
RUNNING AFOUL OF THE NON- REFOULEMENT PRINCIPLE: THE [MIS]INTERPRETATION AND [MIS]APPLICATION OF THE PARTICULARLY SERIOUS CRIME EXCEPTION

DAVID DELGADO*

TABLE OF CONTENTS

I. INTRODUCTION.....	2
II. ORIGIN AND HISTORY OF THE NON-REFOULEMENT PRINCIPLE AND THE PARTICULARLY SERIOUS CRIME EXCEPTION IN ARTICLE 33 OF THE CONVENTION AND INTERNATIONAL LAW	7
A. BACKGROUND: HISTORY AND CONTEXT OF THE NON- REFOULEMENT PRINCIPLE AND ITS EXCEPTION IN THE CONVENTION	7
B. UNDERSTANDING THE NON-REFOULEMENT PRINCIPLE AND ITS EXCEPTION: THE DELEGATE’S INTENT AND SUBSEQUENT INTERPRETATION IN INTERNATIONAL LAW	9
III. THE EVOLUTION OF THE PARTICULARLY SERIOUS CRIME EXCEPTION IN THE UNITED STATES	16
IV. <i>DELGADO V. HOLDER</i> : A CASE STUDY OF THE PARTICULARLY SERIOUS CRIME EXCEPTION.....	23

* Class of 2013, University of Southern California Gould School of Law; B.A. Philosophy and Political Science 2009, University of Southern California. Many thanks to Professor Niels Frenzen and Elizabeth Henneke for their insight and help throughout the development of this Note and to the members of the *Southern California Law Review* for their excellent editing. I want to specifically thank my parents and family for their unwavering love and support.

V. THE BIA’S MISINTREPTATION OF THE PARTICULARLY SERIOUS CRIME EXCEPTION	26
A. RESOLUTION OF THE CONFUSION SURROUNDING THE AGGRAVATED FELONY CLAUSE OF THE PARTICULARLY SERIOUS CRIME EXCEPTION	27
1. Congressional Intent	27
2. The BIA’s Flawed Reasoning.....	28
B. RESOLUTION OF THE PARTICULARLY SERIOUS CRIME AND DANGEROUSNESS TO THE COMMUNITY CONFLATION	31
VI. GETTING AROUND <i>CHEVRON</i> : A PATH TO A COHERENT INTERPRETATION AND APPLICATION OF THE PARTICULARLY SERIOUS CRIME EXCEPTION.....	34
A. AGGRAVATED FELONIES.....	39
B. DANGEROUSNESS TO THE COMMUNITY	39
VII. CONCLUSION.....	40

I. INTRODUCTION

Envision living with the constant fear of being tortured or killed for no other reason than having a different political opinion than those in power. While that may be difficult to imagine for those who live in the United States, unfortunately, many around the world must live with that fear or flee from their homes. That fear has mobilized an estimated 11,000 to 15,000 refugees to flee from Syria.¹ The mass exodus followed Syrian President Bashar al-Assad’s siege of the western city of Homs, which is “the heart of an 11-month uprising against his rule.”² In those early months of violence, only around 7000 Syrian refugees had registered with the United Nations High Commissioner for Refugees (“UNHCR”).³ However, given the persistent violence and the recent allegations that President al-Assad has used chemical weapons on or near civilian populations,⁴ it is unsurprising that current UNHCR projections estimate that there are over two million Syrian refugees.⁵ And according to the UNHCR, if current trends persist, there may be well over three million Syrian refugees by the

1. Emma Batha, *Syrian Guards Shoot Fleeing Refugees – Rights Group*, ALERTNET (Mar. 2, 2012, 7:32 PM), <http://www.trust.org/alertnet/news/syrian-guards-shoot-fleeing-refugees-rights-group>.

2. *Id.*

3. *Id.*

4. *Syria Chemical Weapons Allegations*, BBC (Aug. 21, 2013), <http://www.bbc.co.uk/news/world-middle-east-22557347>.

5. *Stories from Syrian Refugees*, UNHCR, <http://data.unhcr.org/syrianrefugees/syria.php> (last visited Oct. 2, 2013).

end of 2013.⁶

In 2010, the UNHCR estimated there were 10.55 million individuals worldwide who had or were seeking refugee status,⁷ including just under one million individuals who applied for asylum in that year alone.⁸ During the same period, the United States received an estimated 54,300 new asylum applications, the second largest total of any reporting country.⁹ As the statistics¹⁰ and news reports from around the world suggest,¹¹ we continue to live in a world where millions of refugees and asylum seekers require the protection that the United Nations Convention Relating to the Status of Refugees¹² (“the Convention”) and United Nations Protocol Relating to the Status of Refugees¹³ (“the Protocol”) provide. As a signatory to the Protocol, the United States has a legal obligation to provide protection.¹⁴ Failing to do so not only violates international law, but more importantly, it makes a vulnerable population—refugees and asylum seekers—even more vulnerable by potentially returning them to a country where their life or freedom is likely to be threatened. Unfortunately, United States asylum and refugee law—which mirrors and is intended to implement the Convention and the Protocol—has been seriously misinterpreted by the Board of Immigration Appeals (“BIA”), which is the administrative body charged with interpreting and implementing U.S.

6. *Id.*

7. UNITED NATIONS HIGH COMM’R FOR REFUGEES, UNHCR STATISTICAL YEARBOOK 2010, at 6 (10th ed. 2011) [hereinafter UNHCR STATISTICS], available at <http://www.unhcr.org/4ef9cc9c9.html>.

8. *Id.* at 42. Although this constituted a 10 percent global decrease compared to 2009, the three previous years showed annual increases in the total number of individuals seeking refugee status and filing new asylum applications worldwide. *Id.*

9. *Id.* New asylum applications in the United States rose by 13 percent from 2009 to 2010. *Id.*

10. *Id.* at 7, 6, 42.

11. See, e.g., Tami Abdollah, *Citing Persecution, Judge Grants Gay Mexican Immigrant Asylum in the U.S.*, L.A. TIMES (Jan. 31, 2007), <http://articles.latimes.com/2007/jan/31/local/me-persecution31> (chronicling the persecution of a gay Mexican immigrant on account of his membership in a particular social group by the Mexican authorities); *Chinese Writer Yu Jie Describes ‘Inhumane Treatment’*, BBC (Jan. 19, 2012), <http://www.bbc.co.uk/news/world-asia-china-16625119> (describing the persecution by the Chinese government of political dissenters); Aislinn Laing, *Rowan Williams Urges Robert Mugabe to Stop Persecution of Anglicans*, TELEGRAPH (Jan. 31, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/8293170/Rowan-Williams-urges-Robert-Mugabe-to-stop-persecution-of-Anglicans.html> (alleging the religious persecutions of Anglican worshippers by Zimbabwean President Robert Mugabe).

12. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter U.N. Convention].

13. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 268, [hereinafter U.N. Protocol].

14. See United Nations High Comm’r for Refugees, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, at 1, 4 (Apr. 1, 2011), <http://unhcr.org/3b73b0d63.html>; *INS v. Stevic*, 467 U.S. 407, 416 (1984).

immigration law,¹⁵ and the majority of circuit courts.

In 2011, following several panel hearings, the Ninth Circuit, sitting en banc, decided *Delgado v. Holder*.¹⁶ *Delgado* addressed an issue that has made its way through most of the Courts of Appeals within the last six years and has led to a split among the circuits.¹⁷ The primary issue the Ninth Circuit dealt with in *Delgado* was the withholding of removal provision of the Immigration and Nationality Act (“INA”) and one of its exceptions, commonly referred to as the “particularly serious crime” exception.¹⁸ Withholding of removal is a form of relief provided to any otherwise removable alien¹⁹ if that alien’s “life or freedom would be threatened . . . because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”²⁰ Thus, the statute provides that an alien cannot be removed or deported, if the alien can establish that his or her “life or freedom would be threatened” because of one of the enumerated reasons. However, the particularly serious crime exception provides that an alien is not eligible for withholding of removal if the Attorney General decides that the alien, “having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States.”²¹ Congress has established that certain aggravated felonies²² are per se particularly serious crimes.²³ The division among the circuits derives from the portion of the statute that reads as follows:

15. *E.g.*, *Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1160 (9th Cir. 2011).

16. *Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011) (en banc).

17. Regarding the interpretation of “particularly serious crime” in 8 U.S.C. § 1231(b)(3)(B)(ii), the Third Circuit has held that the language of the statute makes clear that a crime cannot be particularly serious unless it is an aggravated felony. *Alaka v. Attorney Gen. of the U.S.*, 456 F.3d 88, 104–05 (3d Cir. 2006). However, the Seventh Circuit and the BIA have held that that language of the statute allows the Attorney General to designate crimes as particularly serious regardless of their classification as aggravated felonies. *Ali v. Achim*, 468 F.3d 462, 469–70 (7th Cir. 2006), *cert. granted*, 551 U.S. 1188 (2007), *and cert. dismissed*, 552 U.S. 1085 (2007); *In re N-A-M-*, 24 I. & N. Dec. 336, 337 (B.I.A. 2007), *aff’d*, 587 F.3d 1052, 1056 (10th Cir. 2009). Several other circuits have since upheld the BIA’s decision in *N-A-M-* as reasonable. *Delgado*, 648 F.3d at 1102–05; *Gao v. Holder*, 595 F.3d 549, 556 (4th Cir. 2010); *N-A-M v. Holder*, 587 F.3d 1052, 1056 (10th Cir. 2009); *Nethagani v. Mukasey*, 532 F.3d 150, 155–57 (2d Cir. 2009).

