avenues of potential relief for aliens who are unlawfully present within or attempting to enter the United States and who face a risk of persecution upon return to their native countries.

First, "if the Attorney General determines" that the alien's "life or freedom would be threatened" in the country of deportation "on account of race, religion, nationality, membership in a particular social group, or political opinion," the alien may be eligible for "withholding of deportation or return." 8 U.S.C. 1253(h)(1) (1994). To be entitled to relief under that provision, the alien must demonstrate a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. 208.16(b) (1998) (applicant bears the burden of proof of eligibility for withholding); 8 C.F.R. 208.16(b) (1995) (same; in effect at time of respondent's hearing).

Withholding of deportation protects the alien only against deportation to the country where the persecution risk exists; it does not entitle the alien to remain in the United States or avoid deportation to a third country. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987) (withholding is "country specific").

If the alien makes the requisite showing of persecution risk, withholding of deportation is mandatory. That provision for mandatory relief "shall not apply," however, if "the Attorney General determines that" the alien is covered by one of four statutory exceptions. Thus, paragraph 2 of Section 1253(h) provides:

> Paragraph (1) [mandatory withholding] shall not apply to any alien if the Attorney General determines that—
>
> (A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
>
> (B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
>
> (C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or
>
> (D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

8 U.S.C. 1253(h)(2). If the evidence indicates that one of those four exceptions may apply, the alien bears the burden of proving by a preponderance of the evidence that the disqualifying event did not occur and that he remains eligible for withholding of deportation. 8 C.F.R. 208.16(c)(2) (1998); 8 C.F.R. 208.16(c)(3) (1995).[1]

Second, if the "Attorney General determines," 8 U.S.C. 1158(a), that an alien is a "refugee"—*i.e.*, "is unable or unwilling to return to" his home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a

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[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III-A, § 305, 110 Stat. 3009-597, substantially revised and rewrote 8 U.S.C. 1253. The withholding provisions are now codified at 8 U.S.C. 1231(b)(3) (Supp. II 1996). IIRIRA does not govern the present case because its provisions apply only to withholding applications of aliens who are placed in proceedings on or after April 1, 1997. IIRIRA, Tit. III-A, § 309(a) and (c), 110 Stat. 3009-625.

Prior to the passage of IIRIRA, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV-B, § 413(f), 110 Stat. 1269, also amended Section 1253(h) by adding a new paragraph (3). See note 13, *infra*. That amendment also does not govern the present case. It took effect as of the date of enactment (April 24, 1996) and applied "to applications filed before, on, or after such date if final action has not been taken on them before such date." AEDPA § 413(g), 110 Stat. 1269-1270. The Board of Immigration Appeals rendered its decision in this case, and thus took "final action" on respondent's application, on March 5, 1996 (Pet. App. 12a), before AEDPA's enactment date. Paragraph (3) was not carried forward in the revision of the withholding of deportation provisions made by IIRIRA.

In this brief, unless otherwise indicated, we shall refer to the withholding of deportation provisions as they were set forth in former 8 U.S.C. 1253(h) (1994) at the time respondent's application was filed and the Attorney General's decision was rendered.

particular social group, or political opinion," 8 U.S.C. 1101(a)(42)(A)—the Attorney General may, in her discretion, grant the alien asylum in the United States, 8 U.S.C. 1158(a). A person granted asylum is permitted to remain in the United States and may apply to adjust his status to lawful permanent resident after one year. 8 U.S.C. 1159; see also *Cardoza-Fonseca*, 480 U.S. at 428 n.6.

An alien seeking asylum need not prove a "clear probability of persecution," as he must to be eligible for withholding of deportation. He need only demonstrate a reasonable fear or risk of persecution. See *Cardoza-Fonseca*, 480 U.S. at 430-441. While withholding of deportation is mandatory, a grant of asylum falls within "the discretion of the Attorney General," 8 U.S.C. 1158(a), although the INA now renders certain categories of aliens ineligible for asylum.[2]

b. Congress enacted the Refugee Act, in large part, to harmonize United States law with the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, to which the United States

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[2] Section 604 of IIRIRA, 110 Stat. 3009-690, significantly revised the INA's asylum provision. IIRIRA leaves the granting of asylum to the discretion of the Attorney General. 8 U.S.C. 1158(b)(1) (Supp. II 1996) ("[t]he Attorney General may grant asylum to an alien * * * if the Attorney General determines that such alien is a refugee"). But it now prohibits the Attorney General from granting asylum to six categories of aliens. 8 U.S.C. 1158(b)(2) (Supp. II 1996). One of those categories includes any alien "if the Attorney General determines that * * * there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." 8 U.S.C. 1158(b)(2)(A)(iii) (Supp. II 1996). That amendment does not govern the present case because it applies to applications for asylum filed on or after April 1, 1997. IIRIRA, Div. C, Tit. VI-A, § 604(c), 110 Stat. 3009-694.

acceded in 1968, 19 U.S.T. 6223-6258. See *Stevic*, 467 U.S. at 416; *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 & n.19 (1993). The Protocol, in turn, binds its signatories to comply with Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259 (to which the United States is not a signatory), and generally adopts the Convention's definition of "refugee," for purposes of identifying who is entitled to the protection of its provisions. Protocol art. I(1) and (2), 19 U.S.T. at 6225; Convention art. I(A)(2), 19 U.S.T. at 6261. The Protocol does not contain any provisions governing the treatment of refugees independent of those incorporated from the Convention. 19 U.S.T. at 6225-6229.[3]

The Convention states, however, that its provisions "shall not apply" to:

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

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[3] For a discussion of the history and context underlying the United States' accession to the Protocol, see *Ming* v. *Marks*, 367 F. Supp. 673, 676-679 (S.D.N.Y. 1973), aff'd, 505 F.2d 1170 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975).

Convention art. I(F)(a)-(c), 19 U.S.T. at 6263-6264. Those limitations are, in turn, incorporated into the Protocol. See art. I(2), 19 U.S.T. at 6225.

The withholding of deportation provision of the INA, 8 U.S.C. 1253(h)(1), implements article 33 of the Convention (as incorporated by the Protocol). Article 33 provides:

> 1. 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.
>
> 2. The benefit of the present provision 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.

19 U.S.T. at 6276.

The disqualifications from withholding relief codified at 8 U.S.C. 1253(h)(2) parallel the limitations contained in Articles I(F) and 33(2) of the Convention on an alien's eligibility for withholding ("*nonrefoulement*"). See Convention arts. I(F), 33(2), 19 U.S.T. 6261, 6276. Neither the Convention nor the Protocol purports to regulate the terms under which signatory nations may grant or deny asylum. See G. S. Goodwin-Gill, *The Refugee in International Law* 103-105, 107, 119, 121, 225 (1983).

2. Respondent is a native and citizen of Guatemala. Pet. App. 13a. Respondent claims that, from 1989 to

1992, he was a member and leader of the student group Estudeante Syndicado. *Ibid.* Respondent was also active with a political party known as the National Central Union (UCN). *Id.* at 15a. During that time period, the UCN held the largest number of seats in the Guatemalan Congress, and one of the party's leaders was president of the Congress. Administrative Record (AR) 157-158 (the UCN "is legislatively the country's most powerful party").[4] According to the materials respondent submitted in conjunction with his application for asylum and withholding of deportation, the National Central Union "poses as a centrist party but leans decidedly to the right." AR 157.

Respondent estimates that, from 1989 to 1992, he personally participated in at least ten burnings of buses to protest increases in bus fares and the Guatemalan government's seeming inaction in investigating the deaths of student leaders. Pet. App. 13a. Wearing masks to hide their identities, respondent and his cohorts stopped the buses, and then would stone, hit with sticks, or tie with ropes and forcibly remove any passengers who did not leave the bus at their command. *Id.* at 13a, 22a. The buses, which were apparently privately owned, were then doused with gasoline and set on fire. J.A. 47.

Respondent also admitted that his activities as a member of the Estudeante Syndicado extended to vandalizing privately owned shops, forcibly evacuating the stores by beating the customers, breaking the windows, and destroying merchandise. Pet. App. 13a, 17a, 22a.