18. *Delgado*, 648 F.3d at 1102–05.

19. The term “alien” will be used as statutorily defined within Title 8 of the United States Code. Alien is defined as “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3) (2012).

20. *Id.* § 1231(b)(3)(A).

21. *Id.* § 1231(b)(3)(B)(ii).

22. The term “aggravated felony” is a term of art in immigration law used to refer to those offenses enumerated in 8 U.S.C. § 1101(a)(43)(A)–(U). *Delgado*, 648 F.3d at 1101.

23. 8 U.S.C. § 1231(b)(3)(B)(iv).

[A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.²⁴

Specifically, the controversy lies in the operation of the second sentence. The BIA has interpreted, and the majority of circuits have upheld, that the second sentence means that any crime may be classified as a “particularly serious crime.”²⁵ However, for the reasons discussed in this Note, that interpretation is contrary to the plain meaning of the statute, the policy behind it, and the international treaty that the statute is meant to implement.²⁶

In light of the United States’ obligations under the Convention and Protocol, Congress amended the INA in 1980²⁷ to mirror the language of the Convention.²⁸ As the statute now reads, the withholding of removal provision mirrors the non-refoulement principle,²⁹ as embodied in Article 33(1) of the Convention. The non-refoulement principle of Article 33(1) of the Convention simply provides that “[n]o Contracting State shall expel or return” a refugee to a country where his or her “life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”³⁰ And the particularly serious crime exception recites, almost verbatim, the sole exception to the non-refoulement principle in Article 33(2).³¹

While a cursory examination of the withholding of removal statute may lead one to conclude that it complies with the United States’

24. *Id.*

25. *Ali v. Achim*, 468 F.3d 462, 469–70 (7th Cir. 2006) (holding that the language of the statute did not strip the Attorney General of designating crimes as particularly serious regardless of their classification as aggravated felonies), *cert. granted*, 551 U.S. 1188 (2007), and *cert. dismissed*, 552 U.S. 1085 (2007); *In re N-A-M-*, 24 I. & N. Dec. 336, 337–38 (B.I.A. 2007) (same), *aff’d*, 587 F.3d 1052, 1056 (10th Cir. 2009). *See Delgado v. Holder*, 648 F.3d 1095, 1102–05 (9th Cir. 2011) (upholding the BIA’s decisions in *N-A-M-* as reasonable); *Gao v. Holder*, 595 F.3d 549, 556 (4th Cir. 2010) (same); *N-A-M v. Holder*, 587 F.3d 1052, 1056 (10th Cir. 2009) (same); *Nethagani v. Mukasey*, 532 F.3d 150, 155–57 (2d Cir. 2009) (same).

26. *See infra* Part V.A.

27. H.R. REP. NO. 96-608, at 1–5 (1979).

28. *Compare* 8 U.S.C. § 1231(b)(3)(A)–(B)(iv), with U.N. Convention, *supra* note 12, at 176.

29. 8 U.S.C. § 1231(b)(3)(A).

30. U.N. Convention, *supra* note 12, at 176.

31. *Compare* 8 U.S.C. § 1231(b)(3)(B)(ii), with U.N. Convention, *supra* note 12, at 176.

obligations under the Convention and Protocol, administrative decisions by the BIA and judicial decisions by the majority of circuits have seriously misinterpreted the particularly serious crime exception. This Note will provide a comprehensive analysis of the particularly serious crime exception³² from its origins in Article 33 of the Convention, to its application in the recent case of *Delgado v. Holder*.³³ An examination of the origin, statutory history, interpretation, and application of the particularly serious crime exception will demonstrate that (1) the interpretation of the BIA and the majority of circuits has stretched the exception further than Congress intended and further than the United States agreed to as a signatory to the Protocol,³⁴ and (2) the BIA's interpretation of the exception as not requiring a separate finding of ongoing dangerousness to the community is contrary to the plain meaning of the statute as well as general international consensus.³⁵ Part II of this Note examines the origin and history of the particularly serious crime exception in Article 33 of the Convention and attempts to unearth the drafters' intent with respect thereto. Part III explores the statutory history of the exception as enacted and amended by Congress and its interpretation by the BIA and the courts. Part IV considers the case of *Delgado v. Holder*³⁶ as a case study to provide context for the analysis of the issues addressed in Parts V and VI. Part V demonstrates that the interpretation of the BIA and the majority of circuits stretches the exception not only beyond the scope intended by the drafters of the Convention but also beyond the broadened version enacted by Congress. Furthermore, it will argue that the exception requires two findings: (1) that the alien has been convicted of a particularly serious crime *and* (2) that the alien poses an ongoing danger to the community. Part VI will consider how to bring the withholding of removal statute and its exception into conformity with the letter and spirit of the Convention in light of the *Chevron* doctrine,³⁷ which restricts the judicial review of administrative decisions under certain circumstances.

32. 8 U.S.C. § 1231(b)(3)(B)(ii), (iv).

33. *Delgado v. Holder*, 648 F.3d 1095, 1102–05 (9th Cir. 2011) (en banc).

34. *See infra* Part V.A.

35. *See infra* Part V.B.

36. *Delgado*, 648 F.3d at 1102–05.

37. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

II. ORIGIN AND HISTORY OF THE NON-REFOULEMENT PRINCIPLE AND THE PARTICULARLY SERIOUS CRIME EXCEPTION IN ARTICLE 33 OF THE CONVENTION AND INTERNATIONAL LAW

A. BACKGROUND: HISTORY AND CONTEXT OF THE NON-REFOULEMENT PRINCIPLE AND ITS EXCEPTION IN THE CONVENTION

The non-refoulement principle, in its earliest forms, reflected the idea that people should not be expelled or returned to a country where they would likely face persecution or torture.³⁸ The principle arose relatively recently, in the early- to mid-nineteenth century.³⁹ It developed in the context of political turmoil in Europe and South America, and in particular, in response to the mass slaughters of Jewish and Christian minorities across Russia and the Ottoman Empire.⁴⁰ In light of these atrocities, it became widely accepted that those who flee their own—often repressive—governments were worthy of protection.⁴¹ The first international implementation of the non-refoulement principle was in the 1933 Convention Relating to the International Status of Refugees, which provided that signatory states could not remove refugees or prevent them from entering their territory except if required by national security or public order.⁴² In what can only be understood as a rejection of the absoluteness of the non-refoulement principle, only eight States ratified the 1933 Convention, and several only did so with reservations and declarations regarding the relative-absoluteness of the principle.⁴³

In 1951 the United Nations convened in Geneva, Switzerland, to address, among other things, the problems faced by European refugees and their host nations following the end of World War II.⁴⁴ What resulted was

38. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 117 (2d ed. 1996).

39. *Id.* at 117–18. In fact prior to then, it was common for sovereigns to enter into formal agreements for the mutual extradition of “subversives, dissidents, and traitors.” *Id.* at 117.

40. *Id.* at 118.

41. *Id.* For example, in 1905, the United Kingdom passed the Aliens Act recognizing the non-refoulement principle. It provided for an exception to a provision which barred entry into the United Kingdom for “want of means” if those seeking to enter were doing so to avoid “prosecution or punishment on religious or political grounds or for an offence of a political character, or persecution involving danger of imprisonment or danger to life or limb on account of religious belief.” *Id.* (internal quotation marks omitted).

42. *Id.*

43. *Id.*

44. See Sadako Ogata, *Foreword* to PAUL WEIS, *THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS* 4, 4 (Paul Weis ed., 1995), available at <http://www.unhcr.org/4ca34be29.html>.

the Convention.⁴⁵ Although the international community had attempted to deal with the problems facing refugees in the past,⁴⁶ the Convention became the “most comprehensive legally binding international instrument” for the treatment of refugees.⁴⁷ The Convention defined a refugee as any person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality” and because of such fear is unable or unwilling to avail himself of the protection of that country.⁴⁸ At the time, the definition of refugee was limited to those affected by events occurring before January 1, 1951, which essentially limited the application of the term to Europeans who had lived through World War II.⁴⁹ However, in 1967, due to “new refugee situations [that] ha[d] arisen since the Convention was adopted,” the United Nations gathered and drafted the Protocol, which incorporated most of the Convention by reference while removing the language that limited refugees to those who were affected by events prior to January 1, 1951.⁵⁰

Notwithstanding the narrow definition of refugee that the Convention adopted, one of the most important and fundamental provisions that emerged from the Convention was the principle of non-refoulement.⁵¹ The principle, as embodied in Article 33(1) of the Convention, states that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”⁵² The principle was considered so fundamental that in the early drafts of the Convention, no exceptions were proposed.⁵³ However, concerns again surfaced regarding the absoluteness of the non-refoulement principle, which led to the inclusion of Article 33(2) of the Convention.⁵⁴ Article 33(2) states, “[t]he benefit of the present provision [in Article 33(1)] may not, however, be claimed by a refugee . . . who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of

45. See generally U.N. Convention, *supra* note 12.

46. *Id.* See also GOODWIN-GILL, *supra* note 38, at 118–19.