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[4] A copy of the administrative record in this case was lodged with the Court in conjunction with the filing of our reply brief at the petition stage.

3. In January 1993, respondent entered the United States without inspection. Pet. App. 20a. The Immigration and Naturalization Service (INS) subsequently charged respondent with deportability for illegal entry, 8 U.S.C. 1251(a)(1)(B). Pet. App. 20a. In November 1994, respondent appeared before an immigration judge and, through counsel, conceded that he was deportable. *Ibid.* He applied for asylum and withholding of deportation, claiming that "my political activities and involvement in political groups, including the U.C.N. political party made me fear that I would be persecuted for my political activities and involvement if I returned to Guatemala." AR 128.

The State Department's report on Guatemala, which the immigration judge solicited in conjunction with respondent's deportation proceedings (AR 107), advised that freely elected civilian governments have been in power in Guatemala since 1986 and that peaceful transfers of power between parties have been effected without violence. AR 116. The report noted that "common [criminal] violence has exploded in recent years," *ibid.*, that the "polarized and conflictive atmosphere in Guatemala makes it exceptionally difficult to differentiate political abuses from criminal violations," and that "[r]outinely, criminal acts are painted * * * as political, often without substantiated evidence," AR 111. The report also explained that, while some students have been threatened, harmed, and killed, "students and student leaders are not considered enemies by the government." AR 114. The report concluded that "[m]ost migration from Guatemala seems to be driven by economic hardship coupled with anxiety about criminal and political violence." AR 116.

Respondent testified before the immigration judge, through a translator, that he had received threats

based on his activities as a member both of the Estudeante Syndicado and the UCN. Pet. App. 23a. He claimed that the threats came from right-wing extremist groups, left-wing guerrillas, and the government. *Ibid.* He also feared punishment by the guerrillas for his participation in the military reserves. *Id.* at 26a.[5] None of the evidence and reports submitted by the State Department or respondent corroborated the existence of the Estudeante Syndicado or listed it or the UCN as a target of oppression by the Guatemalan government, right-wing groups, or leftist guerrillas. See AR 108-118, 134-179A.

After a hearing, an immigration judge granted respondent's applications for asylum and withholding of deportation. Pet. App. 32a. The immigration judge ruled that petitioner qualified as a refugee eligible for withholding of deportation and asylum because he faced the requisite threat and well-founded fear of reprisal for his political activities. *Id.* at 28a-32a. The immigration judge rejected the INS's contention that respondent had engaged in criminal activities that barred him from eligibility for withholding of deportation. *Id.* at 30a-31a. The immigration judge then found respondent statutorily eligible for withholding and, in addition, granted him asylum as a matter of discretion. *Id.* at 31a-32a.

4. The Board of Immigration Appeals (Board) sustained the INS's appeal and ordered respondent deported to Guatemala. Pet. App. 12a-18a.[6] The Board held that respondent was ineligible for withholding of

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[5] Military service is universal in Guatemala. AR 115.

[6] Respondent never filed a brief with the Board, although he was represented by counsel and his request for an extension of time to file a brief was granted. AR 13-21.

deportation because he committed a "serious non-political crime" prior to his entry into the United States and thus fell within a statutory prohibition on withholding, 8 U.S.C. 1253(h)(2)(C). The Board explained that, in applying the "serious nonpolitical crime" exception to eligibility for withholding of deportation, the Board "consider[ed] it important that the political aspect of the offense outweigh its common-law character" and that a crime would not be political if it "is grossly out of proportion to the political objective." Pet. App. 17a.

Evaluating the circumstances of this case, the Board found that respondent's actions in Guatemala "were serious enough to affect the lives of innocent bus passengers, shop owners and their customers," and that respondent's activities with the Estudeante Syndicado "added to the violent atmosphere in Guatemala by burning buses, destroying shops, and stoning, binding, and beating civilians unwilling to cooperate." Pet. App. 17a. The Board concluded that "the criminal nature of [respondent's] acts outweigh their political nature," reasoning that although respondent and the Syndicado "had a political agenda"—opposition to increased bus fares and seeming inaction in the investigation of student deaths—"[t]he ire of the [Syndicado] manifested itself disproportionately in the destruction of property and assaults on civilians." *Id.* at 18a.[7]

The Board also denied respondent asylum, explaining that "the nature of [respondent's] acts against innocent

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[7] The Board rejected the INS's argument that respondent's criminal actions in Guatemala constituted terrorist acts, 8 U.S.C. 1182(a)(3)(B)(ii), and that he therefore is a danger to the security of the United States, which constitutes a separate bar to withholding of deportation under Section 1253(h)(2)(D). Pet. App. 17a.

Guatemalans lead us to find that he is unworthy of a favorable exercise of discretion for a grant of asylum." Pet. App. 17a.[8]

5. a. A divided panel of the court of appeals reversed and remanded to the Board. Pet. App. 1a-11a. Reviewing *de novo* the Board's interpretation and application of the statutory provisions governing eligibility for withholding of deportation, *id.* at 3a, the majority held that the Board committed three legal errors in finding respondent to be statutorily barred from withholding of deportation. *Id.* at 4a-7a.

First, the majority held that the Board erred in failing to "consider[] the political necessity and success of [respondent's] methods, weighing their political character against their criminal content." Pet. App. 5a-6a. Characterizing respondent's acts of burning buses, vandalizing private property, and beating civilians with stones and sticks as "crimes against property" and "minor assaults and batteries," *id.* at 4a, the majority observed that "forceful measures" may be necessary to draw a government's attention to a protest when the government "is an accomplice or an accessory to terroristic methods of government," *id.* at 5a.

Second, the majority held that the Board erred in failing to consider whether respondent's crimes involved "acts of atrocious nature," like the "indiscriminate bombing campaigns, . . . murder, torture, and

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[8] Having determined that respondent was barred from withholding of deportation because of his serious nonpolitical crimes in Guatemala and that those same actions warranted a denial of asylum in the exercise of discretion, the Board found it unnecessary to address the question of respondent's threshold eligibility for either form of relief—that is, whether he had established a clear probability or well-founded fear of persecution if returned to Guatemala. Pet. App. 17a-18a.

maiming of innocent civilians" at issue in the Ninth Circuit's own prior decision in *McMullen* v. *INS*, 788 F.2d 591, 597 (1986). Pet. App. 6a. The court found it significant that respondent's acts here "fall far short" of those atrocities. *Ibid.*

Third, the majority held that the Board "erred as a matter of law" in failing to consider the severity of the persecution that respondent might face if he is returned to Guatemala. Pet. App. 6a. Quoting the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 156 (Jan. 1988), the court reasoned that "[i]f a person has well-founded fear of very severe persecution, * * * a crime must be very grave in order to exclude him." Pet. App. 6a.

Because the court concluded that the Board had committed "errors of law" in its analysis of respondent's eligibility for withholding of deportation, the court also remanded for the Board to reconsider whether respondent should be granted asylum. Pet. App. 7a.

b. Judge Kleinfeld dissented. Pet. App. 7a-11a. He explained that a crime need not be atrocious to bar withholding; rather, in his view, the mandatory bar is triggered as long as the crime is "disproportionate to the objective." *Id.* at 7a-8a (quoting *McMullen*, 788 F.2d at 595). Here, Judge Kleinfeld reasoned, the Board could appropriately conclude, based on respondent's own testimony, that his crimes were disproportionate to his political objectives. *Id.* at 10a. Respondent's acts of stoning and beating civilians, Judge Kleinfeld stressed, "were neither peaceful nor directed at the government" but rather "were violent, and directed at uninvolved people." *Id.* at 8a. Disagreeing with the

majority's characterization of the nature of respondent's violence, Judge Kleinfeld explained:

> Beating people with sticks and stoning them, does not seem "minor" to me. Hitting someone on the head with a stick in the nature of a baseball bat or a stone in the nature of a brick is reasonably likely to cause brain damage. It is hard to imagine a band of masked young men, angry enough to burn buses, being especially gentle and kind as they stone people, hit them with "sticks," and tie them up. * * * The shopkeepers, not their inanimate inventory, were the victims of having their stores trashed. Nor is it evident to me why burning buses and trashing stores is proportional to a protest largely directed at bus fares. (When he testified, [respondent] sometimes forgot to mention that his group was also upset about disappearances.)

Id. at 10a-11a. Judge Kleinfeld then concluded: "The United States should be a haven for innocent people fleeing persecution. It should not be a haven for thugs." *Id.* at 11a.

SUMMARY OF ARGUMENT

In 8 U.S.C. 1253(h)(2)(C), Congress expressly vested in the Attorney General (and her delegates) the authority to determine whether an alien is barred from obtaining withholding of deportation because there are serious reasons for considering that the alien committed a "serious nonpolitical crime" prior to his arrival in the United States. Congress further made clear that, once the Attorney General has determined that there are "serious reasons for considering" that the alien has committed such a crime, the statutory bar is mandatory. In contravention of those clear delegations of

authority, the court of appeals' decision in this case substantially intruded upon the authority and judgment of the Attorney General to administer the INA and to undertake the context-specific and often sensitive determination of whether an alien who engaged in criminal conduct abroad should be granted safe haven in this country. As a result, the court of appeals' ruling inappropriately expands the availability of special humanitarian relief to persons engaged in violent conduct directed at innocent civilians. Accordingly, the judgment of the court of appeals should be reversed.

A. As an initial matter, the court of appeals erred in reviewing the Board's interpretation of Section 1253(h)(2)(C) de novo. This Court has repeatedly admonished that courts should accord the Attorney General and her designate, the Board of Immigration Appeals, substantial deference in construing the terms of the INA. Those principles of deference apply with particular force here, where Congress has expressly hinged an alien's disqualification from withholding on whether the "Attorney General determines" that there are "serious reasons for considering" that the alien committed a serious nonpolitical crime. That standard fairly exudes deference to the Executive Branch; the court of appeals utterly disregarded that delegation.

B. The Board has reasonably concluded that the severity of persecution an alien might face should not influence the determination of whether a serious nonpolitical crime was committed. That factor finds no home in the text of the INA, its legislative history, or the United Nations Convention Relating to the Status of Refugees. The risk of persecution has no bearing on whether a crime was serious or nonpolitical; rather, the court of appeals offered it as a reason to forgive the offense and allow withholding. So understood, the risk-

of-persecution test fashioned by the court of appeals is simply a vehicle for circumventing on policy grounds Congress's mandate that a serious nonpolitical crime disqualifies an alien from eligibility for withholding of deportation.

Consideration of the severity of persecution that an alien faces, moreover, would inject a balancing judgment into Section 1253(h)(2)(C) that is absent in parallel provisions of Section 1253(h)(2). It also presumes, without any basis, that Congress intended the risk of persecution to count twice in the withholding analysis —first, to determine the alien's initial eligibility, then once again to excuse a disqualifying event.

The court of appeals' reliance on the UNHCR *Handbook* was misplaced. As this Court has previously recognized, the UNHCR *Handbook* does not have the force of law and is not binding on the Attorney General. That principle is especially true here because the statutory provision at issue expressly turns upon what the "Attorney General determines"—not what the United Nations High Commissioner for Refugees believes—is a serious nonpolitical crime. Moreover, because the UNHCR *Handbook* is a non-contemporaneous and foreign source—and because it does not purport to interpret the Immigration and Nationality Act enacted by the Congress of the United States—there is no basis for believing that Congress meant for the UNHCR *Handbook* to trump the Attorney General's construction of the INA. That is particularly so where, as here, the Attorney General's interpretation is more consistent with the statutory text and structure. In any event, Congress, in enacting Section 1253(h)(2)(C), already struck a balance between the factors that the UNHCR *Handbook* identifies. There is no ground for a

court to require the Attorney General to strike that balance again on a case-by-case basis.

C. The court of appeals' holding that criminal activity must approach the level of "atrocious" before it will qualify as a serious nonpolitical crime is without merit. The plain meaning of the language Congress enacted refutes such a narrow view, and it is irreconcilable with other provisions of Section 1253(h). That standard, moreover, artificially truncates the Attorney General's ability to permit other important objectives—such as the protection of innocent civilians from violence—to inform the "serious nonpolitical crime" analysis.

D. The court of appeals also erred in insisting that, when determining whether criminal activity is serious and nonpolitical, the Attorney General must give weight to the perceived necessity and success of criminal activity against innocent civilians in attracting governmental attention. Nothing in the text of Section 1253(h)(2)(C), its legislative history, or international law compels the Attorney General to consider those factors. Furthermore, the necessity and success standard may do little to distinguish between political and nonpolitical crimes, and it is likely to reward (and thereby incite) violent, attention-grabbing conduct aimed at civilians. A requirement that the Attorney General must give weight to the perceived need for such conduct in a particular country thus could implicate sensitive foreign policy considerations.

E. Finally, the record in this case amply supports the Board's conclusion that there are serious reasons for considering that respondent committed a serious nonpolitical crime in Guatemala. His admitted and repeated acts of arson (burning buses), stoning and beating of innocent passengers, and destruction of store property qualify as serious crimes. The Board also

reasonably concluded that the targeting of innocent civilians rendered respondent's means disproportionate to his asserted political ends of lowering bus fares and encouraging the government to investigate student disappearances.

ARGUMENT

THE BOARD OF IMMIGRATION APPEALS CORRECTLY INTERPRETED AND APPLIED THE "SERIOUS NONPOLITICAL CRIME" EXCEPTION, 8 U.S.C. 1253(h)(2)(C), TO DENY RESPONDENT WITHHOLDING OF DEPORTATION

Section 1253(h)(2)(C) of Title 8 of the United States Code states that the provision for withholding of deportation "shall not apply" to an alien if the "Attorney General determines" that "there are serious reasons for considering" that the alien "has committed a serious nonpolitical crime" prior to arrival in the United States. To determine whether a particular action constitutes a "serious nonpolitical crime," the Board of Immigration Appeals analyzes whether the "political aspect of the offense outweigh[s] its common-law character." *In re McMullen*, 19 I. & N. Dec. 90, 98 (BIA 1984), aff'd, 788 F.2d 591 (9th Cir. 1986). Crimes that are "grossly out of proportion to the political objective" or "of an atrocious nature" constitute serious nonpolitical crimes. *Ibid.*; see also Pet. App. 17a (applying test to this case).

Neither respondent nor the court of appeals contended that it was impermissible or unreasonable for the Board, in interpreting and applying Section 1253(h)(2)(C), to balance the common-law criminal character of the offense against its political aspects. The court of appeals concluded, however, that the Board was required to include additional factors in the balance: (i) the persecution that respondent might face

if returned to Guatemala, (ii) the lack of "atrocious" conduct, and (iii) the perceived necessity or success of respondent's criminal activity against innocent civilians and private property in achieving his asserted political objectives. None of those criteria appears in Section 1253(h)(2)(C). The court of appeals therefore erred in holding that the Attorney General is required to give them weight. The court of appeals should have instead deferred to the Attorney General's interpretation and application of the Act that she is charged by Congress with administering.

A. The Attorney General's Interpretation Of The Serious Nonpolitical Crime Exception Merits Substantial Deference

The Attorney General's construction of the "serious nonpolitical crime" exception is entitled to substantial deference. As this Court has long recognized, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). That is especially so with respect to the Attorney General's interpretation of the Immigration and Nationality Act (INA), because the INA specifically provides that, in administering the Act, the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a).

Whether particular conduct is "nonpolitical" or rises to the level of a "serious crime" is not self-evident. Like the phrase "well-founded fear" that was at issue in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), "[t]here is obviously some ambiguity in a [phrase] like" serious nonpolitical crime, and that phrase "can only be given concrete meaning through a process of case-by-case

adjudication * * * [in which] the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program." *Id.* at 448. Nor is the scope of the "serious nonpolitical crime" exception a matter to which Congress has directly spoken. To the contrary, in Section 1253(h)(2), Congress expressly left it to the Attorney General (and her delegate, the Board of Immigration Appeals, 8 U.S.C. 1103(a) (1994 & Supp. II 1996); 8 C.F.R. 2.1, 3.1 (1998)) to "determine[]" the nature of the alien's conduct. Accordingly, the Board's conclusion that the existence of a "serious nonpolitical crime" does not turn upon the atrociousness of the conduct, the risk of persecution, or the necessity and success of the criminal conduct, must be upheld if reasonable. *Chevron*, 467 U.S. at 845.