47. Ogata, *supra* note 44, at 4.

48. U.N. Convention, *supra* note 12, at 152.

49. *Id.*

50. U.N. Protocol, *supra* note 13, at 268.

51. GOODWIN-GILL, *supra* note 38, at 119–20.

52. U.N. Convention, *supra* note 12, at 176.

53. GOODWIN-GILL, *supra* note 38, at 120.

54. *Id.*

that country.”⁵⁵

B. UNDERSTANDING THE NON-REFOULEMENT PRINCIPLE AND ITS
EXCEPTION: THE DELEGATE’S INTENT AND SUBSEQUENT INTERPRETATION
IN INTERNATIONAL LAW

Following the end of World War II, the United Nations appointed the Ad Hoc Committee on Statelessness and Related Problems (“Ad Hoc Committee”) to draft a revised and consolidated convention relating to the status of refugees.⁵⁶ When the Ad Hoc Committee met in 1950, the members considered the principle of non-refoulement so fundamental that no exception to the principle was introduced.⁵⁷ However, as previously noted, by 1951, changes in the international situation led some Convention delegates to express concerns regarding the absoluteness of the non-refoulement principle, which led to the introduction of what is now Article 33(2), the sole exception to the non-refoulement principle.⁵⁸ The exception was a joint proposal submitted by the representatives from the United Kingdom and France.⁵⁹ It arose out of concerns raised by the U.K. representative during the first session of the Ad Hoc Committee.⁶⁰ At the second session of the Ad Hoc Committee, the U.K. representative explained that, despite the U.K.’s reservations regarding the absoluteness of the non-refoulement principle,

[t]he power to expel [an alien] would not . . . be employed if it would endanger [the alien’s] life, but if the persecution to which he would be subjected in his country of origin was not very serious, the Government of the country where he had taken refuge might feel a little more inclined to send him there if he refused to mend his ways and could not find another country to receive him.⁶¹

However, several representatives took issue with the implications of the comments made by the representative of the United Kingdom, including the representative of the United States.⁶² In response to the

55. U.N. Convention, *supra* note 12, at 176.

56. GOODWIN-GILL, *supra* note 38, at 119.

57. *Id.* at 119–20. *See* WEIS, *supra* note 44, at 233 (indicating that “[t]he Draft Convention as adopted by the *ad hoc* Committee at its first session” provided for an absolute right against refoulement without any exceptions).

58. GOODWIN-GILL, *supra* note 38, at 120 & n.15.

59. WEIS, *supra* note 44, at 235.

60. *Id.* at 234. The U.K. representative stated that the U.K.’s concerns lie in “certain exceptional cases, including those in which an alien, despite warning, persists in conduct prejudicial to good order and government and the ordinary sanctions of the law have failed to stop such conduct.” *Id.*

61. *Id.*

62. *Id.*

statements made by the representative of the United Kingdom, the U.S. representative stated that

[he] was sure that the UK representative would not wish to impair the provisions of Article [33(1)] . . . [and] it would be highly undesirable to suggest in the text of that Article that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution.⁶³

Prior to eventually cosponsoring the non-refoulement exception, the French representative considered that “any possibility, even in exceptional circumstances, of a genuine refugee being returned to his country of origin would not only be absolutely inhuman, but was contrary to the very purpose of the Convention.”⁶⁴

Despite the misgivings of several delegates as to the advisability of an exception to the non-refoulement principle contained in Article 33(1), the sponsors of the exception were adamant that the exception be narrowly drawn and limited in scope.⁶⁵ In connection with a proposal to include “or having been declared by a court a[] habitual offender” in the exception, the U.K. representative stated that

[he] hoped that the scope of the joint amendment would not be unduly widened. . . . [And] that in order to be classified by a court as a hardened or habitual criminal, a person must either have committed serious crimes, or an accumulation of petty crimes. The first case could be covered by the joint amendment, and he was quite content to leave the second case outside the scope of the provision.⁶⁶

Additionally, in acknowledging the importance of the non-refoulement principle, the delegates from the United Kingdom and France commented that “[r]easons such as the security of the country” are the only reasons that should be invoked as an exception to the non-refoulement principle.⁶⁷

In fact, with the end of World War II and the beginning of the Cold War, national security became an overriding concern among western nations, and it is often cited as the reason for the introduction and inclusion of the Article 33(2) exception.⁶⁸ Thus, not surprisingly, much of the

63. *Id.*

64. *Id.* at 235.

65. *See id.* at 239 (discussing suggestions made by various delegates regarding the appropriate language and interpretation for the exception).

66. *Id.*

67. *Id.* at 236.

68. *See* GOODWIN-GILL, *supra* note 38, at 120 n.15; WEIS, *supra* note 44, at 236–37 (noting that changes in the political climate and increased concerns regarding national security necessitated some

discussion among the delegates during the Convention related to national security concerns.⁶⁹ The delegates from the United Kingdom and France noted “that the [international] climate of opinion had altered since Article[33(1)] had been drafted” and that each country had become “more keenly aware of the current dangers to its national security.”⁷⁰ Similarly, the Canadian delegate acknowledged that the “international situation had deteriorated” and that many governments would not accept the principle of non-refoulement unconditionally.⁷¹ Additionally, several delegates thought it inevitable that, among the large number of refugees, some might “be tempted to engage in [espionage] on behalf of a foreign Power against the country of their asylum, and it would be unreasonable to expect the [country] not to safeguard itself against such a contingency.”⁷²

Neither the Convention nor the delegates attempted to further define what exactly was meant by a “particularly serious crime.” However, Dr. Paul Weis’s commentary on the particularly serious crime exception is particularly enlightening due in large part to the fact that he was not only a universally recognized expert on international refugee law, but also because he was closely involved in the preparation of the Convention.⁷³ In his commentary, Dr. Weis noted that, while exactly what crimes are particularly serious is difficult to define, the exception certainly includes crimes such as murder, rape, armed robbery, and arson.⁷⁴ Moreover, Article 1(F) of the Convention makes reference to “serious non-political crime[s],”⁷⁵ which has subsequently been defined by the *Handbook on Procedures and Criteria for Determining Refugee Status* (“*Handbook*”).⁷⁶ The *Handbook* defines a “‘serious’ non-political crime” as a “capital crime or a very grave punishable act.”⁷⁷ The fact that the Convention requires that a crime be particularly serious before an alien can be returned to the country of likely persecution evidences intent that the crime be sufficiently severe to elevate it from an “ordinary crime” or a “serious crime” to a “particularly serious” one; otherwise the words “particularly serious”

means for countries to protect themselves against espionage).

69. See WEIS, *supra* note 44, at 236–41.

70. *Id.* at 236.

71. *Id.* at 237.

72. *Id.* at 236–37.

73. Ogata, *supra* note 44, at 4.

74. WEIS, *supra* note 44, at 246.

75. U.N. Convention, *supra* note 12, at 156.

76. U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶ 155, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992) [hereinafter *Handbook*], available at <http://www.unhcr.org/3d58e13b4.html>.

77. *Id.*

would have no meaning.⁷⁸ Thus, logic and principles of statutory construction suggest that a “particularly serious crime” is a crime that is more serious than a “capital crime or a very grave punishable act.”⁷⁹

Nevertheless, according to Dr. Weis and other scholars, notwithstanding a finding that an alien has committed a particularly serious crime, the principle of proportionality should be applied.⁸⁰ As Dr. Weis suggests, the principle of proportionality requires balancing the danger the alien poses to the community against the danger the alien would face if returned to the country of likely persecution.⁸¹ In fact, the principle of proportionality is in line with statements made by the U.K. delegate who cosponsored the exception.⁸² In discussing the exception, the U.K. delegate explained that the power to return an alien to the country of likely persecution should not be employed where the severity of the persecution that the alien would face outweighs the cost to society if the alien were permitted to stay.⁸³

Part and parcel of the principle of proportionality is the idea that the exception requires two separate findings.⁸⁴ According to Dr. Weis, a refugee may only be returned to the country of likely persecution if the refugee is convicted, by final judgment, of a particularly serious crime and if the refugee constitutes a danger to the country of refuge.⁸⁵ Accordingly, “a particularly serious crime, if committed in a moment of passion, may not necessarily” warrant the return of a refugee to the country of likely persecution.⁸⁶ This interpretation finds significant support not only in statements made by the delegates, but also in the very text of the Convention. Article 33(2) of the Convention clearly links the “particularly serious crimes” clause with the “danger to the community” clause of the

78. See *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (“The cardinal principle of statutory construction is to save and not destroy.’ It is [the court’s] duty ‘to give effect, if possible, to every clause and word of a statute’” (citations omitted)); *Miller v. United States*, 363 F.3d 999, 1008 (9th Cir. 2004) (“Courts must aspire to give meaning to every word of a legislative enactment”).