That principle of deference applies with particular force here for two reasons. First, the Board was not simply construing ambiguous statutory language. It was interpreting a statutory standard that expressly leaves it to the "Attorney General [to] determine[]" if there are "serious reasons for considering" that a disqualifying crime occurred. That formulation—as opposed to one that looks to whether the alien in fact committed a crime and, if so, whether that crime, in fact, was serious and nonpolitical—emphasizes both that the determination is for the Attorney General to make and that her assessment and characterization of the conduct (whether she finds "serious reasons for considering" it to be serious and nonpolitical) is critical.[9] The deference due an agency's interpretation is magnified when Congress directs that the agency's judgment

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[9] The "serious reasons" standard is essentially one of probable cause. *McMullen* v. *INS*, 788 F.2d at 598 & n.2, 599.

alone should ultimately control. See *INS* v. *Wang*, 450 U.S. 139, 144-145 (1981) (per curiam); see also *Pierce* v. *Underwood*, 487 U.S. 552, 559 (1988); cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

Second, the traditional reasons for deference "apply with even greater force in the INS context," because the Attorney General and those acting on her behalf "must exercise especially sensitive political functions that implicate questions of foreign relations." *INS* v. *Abudu*, 485 U.S. 94, 110 (1988); see also *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) ("[T]he power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.") (internal quotation marks omitted).

That basis for judicial caution obtains here. The decision whether an alien who has engaged in criminal conduct abroad should nevertheless be granted safe haven in this country is a context-specific and often politically sensitive determination. As the Attorney General explained, in a case involving the deportation of an alleged member of the Irish Republican Army to Great Britain, "[i]n practice, characterization of an offence as 'political' is left to the authorities of the state," and "the function of characterization itself is one in which political considerations will be involved." *Deportation Proceedings for Joseph Patrick Thomas Doherty*, 13 Opin. Off. Legal Counsel 1, 23 (1989) (quoting G. S. Goodwin-Gill, *The Refugee in International Law* 35 (1983)), rev'd on other grounds, *Doherty* v. *INS*, 908 F.2d 1108 (2d Cir. 1990), rev'd, 502 U.S. 314 (1992). The United Nations High Commissioner for Refugees likewise has recognized that the decision whether the exclusions from eligibility for return ("*nonrefoulement*") apply rests with the contracting State in whose

territory the alien seeks recognition of his refugee status. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 149 (Jan. 1988) (UNHCR *Handbook*).

In sum, "it is clear that the Court of Appeals misconceived the nature of its role." *Chevron*, 467 U.S. at 845. "In this government of separated powers, it is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appellate review." *INS* v. *Rios-Pineda*, 471 U.S. 444, 452 (1985). The court's duty thus was not to "substitute its own construction" of Section 1253(h)(2)(C), *Chevron*, 467 U.S. at 844, but to determine if the Attorney General's approach "is not one that Congress would have sanctioned," *id.* at 845. Because the Attorney General's interpretation and application of the Act are reasonable and consistent with the statutory text, the legislative history, and the Protocol and Convention, they should have been upheld.

B. The Board of Immigration Appeals Reasonably Concluded That The Risk of Persecution Upon Return Is Not Relevant In Determining Whether The Alien Committed A Serious Nonpolitical Crime

The court of appeals ruled (Pet. App. 6a-7a) that, in deciding whether to grant withholding of deportation, the Board of Immigration Appeals must balance the seriousness of the alien's crime against the risk of persecution he would face upon return. Because that consideration finds no support in the text of Section 1253(h)(2)(C) and is inconsistent with how parallel provisions have been interpreted, it is entirely reasonable

for the Attorney General not to superimpose that form of balancing onto the statutory framework.[10]

1. Nothing in the text of Section 1253(h)(2)(C) requires the Attorney General to consider the risk of persecution an alien allegedly faces if deported to a particular country in determining whether there are serious grounds for considering that he committed a serious nonpolitical crime before he even arrived in the United States. The risk of future persecution does not alter the seriousness of past criminal conduct. Nor can a persecution risk retroactively transmogrify non-political criminal behavior into a political offense. Indeed, the court of appeals did not suggest that the risk of persecution that respondent claims to face informed the analysis of whether his conduct was either "serious" or "nonpolitical." See Pet. App. 6a-7a. Rather, the court of appeals employed the risk of persecution essentially as an extra-statutory equitable ground for excusing respondent's serious nonpolitical crimes: The court observed that "[respondent] 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,'" and faulted the Board because it "did not attempt to balance *his admitted offenses* against the danger to him of death if returned to his native land." *Id.* at 7a (emphasis added).

Congress, however, did not choose to draft Section 1253(h)(2)(C) to allow the risk of persecution the alien might fear to overcome that alien's serious criminal

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[10] The Ninth Circuit's decision in this regard squarely conflicts with the Eleventh Circuit's decision in *Garcia-Mir* v. *Smith*, 766 F.2d 1478, 1488 n.10 (1985) (per curiam), cert. denied, 475 U.S. 1022 (1986).

record. To the contrary, Congress has mandated that aliens be denied withholding if they have committed serious nonpolitical crimes abroad. See *United States* v. *Monsanto*, 491 U.S. 600, 607 (1989) ("shall" denotes a mandatory intent). For that reason, the Board has specifically and reasonably rejected the very balancing approach the Ninth Circuit has imposed. See *In re Rodriguez-Coto*, 19 I. & N. Dec. 208, 209 (BIA 1985) ("[W]e reject any interpretation of the phrase * * * 'serious nonpolitical crime' * * * which would vary with the nature of evidence of persecution. We cannot find that the language and framework of section [1253(h)] support[] such an approach."). Congress has already struck the appropriate balance between the interests of the individual alien and the political, foreign policy, and domestic interests of the United States that are implicated by sheltering an alien with a criminal past. That is a balance that the court of appeals was not free to recalibrate. *Rodriguez-Coto*, 19 I. & N. Dec. at 209 (reweighing the persecution risk "would in effect transform a statutory exclusionary clause into a discretionary consideration").

2. Section 1253(h) already factors the risk of persecution into the analysis of an alien's withholding claim. To be eligible for withholding of deportation at all, an alien must demonstrate at the outset that he faces a clear probability that his life or freedom would be threatened based on race, religion, nationality, social group, or political opinion. 8 U.S.C. 1253(h)(1); see also *Rodriguez-Coto*, 19 I. & N. Dec. at 209-210 ("[I]t is presupposed that all persons barred from relief by the provisions of section [1253](h)(2) can demonstrate a clear probability that their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political

opinion."). The court of appeals identified nothing in the statutory text, legislative history, or purpose of the withholding provision that would justify counting the persecution factor twice—first in determining the alien's initial eligibility, and then in applying the exceptions to withholding relief. Indeed, logic suggests that, if Congress believed the risk of persecution could absolve the alien's prior criminal conduct, there would have been no reason to make the commission of a serious nonpolitical crime a mandatory exception to the provision for withholding of deportation in the first place.

3. Requiring that the risk of persecution be considered again in assessing the "serious nonpolitical" character of a crime would be inconsistent with how the parallel exceptions to withholding relief operate. The other exceptions—applicable to aliens who assisted in the persecution of others, 8 U.S.C. 1253(h)(2)(A); committed a "particularly serious crime," 8 U.S.C. 1253(h)(2)(B); or pose a danger to the security of the United States, 8 U.S.C. 1253(h)(2)(D)—do not entail any further balancing if the alien is found to fall within their terms. See *Arauz* v. *Rivkind*, 845 F.2d 271, 275 (11th Cir. 1988) (no balancing of other considerations under Section 1253(h)(2)(B)); *Ramirez-Ramos* v. *INS*, 814 F.2d 1394, 1397-1398 (9th Cir. 1987) (no balancing of seriousness of offense against severity of persecution under Section 1253(h)(2)(B)); see also *Doherty* v. *INS*, 908 F.2d 1108, 1128 (2d Cir. 1990) (Lumbard, J., concurring in part and dissenting in part) ("[I]t is mandatory for the Attorney General to *deny* withholding if *he* determines that the alien fails any of the tests in § [1253](h)(2)(A)-(D)."), rev'd on other grounds, 502 U.S. 314 (1992). It is unreasonable to assume, in the absence of any differential language in the statutory

text, that Congress intended subsection (C) to operate as a more discretionary prohibition on the withholding of deportation than its immediate predecessor and successor subsections.

4. Nothing in the legislative history supports the court of appeals' holding that the threat of persecution must be considered again in deciding whether a crime is serious and nonpolitical, and therefore renders the alien ineligible for withholding of deportation. In fact, the legislative history of Section 1253(h) sheds little light specifically on the serious nonpolitical crime exception. The most it suggests is a general intent on the part of Congress, in enacting Section 1253(h) as a whole, to conform United States' law to the Protocol (and thus the terms of the Convention that the Protocol incorporates). See S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980) (the withholding provision and its four exceptions are enacted "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. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979) ("The Committee Amendment conforms United States statutory law to our obligations under Article 33 [of the Convention]."); S. Rep. No. 256, 96th Cong., 1st Sess. 4, 9 (1979).

Neither the Protocol nor the incorporated articles of the Convention, however, require that aliens who have committed serious nonpolitical crimes be afforded safe haven based on the severity of persecution they might face if deported to a particular country. To the contrary, the Protocol and Convention both exclude altogether from the Convention's protection "*any* person with respect to whom there are serious reasons for considering" that he "has committed a serious nonpolitical crime outside the country of refuge prior to his

admission to that country as a refugee." Protocol art. I(2), 19 U.S.T. at 6225 (incorporating Convention article I, 19 U.S.T. at 6261) (emphasis added); see also N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* 67 (1953) ("Section F is couched in categorical language * * *. It follows that, once a determination is made that there are sufficient reasons to consider a certain person as coming under this section, the country making the determination is *barred* from according him the status of a refugee.") (emphasis added). The Protocol, moreover, is not a self-executing treaty. It thus does not confer any rights upon aliens beyond those granted by the implementing domestic legislation. *United States* v. *Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991); *Bertrand* v. *Sava*, 684 F.2d 204, 218-219 (2d Cir. 1982); see also *Haitian Refugee Ctr., Inc.* v. *Baker*, 953 F.2d 1498, 1504 (11th Cir.) (withholding provision of Convention, art. 33, as incorporated into the Protocol, is not self-executing), cert. denied, 502 U.S. 1122 (1992).

The court of appeals relied (Pet. App. 6a-7a) on the UNHCR *Handbook*, *supra*, for the proposition that the severity of persecution must be weighed against the seriousness of the nonpolitical crime. *Id.* ¶ 156 ("[I]t is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him."). The court of appeals erred in permitting that *Handbook* provision to trump the Attorney General's interpretation of Section 1253(h)(2)(C).

First, the UNHCR *Handbook* does not have "the force of law or in any way bind[] the INS." *Cardoza-Fonseca*, 480 U.S. at 439 n.22. "Indeed, the [UNHCR] *Handbook* itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.'" *Cardoza-Fonseca*, 480 U.S. at 439 n.22 (quoting UNHCR *Handbook* Foreword (II)). Moreover, while Congress intended to harmonize United States immigration law with the Protocol as a general matter, Congress gave absolutely no indication that it intended to bind itself (or the Attorney General) to the construction of that document by the United Nations High Commissioner for Refugees. Indeed, because the UNHCR *Handbook* postdates the United States' accession to the Protocol by more than a decade, neither Congress nor the President can be presumed to have accepted its interpretation of the Protocol's terms at the time the United States became a signatory.

Second, while the UNHCR *Handbook* may sometimes "provide[] significant guidance in construing the Protocol," *Cardoza-Fonseca*, 480 U.S. at 439 n.22, there is no basis for giving the United Nations High Commissioner more deference than Congress's designee, the Attorney General, in interpreting an Act of the Congress of the United States, especially where, as here, the Attorney General's interpretation comports with the Act's plain language and legislative history. See 8 U.S.C. 1103(a); *Haitian Ctrs. Council*, 509 U.S. at 171.[11]

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[11] In *Cardoza-Fonseca*, by contrast, this Court found the UNHCR *Handbook* helpful when the Attorney General's interpretation was deemed to be inconsistent with the statutory text. See 480 U.S. at 431-432, 438-439. Compare *Haitian Ctrs. Council*,

Congress's intent to conform United States' law to the Protocol cannot be equated with an intent to abdicate responsibility for the interpretation and enforcement of federal law to an agency of the United Nations. See also P. Weis, *The Refugee Convention, 1951: The Travaux Preparatoires Analysed* 333 (1995) (during negotiations on the Convention, it was noted that, because "the words [crimes or offences] had a general sense in all countries, each individual legal system would have to place its own interpretation on them.").

Third, in the text of Section 1253(h), Congress itself has already weighed the alien's risk of persecution against the character of his crimes. While the UNHCR *Handbook* anticipates ad hoc balancing in individual cases, Congress chose to strike the balance at a greater level of generality with respect to all aliens who have committed "serious nonpolitical crime[s]." In so doing, Congress, in effect, chose to give uniform weight to persecution risk in the implementation of Section 1253(h), rather than a weight that varies and must be measured against the seriousness of particular past criminal conduct. The approach suggested by the UNHCR *Handbook*, by comparison, would ease the consequences for aliens facing "severe persecution," while providing that those who face "less serious" persecution would have their crimes scrutinized more harshly. See UNHCR *Handbook* ¶ 156. Thus, the balancing of the threat of future persecution against the severity of past conduct that the UNHCR *Handbook* discusses took place in the United States at an earlier, legislative stage, and it is

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509 U.S. at 183 n.40 (noting UNHCR *Handbook*'s implicit acknowledgment, consistent with the position of the United States, that article 33 of the Convention, 19 U.S.T. at 6276, has no extraterritorial application).

manifested in a manner that is structurally distinct from the model the UNHCR *Handbook* mentions. That departure, to the extent it is one, scarcely renders the approach chosen by Congress and the Attorney General improper.[12]

The legislative history confirms that Congress believed the text of Section 1253(h), as enacted, fully complied with the Protocol and its incorporated Convention terms, and that the Attorney General would not have to engage in further balancing or discretionary judgments to conform her administration of the INA to the United States' treaty obligations. When the competing drafts of the Refugee Act of 1980 went before the Conference Committee, the bill passed by the House of Repre-

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[12] Because of the structure of United States' immigration law, incorporation of the UNHCR *Handbook* approach here could have additional untoward consequences. As previously noted (see note 2, *supra*), Congress has recently revised federal asylum law. As amended by IIRIRA, the INA now prohibits the Attorney General from granting asylum to an alien if, *inter alia*, "the Attorney General determines that * * * there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." 8 U.S.C. 1158(b)(2)(A)(iii) (Supp. II 1996). A ruling that the UNHCR *Handbook*'s approach governs the interpretation of "serious nonpolitical crime" in Section 1253(h)(2)(C) could now mean either that the same definition applies to IIRIRA's amendments to the INA's asylum provisions, even though it is undisputed that neither the Convention nor the Protocol purports to regulate asylum (UNHCR *Handbook*, Intro. (G) ¶¶ 24-25), or that Congress intended the term "serious nonpolitical crime" to have two different meanings within the same statute (see *Reno* v. *Koray*, 515 U.S. 50, 58 (1995) ("[T]he basic canon of statutory construction [is] that identical terms within an Act bear the same meaning.") (internal quotation marks omitted)). The better conclusion is simply that the UNHCR *Handbook* does not displace the Attorney General's interpretation of an Act of Congress.

sentatives contained the four exceptions to withholding of deportation that currently appear in 1253(h)(2), including the serious nonpolitical crime exception. See H.R. 2816, 96th Cong., 1st Sess. (1979), *reprinted in* H.R. Rep. No. 608, *supra*, at 47. The House Judiciary Committee believed that its four exceptions corresponded to those in the Convention. H.R. Rep. No. 608, *supra*, at 18 ("The exceptions are those provided in the Convention."). The Senate bill, by contrast, provided only that the Attorney General would not deport any alien facing persecution "unless deportation or return would be permitted under the terms of the United Nations Protocol Relating to the Status of Refugees." S. 643, 96th Cong., 1st Sess. § 203(e) (1979). The Senate bill thus would have left it to the Attorney General to discern what exceptions to withholding of deportation are called for under the Protocol (and therefore under the Convention) itself, giving whatever weight she deemed appropriate to the views of the UNHCR and conducting whatever balancing (if any) she believed was appropriate under the Convention.