79. See *In re Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982) (noting that “particularly serious crimes” are more than “serious nonpolitical crimes”).

80. WEIS, *supra* note 44, at 246; GOODWIN-GILL, *supra* note 38, at 140.

81. WEIS, *supra* note 44, at 246. See GOODWIN-GILL, *supra* note 38, at 140.

82. WEIS, *supra* note 44, at 234.

83. See *id.* at 234, 246.

84. *Id.* at 246.

85. *Id.*

86. *Id.* See GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULEMENT 228 (1989) (noting that a capital crime committed while in a state of emotional distress or in self-defense would not constitute a danger to the community).

exception.⁸⁷ In light of the intended narrowness of the exception,⁸⁸ as well as the primary goal of the Convention, the protection of refugees,⁸⁹ the interpretation requiring a separate and distinct finding of “danger[ousness] to the community” most closely vindicates the policy behind the Convention. As one judge noted, “To accept the . . . contention that the ‘danger to the community’ inquiry is subsumed within the ‘particularly serious’ offense inquiry seems to run afoul of the clear language of [the Convention].”⁹⁰

Still, some question whether the exception requires that an alien must constitute a danger to the community.⁹¹ One of the principle arguments against requiring a separate finding of dangerousness to the community has been based on judicial economy.⁹² In determining that a separate finding was not required, it has been argued that “[a] separate determination of an alien’s potential dangerousness would require a prediction as to an alien’s potential for recidivism and would lead to extensive, drawn-out hearings complete with psychological evaluations and expert testimony,”⁹³ and that “[t]he phrase ‘danger to the community’ is an aid to defining a ‘particularly serious crime,’ not a mandate that administrative agencies or the courts determine whether an alien will become a recidivist.”⁹⁴ However, for the reasons stated above, many other scholars are adamant that that is exactly what the exception requires.⁹⁵ In fact, courts in both Canada⁹⁶ and the United Kingdom⁹⁷ have held that the language of Article 33(2) requires a

87. U.N. Convention, *supra* note 12, at 176.

88. See *supra* text accompanying notes 57–72.

89. See U.N. Convention, *supra* note 12, at 150–52 (indicating that one of the primary reasons for the Convention was the “profound concern for refugees and [that the Convention’s intent was] to assure refugees the widest possible . . . fundamental rights and freedoms”).

90. *N-A-M v. Holder*, 587 F.3d 1052, 1061 (10th Cir. 2009) (Henry, J., concurring).

91. *In re Carballe*, 19 I. & N. Dec. 357, 360 (B.I.A. 1986); GOODWIN-GILL, *supra* note 38, at 140.

92. *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1222–23 (11th Cir. 1985).

93. *Id.*

94. *Carballe*, 19 I. & N. Dec. at 360 (arguing that the exception does not require administrative agencies or courts to determine whether an alien poses an ongoing danger to the community).

95. See Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, 129 (Erika Feller et al. eds., 2003), available at <http://www.unhcr.org/refworld/docid/470a33af0.html>; Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1080–85 (2011); ATLE GRAHL-MADSEN, COMMENTARY OF THE REFUGEE CONVENTION 1951: ARTICLES 2-11, 13-37, at 139 (1963), available at <http://www.unhcr.org/3d4ab5fb9.html> (noting that the exception “can clearly not refer to a past danger, but only to a present or future danger”).

96. *Pushpanathan v. Canada (Minister of Citizenship & Immigration)*, [1998] 1 S.C.R. 982, ¶ 12 (Can.).

97. *R. v. Sec’y of State for the Home Dep’t*, [2006] EWHC 3513 (Eng. Q.B.).

finding of ongoing dangerousness to the community.⁹⁸ Similarly, before an alien can be returned to the country of likely persecution, Germany requires that an alien be found to be in danger of relapsing into crime, thus making him a serious threat to the community.⁹⁹ As the UNHCR has suggested, and which is supported by “a wealth of persuasive authority,” what the danger to the community language of the exception implies is that the “decisive factor is not the seriousness or categorization of the crime that the refugee has committed, but, rather, whether the refugee, in light of the crime and conviction, poses a *future* danger to the community.”¹⁰⁰

While there is international consensus that the exception requires a separate finding of dangerousness to the community, what remains unanswered is what constitutes a particularly serious crime. As previously noted, one can conclude, by inference, that a particularly serious crime is at least a “capital crime or a very grave punishable act.”¹⁰¹ Still, what constitutes a grave punishable act is not really any clearer. However, the lack of certainty with regard to what constitutes a particularly serious crime may have been by design. This is because any per se definition of a particularly serious crime would obviate the need for balancing the nature and circumstances of the crime against the potential persecution faced in the alien’s country of origin, and such a result would violate the principal of proportionality intended by the delegate from the United Kingdom¹⁰² and echoed by several scholars.¹⁰³ Nevertheless, others have argued that a crime is per se particularly serious if the punishment is incarceration for five years or more, in North America or Europe.¹⁰⁴ But, as others have already noted, the problem with this approach is that the criminal penalties of some countries are more draconian than others and, “[a]s the United States imposes ever-longer terms of incarceration for non-violent crimes, such a per se approach becomes increasingly untenable.”¹⁰⁵ Consequently, the proper approach for considering the seriousness of a refugee’s crime is

98. Farbenblum, *supra* note 95, at 1081–82.

99. STENBERG, *supra* note 86, at 240.

100. N-A-M v. Holder, 587 F.3d 1052, 1062 (10th Cir. 2009) (Henry, J., concurring) (quoting Brief for the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner at 17, N-A-M v. Holder, 587 F.3d 1052 (10th Cir. 2009) (No. 08-9527, 07-9580)) (internal quotation marks omitted).

101. See *supra* text accompanying notes 75–79.

102. WEIS, *supra* note 44, at 234, 236.

103. *Id.* at 246; GOODWIN-GILL, *supra* note 38, at 140.

104. See ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 294 (1966).

105. Kathleen M. Keller, Note, *A Comparative and International Law Perspective on the United States (Non)Compliance with its Duty of Non-Refoulement*, 2 YALE HUM. RTS. & DEV. L.J. 183, 189 n.29 (1999).

a contextual approach. The UNHCR has also recommended that a contextual approach be taken with regard to the particularly serious crime exception, noting that

[w]hat constitutes an offence permitting forcible repatriation in one case may not be such an offence in another case because of the circumstances of the crime and the character of the criminal. Only where one or several of the convictions are symptomatic of the basically criminal, incorrigible nature of the person and where any other measure (detention, assigned residence, resettlement in another country) are [*sic*] not practical to prevent him from endangering the community may repatriation be resorted to.¹⁰⁶

Several countries use the contextual approach in at least some respect.¹⁰⁷ While the contextual approach gives courts the freedom to adhere to the intent underlying the Convention by taking into consideration the proportionality principle and the circumstances of a criminal conviction, the contextual approach is also more likely to be applied arbitrarily.¹⁰⁸

The historical record and the international application of the particularly serious crime exception reveal much about its nature: (1) the exception was clearly intended to be narrow and limited;¹⁰⁹ (2) the phrase particularly serious crime should be interpreted to mean a capital crime or, at the least, a very grave punishable offense;¹¹⁰ (3) in light of the intent of the drafters and the proportionality principle, the particularly serious crime determination should be made using the contextual approach;¹¹¹ and (4) despite the lack of unanimity on the subject, the international consensus, the spirit of the Convention, and the language of the exception require a finding that, in addition to having committed a particularly serious crime, the alien also constitutes a danger to the community.¹¹²

106. STENBERG, *supra* note 86, at 227 (quoting UNHCR guidelines).

107. Keller, *supra* note 105, at 189–90 (indicating that in considering the particularly serious crime exception, Sweden and Canada both employ the contextual approach).

108. *Id.* at 189 (noting that in one Swedish case a South African who had been convicted of drug offenses and sentenced to a cumulative six and half years was determined to have committed a particularly serious crime while an Eastern European who was sentenced to a cumulative fifteen years for smuggling and drug offenses was considered not to have committed a particularly serious crime).

109. *See supra* text accompanying notes 63–66.

110. *See supra* text accompanying notes 75–79.

111. *See supra* text accompanying notes 101–08.

112. *See supra* text accompanying notes 84–100.