In conference, the House of Representatives' version prevailed. S. Conf. Rep. No. 590, *supra*, at 20. Thus, after specific consideration of the alternative of incorporating the provisions of the Convention directly into United States law, Congress instead enacted a version of Section 1253(h) that struck, in mandatory legislative terms, what it considered to be the appropriate balance between the risk of persecution and the seriousness of a criminal offense.[13]

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[13] In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV-B, § 413(f), 110 Stat. 1269, Congress temporarily instituted a scheme under which the Attorney General had the authority independently to conform

In sum, the court of appeals erred in mandating that the seriousness of respondent's crimes be discounted by the severity of the persecution he allegedly faces. That factor derives not from the text or legislative history of the governing Act of Congress, or even from the text of the Convention, but solely from a non-contemporaneous and non-binding document concerning implementation of the Convention authored by a source external to the United States Government.

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withholding provisions to the Protocol. Section 413(f) of that Act provided that the mandate for withholding of deportation shall apply to an alien, notwithstanding any other provision of law, "if the Attorney General determines, in the discretion of the Attorney General," that (A) such alien faces a clear probability of persecution in the country to which the alien would be deported, and (B) withholding of deportation "is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees." 110 Stat. 1269. That amendment, however, does not govern the present case. It took effect as of the date of enactment (April 24, 1996) and applied "to applications filed before, on, or after such date if final action has not been taken on them before such date." AEDPA § 413(g), 110 Stat. 1269-1270. The Board of Immigration Appeals rendered its decision, and thus took "final action" on respondent's application, on March 5, 1996 (Pet. App. 12a). In any event, AEDPA gave the Attorney General discretion to conform the withholding prohibitions to the Protocol, not to the UNHCR *Handbook*. Furthermore, the legislative history of Section 413(f) indicates that it was designed not to alter the scope of the serious nonpolitical crime exception, but to afford the Attorney General discretion in assessing whether aggravated felonies constitute "particularly serious" crimes within the meaning of Section 1253(h)(2)(B). See *Choeum* v. *INS*, 129 F.3d 29, 42-43 (1st Cir. 1997); accord 8 C.F.R. 208.16(c)(3) (1998).

C. The Board Reasonably Concluded That Respondent's Offenses Constituted Serious Nonpolitical Crimes Even Though They Were Not "Atrocious" In Character

The Ninth Circuit further erred in requiring the Attorney General to consider whether respondent's criminal activities involved "acts of an atrocious nature," of the sort described in that court's *McMullen* opinion (Pet. App. 6a), before concluding that they were serious nonpolitical crimes. While the Attorney General certainly considers atrocious crimes to fall within Section 1253(h)(2)(C)'s exception to mandatory withholding of deportation, she has also concluded that an offense "should be considered a serious nonpolitical crime if the act is disproportionate to the objective." See *Deportation Proceedings for Joseph Patrick Thomas Doherty*, 13 Opin. Off. Legal Counsel at 23 (quoting *McMullen* v. *INS*, 788 F.2d at 595). The Board, in other words, "consider[s] it important that the political aspect of the offense outweigh its common-law character." Pet. App. 17a. As a result, a crime will not, for example, be deemed political if it "is grossly out of proportion to the political objective." *Ibid.*

1. The Attorney General's interpretation of "serious nonpolitical crime" to include disproportionately criminal offenses, as well as atrocities, is consistent with the statute's language and structure. "Serious" generally signifies actions that "cause considerable distress, anxiety, or inconvenience." *Webster's Third New Int'l Dictionary* 2073 (1986); see also *Webster's II New Riverside Univ. Dictionary* 1065 (1994) ("[g]rave in quality, character or manner * * * [i]nvolving important rather than trivial matters"). "Atrocious," on the other hand, captures only a narrow subset of serious crimes, those that are "marked by or given to extreme wickedness * * * [or] extreme brutality or cruelty: grossly

inhumane." *Webster's Third New Int'l Dictionary*, *supra*, at 139; see also *Webster's II*, *supra*, at 135 ("[e]xtremely evil or cruel: monstrous"). By focusing on the relative level of criminality, violence, and disorder occasioned by an individual's criminal activity, and its proportionality to the claimed objective, the Attorney General's interpretation gives the phrase "serious nonpolitical crime" its full meaning. Thus, unlike the court of appeals, the Attorney General has reasonably recognized that "serious nonpolitical crime" embraces a spectrum of conduct, and not simply humanity's nadir.

2. The Attorney General's interpretation is also consistent with the structure of Section 1253(h)(2). See *Smith* v. *United States*, 508 U.S. 223, 229 (1993) ("Language, of course, cannot be interpreted apart from context."). Subsection (h)(2)(B) of Section 1253 separately precludes any alien who has been convicted of a "particularly serious crime" from obtaining mandatory withholding relief. The Section then instructs that "an aggravated felony shall be considered to" be a "particularly serious crime." 8 U.S.C. 1253(h)(2). "Aggravated felony" is broadly defined to include illicit trafficking in firearms, money laundering, and certain controlled substance and theft offenses. 8 U.S.C. 1101(a)(43)(B), (C), (D) and (G). Common sense dictates that Congress intended the phrase "particularly serious crime" in Subsection (h)(2)(B) to embrace criminal conduct of a more weighty and grave magnitude than the "serious" nonpolitical crimes addressed by Subsection (h)(2)(C). See generally *United States* v. *Granderson*, 511 U.S. 39, 42 (1994) (statute should be accorded "a sensible construction"). Otherwise the word "particularly" would have no independent significance. See generally *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) ("[A] legislature is presumed to have used no superfluous words.")

(internal quotation marks omitted). Because Congress has directed that an aggravated felony satisfies the definition of "particularly serious crime," it surely is reasonable for the Attorney General to adopt a construction of "serious" crime that does not categorically require that same level of criminality, much less that the criminal activity be "atrocious" in nature. The court of appeals' focus on atrocity, by contrast, results in an upside-down statutory construct under which "serious" crimes must register as more depraved and violent than "particularly serious crimes."

3. In effectively equating "serious nonpolitical crime[s]" with atrocities, the court of appeals not only departed from the INA's plain text, but also artificially truncated the Attorney General's ability to factor other, significant judgments into the "serious nonpolitical crime" calculus. As relevant to this case, the Attorney General has determined that criminal violence targeted solely or primarily at innocent civilians will often be disproportionate to any reasonable political objective. See *Deportation Proceedings of Joseph Doherty*, 12 Opin. Off. Legal Counsel 1, 8 n.9 (1988) ("[I]t is the policy of the United States to condemn acts of violence directed against non-combatants even by those who are otherwise legitimately seeking to oppose a non-democratic government."); *Deportation Proceedings for Joseph Doherty*, 13 Opin. Off. Legal Counsel at 24; *McMullen*, 19 I. & N. Dec. at 98-99. "The distinction between acts against ordinary civilians and official instrumentalities has been extant in the common law since *In re Meunier*, 2 Q.B. 415 (1894)." *McMullen* v. *INS*, 788 F.2d at 597. Both this Court and the courts of appeals have recognized that violence against helpless civilians falls beyond the legitimate boundaries of political activity. See *Ornelas* v. *Ruiz*, 161 U.S. 502, 510-511

(1896) (where "private citizens were also violently assaulted; horses belonging to them taken; houses burned; small sums of money extorted from women; clothes, provisions, and goods appropriated; and three citizens kidnapped," the State Department reasonably concluded that the actions were not political for purposes of an exception to extradition); *McMullen* v. *INS*, 788 F.2d at 598 (refusing to deem "acts of violence directed at ordinary citizens" to be "political crimes," within the meaning of 8 U.S.C. 1253(h)(2)(C)); *Eain* v. *Wilkes*, 641 F.2d 504, 521-523 (7th Cir.) (bombing campaign directed at a civilian population cannot be considered a political offense for extradition purposes), cert. denied, 454 U.S. 894 (1981).

The Attorney General's judgment regarding the inherent gravity of violence against civilians, moreover, is consonant with general principles of international law, which clearly confirm that civilians should not be the intentional targets of attacks by government or anti-government forces. See, *e.g.*, Protocol I Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 51(2), 16 I.L.M. 1391, 1413 ("The civilian population as such, as well as individual civilians, shall not be the object of attack."); *id.* art. 48, 16 I.L.M. at 1412 ("In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the [self-determination] conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."); Protocol II Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977,

arts. 4, 13, 16 I.L.M. 1442, 1444, 1447;[14] Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, arts. 1, 4, 8, *reprinted in* 24 U.S.T. 565, 568, 569, 571; UNHCR *Handbook* ¶ 158 (suggesting that hijacking of aircraft and its crew, "under threat of arms or with actual violence," will be "difficult" to overlook under the serious nonpolitical crime exception).[15]

A further defect in the court of appeals' restrictive view of a "serious nonpolitical crime" is thus that it effectively bars the Attorney General from giving significant weight not only to the nature and severity of the crime, but also to the identity of the victim. Because case law dating from the 19th century and established international norms alike recognize that organized violence against innocent civilians is not protected political conduct, the Attorney General and the Board have reasonably construed Section 1253(h)(2)(C) in a manner that ensures that the special humanitarian relief of withholding of deportation does not reward the

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[14] Although both Protocols I and II have been signed by the United States, at this time only Protocol II has been transmitted to the Senate for its advice and consent to ratification by the President. See S. Treaty Doc. No. 2, 100th Cong., 1st Sess. iv (1987). The United States accepts the principle that civilians and civilian property per se may not be the intentional object of attack in armed conflict.

[15] See generally Geneva Convention Relative to the Protection of Civilian Persons in Time Of War, Aug. 12, 1949, 75 U.N.T.S. 287, *reprinted in* 6 U.S.T. 3516 (this Convention entered into force for the United States on Feb. 2, 1956); D. Costello, *International Terrorism and the Development of the Principle Aut Dedere Aut Judicare*, 10 J. Int'l L. & Econ. 483, 501 (1975) ("'[T]he legitimacy of a cause does not in itself legitimize the use of certain forms of violence especially against the innocent.'") (quoting study by the United Nations Secretariat).

perpetrators of such violence. See also Pet. App. 11a (Kleinfeld, J., dissenting) ("The United States should be a haven for innocent people fleeing persecution. It should not be a haven for thugs.").

D. The Board Reasonably Concluded That Respondent's Offenses Were Serious Nonpolitical Crimes Based On Their Nature And Character, Not Their Perceived Necessity Or Success

In determining whether respondent's acts of arson, assault and battery, and vandalism constituted serious nonpolitical crimes, the Board focused on the nature and character of respondent's behavior and the correlation between respondent's conduct and his proclaimed political objectives. Pet. App. 18a. The court of appeals held (*id.* at 5a-6a) that, in addition, "[t]he Board should have considered the political necessity and success of [respondent's] methods." Injecting those new elements into the "serious nonpolitical crime" inquiry was error.

First, those factors make no appearance in the statutory text. They do not inhere in the ordinary meaning of the terms "serious" and "nonpolitical," which suggest no more than a requirement that there be an evaluation of the potential or actual damage wrought by the crime and its effect on the victims, and the crime's nexus to the achievement of a political end. Indeed, the court of appeals employed the concepts of necessity and success not to discern the character of respondent's crimes, but rather to excuse the violence after the fact. See Pet. App. 5a ("When you are dealing with an ass it may be necessary to move the beast by a blow on a sensitive part even though what you want to move are the feet.").

Second, the necessity and success factors make no appearance in the legislative history of the Refugee Act or in the text of the Protocol or Convention, or even in

the UNHCR *Handbook*. Nor did the court of appeals cite any other authority to support its ruling. See Pet. App. 5a-6a. The mere fact that the perceived necessity and success of violence directed at innocent civilians and private property might strike a reviewing court as germane does not warrant displacing the interpretation of "serious nonpolitical crime" adopted by the Attorney General under authority of Congress's express assignment of interpretative responsibility. See *Rios-Pineda*, 471 U.S. at 451 ("The Act commits the definition of the standards in the [Immigration and Nationality] Act to the Attorney General and [her] delegate in the first instance, and their construction and application of th[ese] standard[s] should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute.") (internal quotation marks omitted).

Third, strong policy reasons counsel against a rule compelling the Attorney General to give weight to the perceived necessity and success of violence in these circumstances. In the first place, an announcement by officials of the United States Government that criminal violence against civilians is "necessary" in a particular country could incite further violence and could have extremely sensitive foreign policy and diplomatic implications. The Attorney General may thus reasonably elect to forgo injecting such an element into the withholding analysis under United States law.[16]

[16] Conversely, to require a showing of necessity could impair the ability of genuine political refugees to qualify for withholding. Where the character of the alien's conduct is not serious and yet unquestionably political (*e.g.*, trespass by sitting in at a segregated lunch counter; striking by farm laborers; engaging in prohibited religious exercise), it is reasonable for the Attorney General not to require the alien also to prove that no alternative means of protest

Further, the Board could reasonably conclude, based on established domestic and international norms, that violence aimed at unarmed and helpless civilians will presumptively constitute a serious and nonpolitical crime despite the alien's own perception that it was necessary. Such actions seek in the first place only general social disorder and misery; the change or downfall of the government is at best "intended only as an indirect result." *McMullen* v. *INS*, 788 F.2d at 597; see also *Eain*, 641 F.2d at 519 (terror tactics aimed at civilians "seek[] to promote social chaos"). It is well within the Attorney General's "considerable discretion," *Stevic*, 467 U.S. at 429 n.22, to conclude that violent crime targeting civilians is too tangential and remote a means of effecting political change to discount the otherwise serious and nonpolitical nature of an offense.[17]

(such as a march) were available and thus that the unlawful conduct was "necessary."

[17] Even if the Attorney General were to decide that necessity should be a relevant consideration, the court of appeals' conclusion that arson, beatings, and vandalism directed at civilians were necessary to effect governmental change during the relevant time in Guatemala misunderstands the record and reality. As the State Department reported to the immigration judge, Guatemala has enjoyed peaceful transfers of power between governments since 1986. AR 116. Furthermore, shortly after respondent left Guatemala, an attempt by the then Guatemalan President to suspend constitutional rule was quelled, and the President ousted, by purely peaceful protests. See *Serrano out, de Leon Carpio in*, Latin American Weekly Report, June 17, 1993, at 267; F. Villagran de Leon, *Thwarting the Guatemalan Coup*, 4 Journal of Democracy 117 (Oct. 1993). If peaceful resistance was a sufficiently potent protest vehicle to bring down a government, it is difficult to conceive why beating and stoning bus passengers were "necessary" simply to have bus fares lowered or crimes investigated.