III. THE EVOLUTION OF THE PARTICULARLY SERIOUS CRIME EXCEPTION IN THE UNITED STATES

Following the United States' adoption of the Protocol in 1968, the then-current law had been "held by court[s] and administrative decisions to accord to aliens the protection required under Article 33."¹¹³ However, in 1980, Congress amended the INA in order to conform U.S. law to its obligations under the Protocol by mirroring the language of the Convention.¹¹⁴ In amending the INA, the House Judiciary Committee Report noted that "although [U.S. law] has been held . . . to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section [of the INA] to the Convention."¹¹⁵ Thus, section 243(h), the withholding of removal provision of the INA was amended to read:

The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. [The preceding sentence shall not apply] if the Attorney General determines that . . . the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.¹¹⁶

The language of the amended withholding of removal provision and its exception, almost exactly mirrors the language of the non-refoulement principle and its exception in Article 33 of the Convention.¹¹⁷

In 1982, the BIA, the agency charged with interpreting and implementing the INA,¹¹⁸ addressed how the courts ought to determine whether a crime is particularly serious in *In re Frentescu*.¹¹⁹ The BIA searched the language of the INA, its legislative history, the Convention,

113. H.R. REP. NO. 96-608, at 18 (1979).

114. *Id.*; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

115. H.R. REP. NO. 96-608, at 18.

116. Refugee Act of 1980, Pub. L. No. 96-212, sec. 202, § 1253, 94 Stat. 102, 107 (codified as amended at 8 U.S.C. § 1231 (2012)).

117. Compare Pub. L. No. 96-212, § 202, 94 Stat. 102, 107, with U.N. Convention, *supra* note 12, at 176 (stating "[n]o contracting State shall expel [an alien] . . . 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." However, the non-refoulement principle may not be claimed "by [an alien] . . . who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.").

118. *E.g.*, *Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1160 (9th Cir. 2011).

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

the Protocol, and the Handbook for a definition of a particularly serious crime, without success.¹²⁰ Noting that it was unable to “set forth an exact definition” of the term, the BIA provided several factors that should be weighed in determining the seriousness of a given crime.¹²¹ The factors include “the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.”¹²² The factors set forth in *Frentescu* are currently used to determine a crime’s seriousness.¹²³ Although the case-by-case analysis adopted in *Frentescu* may appear to be in line with the contextual approach envisioned by the drafters of the Convention,¹²⁴ supported by scholars,¹²⁵ and embraced by several other countries,¹²⁶ the *Frentescu* analysis differs in several key respects. Primarily, the contextual approach, as endorsed by the UNHCR, appears to require that the host country consider alternatives to refoulement including, “detention, assigned residence, [and] resettlement in another country” before the alien is returned to the country of likely persecution.¹²⁷ Additionally, in *Frentescu*, the BIA also mentioned that “there are crimes which, on their face, are ‘particularly serious crimes’ or clearly are not ‘particularly serious crimes.’”¹²⁸ In an attempt to promote judicial uniformity and efficiency, the BIA subsequently held that certain crimes, which, on their face are particularly serious crimes, constitute per se particularly serious crimes and “requir[e] no further inquiry into the nature and circumstances of the underlying conviction.”¹²⁹ Furthermore, in *In re Rodriguez-Coto*, the BIA expressly disclaimed the principle of proportionality envisioned by one of the sponsors of the exception,¹³⁰

120. *Id.* at 245–46.

121. *Id.* at 247.

122. *Id.*

123. *See, e.g.*, Gao v. Holder, 595 F.3d 549, 557–58 (4th Cir. 2010); Miguel-Miguel v. Gonzales, 500 F.3d 941, 951 (9th Cir. 2007); *In re L-S-*, 22 I. & N. Dec. 645, 648–49 (B.I.A. 1999); *In re Q-T-M-T-*, 21 I. & N. Dec. 639, 649–50 (B.I.A. 1996).

124. *See supra* text accompanying notes 102–06.

125. *See supra* text accompanying note 103.

126. *See supra* text accompanying notes 107–08.

127. STENBERG, *supra* note 86, at 227 (indicating that “[o]nly where one or several of the convictions are symptomatic of the basically criminal, incorrigible nature of the person and where any other measure (detention, assigned residence, resettlement in another country) are [*sic*] not practical to prevent him from endangering the community may repatriation be resorted to” (quoting a UNHCR general guideline)).

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

129. *In re Garcia-Garrocho*, 19 I. & N. Dec. 423, 425 (B.I.A. 1986), *superseded by statute as recognized in* Blandino-Medina v. Holder, 712 F.3d 1338, 1347 n.9 (9th Cir. 2013).

130. WEIS, *supra* note 44, at 246.

“reject[ing] any interpretation of the phrase[] ‘particularly serious crime’ . . . which would vary with the nature” of the persecution the alien would suffer if returned to the country of likely persecution.¹³¹ The approach adopted by the BIA, which considers the facts and circumstances of some convictions while ignoring others, overlooks the possibility that despite a conviction for a particularly serious crime, the alien does not constitute a danger to the community. Furthermore, it completely disregards the principle of proportionality. Time and again, immigration judges and the BIA have held that a given conviction constitutes a particularly serious crime, making the alien ineligible for withholding of removal, without substantively considering the merits of the alien’s underlying claim.¹³² Such a mechanical application of the exception is the antithesis of what was envisioned by the drafters of the Convention, including not only the sponsors of the exception but the U.S. delegate as well.¹³³

In 1986, the BIA turned its attention to the question of whether a separate and distinct finding of dangerousness to the community is required by the language of the exception. In *In re Carballe*, the BIA held that no separate finding is required.¹³⁴ In *Carballe*, the BIA stated that

[i]f it is determined that the crime was a “particularly serious” one, the question of whether the alien is a danger to the community of the United States is answered in the affirmative. We do not find that there is a statutory requirement for a separate determination of dangerousness focusing on the likelihood of future serious misconduct on the part of the alien.¹³⁵

The BIA conceded that “[i]t must be determined that an [alien] constitutes a danger to the community of the United States” in order to be barred under the particularly serious crime exception.¹³⁶ However, the BIA went on to note that “the statute provides the key for determining whether an alien constitutes such a danger. That is, those aliens who have been finally convicted of particularly serious crimes are presumptively dangers to this country’s community.”¹³⁷ The BIA seems to have relied heavily on the contention that had Congress wished to establish two distinct criteria

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

132. *See, e.g.*, *Delgado v. Holder*, 648 F.3d 1095, 1097–100 (9th Cir. 2011) (en banc); *In re Carballe*, 19 I. & N. Dec. 357, 358–59 (B.I.A. 1986).

133. *See supra* text accompanying notes 58–71.

134. *Carballe*, 19 I. & N. Dec. at 360.

135. *Id.*

136. *Id.*

137. *Id.*

for the particularly serious crime exception, it could have done so by using the word “and.”¹³⁸ Additionally, the BIA also noted comments made in the House Judiciary Committee Report stating that “aliens . . . who have been convicted of particularly serious crimes *which* make them a danger to the community of the United States,” in support of the proposition that “[t]he phrase ‘danger to the community’ is an aid to defining a ‘particularly serious crime,’ not a mandate that administrative agencies or the courts determine whether an alien will become a recidivist.”¹³⁹ Thus, according to the BIA, an alien convicted of a particularly serious crime constitutes a danger to the community and is automatically barred from withholding of removal under the particularly serious crime exception.¹⁴⁰ Despite some courts’ reservations with the BIA’s reasoning, it has been repeatedly affirmed by the Courts of Appeals due in part to the belief that the BIA’s decision is owed deference under *Chevron*.¹⁴¹

In 1990, Congress added a category of crimes that are per se particularly serious crimes.¹⁴² In passing the Immigration Act of 1990, Congress changed the particularly serious crime exception to read that “an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.”¹⁴³ The term “aggravated felony” was first added to the INA in 1988 through the Anti-Drug Abuse Act.¹⁴⁴ At the time, the list of aggravated felonies was rather limited and only included murder, drug trafficking, and trafficking in firearms or destructive devices.¹⁴⁵ However, the Immigration Act of 1990 expanded the list of aggravated felonies to include money laundering and violent crimes where the alien is sentenced to five or more years in prison.¹⁴⁶ Congress again expanded the list of aggravated felonies with the

138. *Id.* at 359.

139. *Id.* at 359–60.

140. *Id.* at 360.

141. *Choeum v. INS*, 129 F.3d 29, 40–41 (1st Cir. 1997) (stating that despite the fact that there is “‘considerable logical force’ to the argument that the Particularly Serious Crime Exception requires a separate determination of dangerousness to the community, [this court] has upheld the agency’s interpretation under *Chevron*”). *See also Ahmetovic v. INS*, 62 F.3d 48, 53 (2d Cir. 1995) (noting that “the BIA’s interpretation conflating the two requirements has been accepted by every circuit that has considered the issue”).

142. Immigration Act of 1990, Pub. L. No. 101-649, sec. 515, §§ 1158, 1253, 104 Stat. 4978, 5053 (codified as amended at 8 U.S.C. §§ 1158, 1253 (2012)).

143. *Id.*

144. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sec. 7342, § 101(a), 102 Stat. 4181, 4469–70 (codified as amended at 8 U.S.C. 1101(a) (2012)).

145. *Id.* at 4469.

146. Immigration Act § 501, 104 Stat. at 5048.

Immigration and Nationality Technical Correction Act of 1994.¹⁴⁷ The expanded list included offenses related to transmitting national defense information, document fraud, fraud with a loss to the victim of more than \$200,000, racketeering, prostitution, kidnapping, or an attempt or conspiracy to commit any of the enumerated offenses.¹⁴⁸

By 1996, however, Congress reversed course and began to restrict the ever-expanding aggravated felony provision of the particularly serious crime exception.¹⁴⁹ The Antiterrorism and Effective Death Penalty Act of 1996, authorized the Attorney General to remove aggravated felonies from the category of crimes that are *per se* particularly serious if he judged them not to be particularly serious.¹⁵⁰ Additionally, realizing that the expansive list of aggravated felonies which are *per se* particularly serious may be contrary to the Protocol, Congress amended the aggravated felony provision of the particularly serious crime exception to permit the Attorney General to grant withholding of removal, notwithstanding an alien's conviction of an enumerated aggravated felony, if "[it] is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees."¹⁵¹ That same year, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") which enacted the current version of the particularly serious crime exception,¹⁵² codified as 8 U.S.C. § 1231(b)(3)(B)(ii), (iv).¹⁵³ The relevant provisions of the current version of the statute read as follows:

[Withholding of removal is not available] if the Attorney General decides that— . . .

the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;

. . . an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of

147. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, sec. 222, § 101(a)(43), 108 Stat. 4305, 4320-22 (codified as amended at 8 U.S.C. § 1101 (2012)).

148. *Id.* at 4320.

149. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 413, § 1253(h), 110 Stat. 1213, 1269; Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 305, 110 Stat. 3009, 3009-602 (1996).

150. Sec. 413, §1253(h), 110 Stat. at 1269.

151. *Id.*

152. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, sec. 305, § 1231, 110 Stat. at 3009-546, 3009-602 (codified as amended at 8 U.S.C. § 1231 (2012)).

153. See 8 U.S.C. § 1231(b)(3)(B)(ii), (iv) (2012).

sentence imposed, an alien has been convicted of a particularly serious crime.¹⁵⁴

Unfortunately, despite Congress's attempt to restrict the expansion of the categorical particularly serious crime bar, decisions by the BIA have eviscerated the spirit, if not the letter, of Article 33 of the Convention and circumvented Congress's attempt to bring the particularly serious crime exception back in line with the United States' obligation under the Protocol.¹⁵⁵

Following the enactment of the current version of the exception, the question that arose was whether the language of the exception requires an offense be an aggravated felony to be classified as a particularly serious crime.¹⁵⁶ The statute quite clearly classifies an aggravated felony, for which an alien is sentenced to at least five years or more, as a per se particularly serious crime.¹⁵⁷ However, the function of the second sentence, which states that "[t]he previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime,"¹⁵⁸ is what is in dispute. The first court to issue a precedential decision on the matter was the U.S. Court of Appeals for the Third Circuit. In 2006, in *Alaka v. Attorney General*, the court held that an offense must be an aggravated felony to be considered a particularly serious crime.¹⁵⁹ The court reasoned that in light of principles of statutory construction that "words in a statute must be given their ordinary meaning"¹⁶⁰ and that they be considered in light of the structure of the section in which the key language is found that "[t]he second sentence, authorizing the Attorney General to determine when a conviction is 'particularly serious,' is clearly tied to the first."¹⁶¹ According to the court, the first sentence establishes a category of per se

154. *Id.*

155. See generally *Delgado v. Holder*, 648 F.3d 1095 (9th Cir. 2011) (en banc) (interpreting the particularly serious crime category); *Gao v. Holder*, 595 F.3d 549 (4th Cir. 2010) (same); *N-A-M v. Holder*, 587 F.3d 1052 (10th Cir. 2009) (same); *Nethagani v. Mukasey*, 532 F.3d 150 (2d Cir. 2008) (same); *Alaka v. Att'y Gen.*, 456 F.3d 88 (3d Cir. 2006) (same); *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2006) (same), *cert. granted*, 551 U.S. 1188 (2007), and *cert. dismissed*, 552 U.S. 1085 (2007); *In re N-A-M-*, 24 I. & N. Dec. 336 (B.I.A. 2007) (same), *aff'd*, 587 F.3d 1052 (10th Cir. 2009).

156. See *Delgado*, 648 F.3d at 1102; *Gao*, 595 F.3d at 554–56; *N-A-M*, 587 F.3d at 1056; *Nethagani*, 532 F.3d at 155–57; *Alaka*, 456 F.3d at 104–05; *Ali*, 468 F.3d at 468–70; *In re N-A-M-*, 24 I. & N. Dec. at 338–41.

157. 8 U.S.C. § 1231(b)(3)(B)(iv).

158. *Id.*

159. *Alaka*, 456 F.3d at 105.

160. *Id.* at 104 (quoting *Okeke v. Gonzales*, 407 F.3d 585, 593 (3d Cir. 2005)) (internal quotation marks omitted).

161. *Id.*

particularly serious crimes, namely aggravated felonies for which the alien is sentenced to at least five years in prison.¹⁶² The second sentence serves as a modifier for the first, permitting the Attorney General to designate offenses as particularly serious “notwithstanding the length of the sentence imposed”¹⁶³ Thus, the court noted that the second sentence “explicitly refers back to the ‘previous sentence,’ and accordingly implies that it is limited to aggravated felonies.”¹⁶⁴

Within months, the Seventh Circuit considered the same question and arrived at the opposite conclusion in *Ali v. Achim*.¹⁶⁵ Petitioner, Ali, argued that the language of § 1231(b)(3)(B)(iv) makes aggravated felonies in which the alien is sentenced to five years in prison per se particularly serious and that the second sentence simply allows the Attorney General to determine that an aggravated felony was particularly serious even if the alien was not sentenced to five years in prison.¹⁶⁶ Ali concluded that because the statute does not explicitly provide the Attorney General with discretion to classify nonaggravating felonies as particularly serious crimes—like it does for aggravated felonies with sentences of less than five years—the language of the statute precludes offenses that are not aggravated felonies from being classified as particularly serious crimes.¹⁶⁷ However, the court reasoned,

The designation of aggravated felonies producing sentences of at least five years’ imprisonment as per se “particularly serious” creates no presumption that the Attorney General may not exercise discretion on a case-by-case basis to decide that other nonaggravated-felony crimes are also “particularly serious.” Congress specified that the Attorney General may extend the “particularly serious” designation to aggravated felonies producing prison terms of less than five years. But the absence of a similar provision for nonaggravated-felony crimes does not imply that only aggravated felonies can qualify as “particularly serious” crimes.¹⁶⁸

The following year, in 2007, the BIA issued a published decision addressing the same question,¹⁶⁹ which every subsequent Court of Appeals has held is entitled to deference.¹⁷⁰ In *In re N-A-M-*, the BIA subsumed the

162. *See id.*

163. 8 U.S.C. § 1231(b)(3)(B)(iv). *See Alaka*, 456 F.3d at 104–05.

164. *Id.* at 104–05.

165. *Ali v. Achim*, 468 F.3d 462, 469–70 (7th Cir. 2006), *cert. granted*, 551 U.S. 1188 (2007), *and cert. dismissed*, 552 U.S. 1085 (2007).

166. *Id.* at 469.

167. *Id.* at 469–70.

168. *Id.* at 470.

169. *In re N-A-M-*, 24 I. & N. Dec. 336, 337 (B.I.A. 2007), *aff’d*, 587 F.3d 1052 (10th Cir. 2009).

170. *See, e.g., Gao v. Holder*, 595 F.3d 549, 554 (4th Cir. 2010) (holding that the BIA’s decision

Seventh Circuit's reasoning in *Ali* but also considered the question in light of the "history and background of the particularly serious crime provision."¹⁷¹ The BIA noted that after Congress first linked aggravated felonies to particularly serious crimes in 1990, there was no question that the Attorney General retained the authority to determine on a case-by-case basis whether crimes, falling outside the definition of aggravated felonies, constituted particularly serious crimes.¹⁷² According to the BIA, throughout the many amendments to the particularly serious crime exception, the BIA has consistently found that offenses that are not aggravated felonies may still be particularly serious.¹⁷³ The BIA also reasoned that it could not have been Congress's intent to limit particularly serious crimes to only those classified as aggravated felonies because that would "creat[e] a gap or loophole for particularly serious crimes that happen to escape classification as aggravated felonies. [This] would be inconsistent with the goal of protecting the public, which is at the heart of the 'particularly serious crime' bar."¹⁷⁴ Since the BIA's decision in *N-A-M-*, every Court of Appeals to consider the question has held that the BIA's interpretation of the statute is reasonable and is entitled to deference under *Chevron*,¹⁷⁵ with the most recent being *Delgado v. Holder*.¹⁷⁶

IV. DELGADO V. HOLDER: A CASE STUDY OF THE PARTICULARLY SERIOUS CRIME EXCEPTION

In a case that has spanned over a decade, after two panel hearings, the Ninth Circuit, sitting en banc, decided *Delgado v. Holder*.¹⁷⁷ Joining the majority of circuits that have considered the issue, the Ninth Circuit decided that the BIA's interpretation of the particularly serious crime

is entitled to deference under *Chevron*).