"Success," which the court of appeals defined simply as "draw[ing] the government's attention to your protest; your political objective is a governmental response" (Pet. App. 5a), is also a problematic consideration. Attracting the attention of the government might often weigh strongly in favor of—not against—the conclusion that a crime was "serious." The government is rarely waylaid by petty infractions. See Pet. App. 18a (respondent's crimes were "*violent enough* to attract the attention of the main combatants in the Guatemalan conflict.") (emphasis added). Success in attracting governmental attention, moreover, may do little to distinguish political from nonpolitical offenses. Narcoterrorists, street gangs, and serial killers all receive attention from and provoke reactions by the government. The government's response, however, cannot by itself retroactively invest the crime with a political content that was lacking at the time of commission. Finally, the court of appeals paid scant heed to the Attorney General's policy judgment that violence against innocent civilians, however successful in accomplishing its supposed political objectives, may militate strongly in favor of concluding that a serious nonpolitical crime has been committed.

E. Substantial Evidence Supported The Board's Determination That Respondent's Violence Constituted Serious Nonpolitical Crimes

Even as to those aspects of the Board's approach in this case with which it agreed, the court of appeals concluded that the Board erred in applying them to respondent's case. Pet. App. 4a-6a. The question whether there are "serious reasons for considering" that a particular offense qualifies as serious and nonpolitical, however, is largely factual. See *Ornelas*, 161 U.S. at 509 (whether a crime is a political offense is

chiefly a question of fact). The Board's resolution of those factual issues must be sustained by the court of appeals if supported by substantial evidence. 8 U.S.C. 1105a(a)(4) (factual findings made by the Board are to be reviewed for substantial evidence); see also *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481, 483-484 (1992). Once respondent admitted his criminal activities, moreover, the burden of proof fell on him to show that his offenses were not serious and were political in character. See 8 C.F.R. 208.16(c)(2) (1998); 8 C.F.R. 208.16(c)(3) (1995). Before a court of appeals may set aside a Board decision, the alien must show that the evidence he presented "was so compelling that no reasonable factfinder could fail to find" that he was eligible for relief. *Elias-Zacarias*, 502 U.S. at 483-484; see also *id.* at 481 n.1 ("To reverse the [Board] finding we must find that the evidence not only *supports* [the contrary] conclusion, but *compels* it.").

Based on the record before the Board, there plainly was substantial evidence to support its determination that respondent's acts of arson, assault and battery, and vandalism against innocent civilians and their property constituted serious nonpolitical crimes. Respondent testified that, on numerous occasions, he would stone, beat with sticks, and bind innocent civilians if they did not abandon the buses promptly at his command. Pet. App. 8a-9a; J.A. 47-48. He also confessed to burning the buses and vandalizing and destroying the inventory of local shopkeepers. Pet. App. 9a-10a; J.A. 49. Respondent's own admissions unquestionably amount to substantial evidence of his crimes. Cf. *Motes* v. *United States*, 178 U.S. 458, 475-476 (1900) (testimonial admission to criminal conduct is sufficient by itself to sustain a guilty verdict).

Nor can it reasonably be disputed that respondent's repeated burning of buses (arson), beating with sticks and stoning of passengers (assault with dangerous weapons), and destruction of private property constitute "serious" crimes. They are, to the contrary, the very types of crimes that the Convention contemplated as "serious." *McMullen* v. *INS*, 788 F.2d at 597; P. Weis, *supra*, at 342 (arson); 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 294 (1966) (arson); *The Refugee in International Law*, *supra*, at 62 (arson). Indeed, "there are serious reasons for considering," 8 U.S.C. 1253(h)(2)(C), on the basis of the present record, that respondent's acts of arson and assault with a dangerous weapon would qualify as aggravated felonies. See 18 U.S.C. 16, 33, 81, 113; 8 U.S.C. 1101(a)(43). Congress intended for that very conduct, if the subject of a conviction, to constitute "particularly serious crime[s]" which would disqualify the perpetrator from withholding under 8 U.S.C. 1253(h)(2)(B). It should follow *a fortiori* that the crimes are "serious" within the meaning of Section 1253(h)(2)(C) as well.

The court of appeals (Pet. App. 4a) was unjustified in characterizing respondent's offenses as mere "crimes against property" and "minor assaults and batteries." As the dissent noted:

> Beating people with sticks and stoning them, does not seem "minor" to me. Hitting someone on the head with a stick in the nature of a baseball bat or a stone in the nature of a brick is reasonably likely to cause brain damage. It is hard to imagine a band of masked young men, angry enough to burn buses, being especially gentle and kind as they stone people, hit them with "sticks," and tie them up. * * * The bus passengers, perhaps travelling to

> work or going home exhausted at the end of hard days, probably would not interrupt their journeys for a bunch of angry boys with little sticks.

Pet. App. 10a-11a. Nor is it reasonable to assume that "minor" assaults and petty property crimes would have, as respondent claims and the court of appeals found, attracted the attention of government officials and "earn[ed] the enmity of a rival rebel group, 'the guerrillas.'" *Id.* at 5a.[18] In any event, it was respondent's burden to prove that his assaults and arson were minor; his claims that his conduct inspired death threats and governmental and guerrilla attention undercut any such theory.

The record also amply supports the Board's determination that respondent's crimes were nonpolitical. Respondent's primary concern about increased bus fares could reasonably be regarded as more economic than political, notwithstanding the court of appeals' assertion that respondent had "no personal motivation or gain." Pet. App. 5a. Even assuming that his occasional references to student disappearances as the impetus for his conduct would be sufficient to invest his

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[18] Respondent's description of his activities of forcibly removing passengers from the bus and beating them with stones and sticks is reminiscent of the beating of truck driver Reginald Denny during the Los Angeles riots in May 1992—a brutal assault that no reasonable person could characterize as anything but "serious." See R. W. Stevenson, *Riots in Los Angeles: Moment of Terror; Blacks Beat White Truck Driver as TV Cameras Record the Scene*, New York Times, May 1, 1992, at A21 ("Mr. Denny * * * was yanked from the cab of his truck by a band of black men and beaten * * *. [S]everal men could be seen approaching him, throwing stones or bottles."); see also *New Assault Charges Filed Against 3 in Riot*, New York Times, May 29, 1992, at A13 (37 felony charges filed against perpetrators of Denny beating).

crimes with a political component, his crimes were disproportionate and bore only a remote nexus to his claimed political objectives. In the view of the Attorney General and the Board, the wanton victimization of defenseless civilians plays a vital role in determining whether a crime is disproportionate to the achievement of any legitimate political objective. Respondent's venting of his political anger on innocent and helpless civilians, moreover, would at most have accomplished general social unrest and disorder. Its capacity to motivate the government either to lower bus fares or to investigate student disappearances was remote, especially if, as respondent and the court of appeals believed (Pet. App. 5a), the Guatemalan government cared little for the well-being of its citizens. Why the buses had to be burned during the day when filled with civilians, rather than when empty at night or off duty, is left unexplained, unless terrorizing civilians was one of respondent's primary objectives. Nor is there any obvious logical, direct connection between beating civilians, burning what were apparently privately owned buses, and looting privately owned stores, on the one hand, and prompting governmental investigations of student disappearances on the other.

In short, because respondent's ire "manifested itself disproportionately in the destruction of [private] property and assaults on civilians," Pet. App. 18a, the Board reasonably concluded that there was not a sufficiently direct causal link between the criminal acts respondent inflicted on ordinary, uninvolved civilians and his opposition to the government and its official instrumentalities. Thus, the Board's conclusion that respondent is ineligible for withholding of deportation because there are "serious reasons for considering" that

he "committed a serious nonpolitical crime" in Guatemala should have been sustained.[19]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[19] In addition to reversing and remanding the Board's determination that respondent was ineligible for withholding of deportation, the court of appeals vacated and remanded the Board's discretionary denial of asylum on the ground that reconsideration of respondent's activities in light of the court's decision on the withholding of deportation issue could alter the Board's exercise of its discretion to deny asylum as well. Pet. App. 7a. If this Court reverses the court of appeals' holding on the withholding of deportation issue, the sole basis for the court of appeals' asylum ruling will necessarily be eliminated as well. Furthermore, this Court repeatedly has confirmed that the Attorney General may deny asylum purely on discretionary grounds, without reference to the alien's statutory eligibility for non-discretionary forms of relief. See *INS* v. *Doherty*, 502 U.S. 314, 323 (1992); *Abudu*, 485 U.S. at 105.