171. *N-A-M-*, 24 I. & N. Dec. at 338–40.

172. *Id.* at 339.

173. *Id.* at 340–41.

174. *Id.* at 341.

175. *Gao*, 595 F.3d at 554–55 (noting that many other circuits have considered the BIA's decision in *N-A-M-* and concluded that the BIA's interpretation is reasonable and entitled to deference). It should be noted that when the circuit split first arose, the United States Supreme Court granted certiorari in *Ali*, but certiorari was subsequently dismissed following a settlement between *Ali* and the government that would allow him to stay in the country. See *Ali v. Achim*, 468 F.3d 462, 469–70 (7th Cir. 2006), *cert. granted*, 551 U.S. 1188 (2007), and *cert. dismissed*, 552 U.S. 1085 (2007); Michael McGarry, Note, *A Statute in Particularly Serious Need of Reinterpretation: The Particularly Serious Crime Exception to Withholding of Removal*, 51 B.C. L. REV. 209, 212 n.23 (2010).

176. *Delgado v. Holder*, 648 F.3d 1095, 1097–98 (9th Cir. 2011) (en banc).

177. *Id.* at 1098 (indicating that the Immigration and Naturalization Service first initiated removal proceedings against *Delgado* in 2001).

exception was both reasonable and permissible.¹⁷⁸

Delgado is a native citizen of El Salvador who entered the United States on a nonimmigrant visa in 1980. He fled El Salvador at the age of ten after his mother and father were tortured and murdered on account of their political beliefs. After arriving in the United States, Delgado was convicted of driving under the influence on three separate occasions.

Delgado's first DUI conviction in 1992 arose from an accident in which he and his passenger suffered broken legs. His subsequent two convictions occurred in 2000 and 2001, respectively. For his three convictions, Delgado was sentenced to one year, sixteen months, and two years in prison, respectively.

Following his second DUI conviction, the Immigration and Naturalization Service ("INS") initiated removal proceedings against him on the grounds that he had overstayed his visa and because his second DUI constituted an aggravated felony.¹⁷⁹ However, the INS ultimately dropped the charge that Delgado's second DUI constituted an aggravated felony.¹⁸⁰ Delgado admitted that he was removable but sought withholding of removal, as well as other forms of relief, on the grounds that he would be persecuted if he was returned to El Salvador.¹⁸¹

The Immigration Judge denied every one of Delgado's applications for relief including his application for withholding of removal on the basis that each one of Delgado's DUIs, individually, constituted a particularly serious crime and that his DUIs, when considered cumulatively, were also particularly serious.¹⁸² On appeal the BIA affirmed the Immigration

178. *Id.* at 1102–05.

179. *Id.* at 1098.

180. *Id.* at 1098 n.5.

181. *Id.* at 1098.

182. *Id.* at 1099. Although it will not be addressed in the body of this Note, the question of whether an alien's offenses can be aggregated to constitute a particularly serious crime is an interesting one that has not been addressed. There is a strong argument to be made that such analysis is impermissible. As previously noted, the BIA set forth the following factors for determining whether an offense is particularly serious: "the nature of the conviction;" "the circumstances and underlying facts of the conviction;" "the type of sentence imposed;" and "whether the type and circumstances of the crime indicate that the alien will be a danger to the community." *In re Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982). The language of each of the factors imposes its own limit. The relevant circumstances and facts that can be considered are those relating to the conviction or the crime, not the alien's criminal record. *See In re Carballe*, 19 I. & N. Dec. 357, 360 (B.I.A. 1986). Similarly, the BIA has held that "the proper focus for determining whether a crime is particularly serious is on the nature of the crime" and not on other factors such as the alien's criminal history or recidivism. *See In re N-A-M-*, 24 I. & N. Dec. 336, 342 (B.I.A. 2007), *aff'd*, 587 F.3d 1052 (10th Cir. 2009). Moreover, the BIA has repeatedly recognized that it is inappropriate to consider the cumulative total of an alien's convictions in the closely-related context of crimes involving moral turpitude. *In re Torres-Varela*,

Judge's decision in an unpublished opinion that provided no analysis on the particularly serious crime question.¹⁸³ At the Ninth Circuit, two panel decisions were issued before the issues Delgado presented were decided by the court sitting en banc.¹⁸⁴

At the Ninth Circuit, Delgado argued that the language of the particularly serious crime exception should be interpreted, as in *Alaka*, to mean that only aggravated felonies could be particularly serious crimes.¹⁸⁵ However, the court held that under *Chevron*, the court must defer to the BIA's precedential decisions interpreting the INA.¹⁸⁶ Under *Chevron*, a BIA decision is entitled to deference when the BIA is interpreting a statute that is "silent or ambiguous."¹⁸⁷ If the statute in question is silent or ambiguous, the court may not "supply the interpretation of the statute [it] think[s] [is] best . . . but must limit [itself] to asking 'whether the agency's answer is based on a permissible construction of the statute.'"¹⁸⁸ Acknowledging that the language of the particularly serious crime exception could be read to mean that only aggravated felonies can be particularly serious as in *Alaka*, the court stated that the interpretation "that any crime potentially can be particularly serious regardless of the sentence imposed," as interpreted in *Ali* and *N-A-M-*, "is at least as reasonable."¹⁸⁹ Much like in *N-A-M-*, the court went on to discuss the evolution of the particularly serious crime exception concluding that there was no evidence to suggest "that Congress intended, by creating a categorical bar and by

the BIA not only stated that a "DUI is a marginal crime" but also that "multiple convictions for the same DUI offense, which individually is not a crime involving moral turpitude, do not, by themselves, aggregate into a conviction for a crime involving moral turpitude[.]" concluding that "nonturpitudinous conduct is not rendered turpitudinous through multiple convictions for the same offense." *In re Torres-Varela*, 23 I. & N. Dec. 78, 86 (B.I.A. 2001). For the same reasons that "nonturpitudinous conduct is not rendered turpitudinous through multiple convictions for the same offense," *id.*, a conviction for a crime that, by itself, is not particularly serious does not become a particularly serious crime through multiple convictions for that same crime, *Delgado*, 648 F.3d at 1112 (Reinhardt, J., concurring in part and concurring in the judgment).

183. *Delgado*, 648 F.3d at 1099.

184. See *Delgado v. Mukasey*, 546 F.3d 1017 (9th Cir. 2008), vacated on rehearing sub nom., *Delgado v. Holder*, 563 F.3d 863 (9th Cir. 2009), rev'd en banc, *Delgado*, 648 F.3d 1095 (9th Cir. 2011). The first two decisions, which have been vacated by the en banc decision, will not be discussed in depth. They are mentioned primarily to highlight the complexity of the aggravated felony issue as it relates to the particularly serious crime exception, as well as the other issues presented in Delgado's case.

185. *Delgado*, 648 F.3d at 1102.

186. *Id.*

187. *Id.* (quoting *Marmolejo-Campos v. Holder*, 558 F.3d 903, 908 (9th Cir. 2009) (en banc)).

188. *Id.* (emphasis added) (quoting *Marmolejo-Campos v. Holder*, 558 F.3d 903, 908 (9th Cir. 2009) (en banc)).

189. *Id.* at 1103.

later relaxing that categorical bar, to eliminate the Attorney General's pre-existing authority to determine that, under the circumstances presented by an individual case, a crime was 'particularly serious,' whether or not the crime was an aggravated felony."¹⁹⁰ Consequently, the court determined that the statute¹⁹¹ is ambiguous and that the BIA's interpretation is reasonable.¹⁹²

The Ninth Circuit subsequently remanded the case to the BIA on the issues of whether the Immigration Judge erred in considering Delgado's DUI convictions cumulatively, and whether the convictions, individually, rise to the level of particularly serious crimes.¹⁹³

V. THE BIA'S MISINTERPRETATION OF THE PARTICULARLY SERIOUS CRIME EXCEPTION

One of the primary motivating reasons for the passage of IIRIRA, which was the final amendment to the particularly serious crime exception, was to prevent violations of the Protocol in light of the expansion of the list of aggravated felonies during the 1990s.¹⁹⁴ Congress acknowledged that the expansive list of aggravated felonies "created tension with the Protocol by sweeping in some 'fairly minor offenses.'"¹⁹⁵ However, as *Delgado*

190. *Id.* at 1105.

191. 8 U.S.C. § 1231 (2012).

192. *Delgado*, 648 F.3d at 1103–05. The court did not address the BIA's determination that Delgado's three DUIs constitute, either individually or cumulatively, or both, a particularly serious crime or crimes because of the BIA's "scant analysis." *Id.* at 1107. However, in a concurring opinion, Judge Reinhardt provides an analysis that suggests that simple DUIs should never be considered particularly serious. *Id.* at 1109–11 (Reinhardt, J., concurring in part and concurring in the judgment). Additionally, the BIA has held that "[it] should . . . exercise great caution in designating . . . an offense as a particularly serious crime" when it is not necessarily even a crime involving moral turpitude, *In re L-S-*, 22 I. & N. Dec. 645, 655 (B.I.A. 1999), and it should exercise similar caution when finding that an offense that does not constitute a "crime of violence" can constitute a "particularly serious crime," *see Begay v. United States*, 553 U.S. 137, 145–47 (2008). It is well established that a single DUI does not constitute a crime involving moral turpitude. *Murillo-Salmeron v. INS*, 327 F.3d 898, 902 (9th Cir. 2003) (holding that "simple DUI convictions, even if repeated, are not crimes of moral turpitude"); *In re Torres-Varela*, 23 I. & N. Dec. 78, 85 (B.I.A. 2001) (stating that DUIs are not crimes involving moral turpitude based in part because "a simple DUI offense under Arizona law . . . did not require a showing of a culpable mental state"). Furthermore, DUI's are not considered "crimes of violence." *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004). Because simple DUIs are not crimes of moral turpitude or crimes of violence, the BIA should be reluctant to hold that simple DUIs constitute particularly serious crimes. As the Supreme Court noted, "Drunk driving is a nationwide problem . . . [b]ut [that] fact does not warrant our shoehorning it into statutory sections where it does not fit." *Id.* at 13.

193. As a clinical law student with the USC Law Immigration Clinic, the author worked on appellant-Delgado's BIA brief following the case's remand to the BIA from the Ninth Circuit.

194. *E.g.*, *Delgado*, 648 F.3d at 1104–05.; *N-A-M v. Holder*, 587 F.3d 1052, 1059 (10th Cir. 2009).

195. *Delgado*, 648 F.3d at 1104–05.

demonstrates, ordinary regulatory offenses and “marginal crimes” continue to be classified as particularly serious.¹⁹⁶

A. RESOLUTION OF THE CONFUSION SURROUNDING THE AGGRAVATED FELONY CLAUSE OF THE PARTICULARLY SERIOUS CRIME EXCEPTION

As previously mentioned, only two circuits have considered the substantive question of how the aggravated felony subsection of the particularly serious crime exception should be interpreted.¹⁹⁷ Following the BIA’s precedential decision in *N-A-M-*, subsequent courts that have considered the issue have simply concluded that the BIA’s interpretation of the statute is both reasonable and permissible.¹⁹⁸ However, based on the history of the Convention and Protocol, from which the exception is derived, the legislative history of the exception, and basic principles of statutory construction, the BIA’s interpretation is neither correct nor reasonable.

1. Congressional Intent

In 1980, Congress amended the INA to mirror, almost verbatim, the language of Article 33(1) and (2) of the Convention.¹⁹⁹ In considering a different provision, the Supreme Court noted that “one of Congress’ primary purposes [in passing the Refugee Act of 1980] was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees to which the United States acceded in 1968.”²⁰⁰ The Supreme Court has explained that because Congress knowingly adopted the language of the Convention with the intent that the language of the INA be “construed consistent with the [Convention],” that language, which mirrors the Convention’s, should be interpreted in light of the Convention.²⁰¹

196. See *Torres-Varela*, 23 I. & N. Dec. at 86 (holding that DUIs are “marginal crime[s]”).

197. Compare *Alaka v. Att’y Gen.*, 465 F.3d 88, 105 (3d Cir. 2006) (holding that that in order for an offense to be considered a particularly serious crime it must be an aggravated felony), and *Ali v. Achim*, 468 F.3d 462, 469–70 (7th Cir. 2006) (holding that the language of the exception does not require that an offense must be an aggravated felony in order to be considered a particularly serious crime), *cert. granted*, 551 U.S. 1188 (2007), and *cert. dismissed*, 552 U.S. 1085 (2007), with *Gao v. Holder*, 595 F.3d 549, 554 (4th Cir. 2010) (holding that the BIA’s decision in *N-A-M-*, stating that particularly serious crimes need not be aggravated felonies, is entitled to deference, and the BIA’s opinion is both a reasonable and permissible construction of the statute).

198. See, e.g., *Gao*, 595 F.3d at 554.

199. See *supra* text accompanying notes 113–17.

200. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (citation omitted).

201. *Id.* at 437 (quoting S. REP. NO. 96-590, at 20 (1980)) (internal quotation marks omitted).

As previously noted, the delegates who sponsored the exception, as well as those who commented on it, agreed that the exception should be limited in scope and narrowly construed.²⁰² Moreover, the primary purpose of the particularly serious crime exception, when it was first introduced at the Convention, was to alleviate national security concerns.²⁰³ As the Supreme Court noted, deportation, or removal, is a “harsh measure” and this is especially true due to the particularly serious consequences of returning an alien to a country where he or she may face persecution or death.²⁰⁴ It is perhaps for that reason that the Supreme Court has continually upheld the “longstanding principle” of resolving any ambiguities in deportation statutes in favor of the alien.²⁰⁵ In light of the exception’s origins as a very narrow and limited exception to the non-refoulement principle, the exception should be interpreted to prohibit the classification of nonaggravated felonies as particularly serious crimes.

2. The BIA’s Flawed Reasoning

Notwithstanding the previous section, which establishes independent grounds for concluding that particularly serious crimes should be restricted to include only aggravated felonies, the reasoning employed by the BIA, in *N-A-M-*, and adopted by every subsequent Court of Appeals, is fatally flawed. The correct application of basic principles of statutory construction demonstrate that not only is their conclusion incorrect, but it is also unreasonable under *Chevron*.

In *N-A-M-*, the BIA held that the “designation of aggravated felonies producing sentences of at least five years’ imprisonment as per se ‘particularly serious’ creates no presumption that the Attorney General may not exercise discretion on a case-by-case basis to decide that other nonaggravated-felony crimes are also ‘particularly serious.’”²⁰⁶ The BIA noted that from 1980—when Congress amended the INA to mirror the language of the Convention—to 1990—when Congress first statutorily defined all aggravated felonies as per se particularly serious crimes—the Attorney General had unfettered discretion in determining whether a given crime was particularly serious.²⁰⁷ The BIA also noted that it retained

202. See *supra* text accompanying notes 62–72.

203. See *supra* text accompanying notes 67–72.

204. *Cardoza-Fonseca*, 480 U.S. at 449.

205. *Id.* at 448–49 (citing *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

206. *In re N-A-M-*, 24 I. & N. Dec. 306, 338 (B.I.A. 2007) (quoting *Ali v. Achim*, 468 F.3d 462, 470 (7th Cir. 2006)), *aff’d*, 587 F.3d 1051 (10th Cir. 2009).

207. *Id.* at 339–40.

discretion to determine whether an offense was particularly serious on a case-by-case basis after Congress amended the link between aggravated felonies and particularly serious crimes in 1996 to provide the Attorney General with discretion to overrule the categorical bar “designating every aggravated felony a particularly serious crime.”²⁰⁸ The Ninth Circuit upheld the BIA’s reasoning, concluding that IIRIRA, which enacted the current language of the statute, was not intended “to eliminate the Attorney General’s pre-existing authority” to determine on a case-by-case basis whether a crime was particularly serious, regardless of its classification as an aggravated felony or not.²⁰⁹

While the BIA’s historical account is accurate, what the BIA failed to mention was that the current version of the statute is markedly different from the earlier versions.²¹⁰ When Congress adopted the language of the Convention in 1980, a “particularly serious crime” was not defined by statute, and discretion to determine whether an offense was particularly serious rested with the Attorney General.²¹¹ And when Congress first statutorily defined all aggravated felonies as particularly serious crimes, Congress did not include any limiting language.²¹² Similarly, the next Congressional amendment to the statute did not limit the Attorney General’s discretion, rather it expanded it by allowing the Attorney General to overrule the categorical bar defining all aggravated felonies as particularly serious crimes.²¹³

Conversely, the current version of the statute purports to limit the Attorney General’s discretion.²¹⁴ As previously quoted, the statute categorically defines all aggravated felonies that result in a prison sentence of five years or more as particularly serious. The next sentence appears to limit the Attorney General’s discretion by allowing him to find that aggravated felonies, notwithstanding the length of sentence imposed, are also particularly serious, but no more.²¹⁵ Both the Seventh Circuit and the BIA dispute this interpretation of the sentence.²¹⁶ They interpret the

208. *Id.* at 340.

209. *Delgado v. Holder*, 648 F.3d 1095, 1105 (9th Cir. 2011) (en banc).

210. *See supra* text accompanying notes 113–54.

211. *See In re Frentescu*, 18 I. & N. Dec. 244, 245–47 (B.I.A. 1982).

212. Immigration Act of 1990, Pub. L. No. 101-649, sec. 515, §§ 1158, 1253, 104 Stat. 4978, 5053 (codified as amended at 8 U.S.C. §§ 1158, 1253 (2012)).

213. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 413, § 1253(h), 110 Stat. 1213, 1269.

214. *See* 8 U.S.C. § 1231(b)(3)(B)(iv) (2012).

215. *See id.*

216. *Ali v. Achim*, 468 F.3d 462, 470 (7th Cir. 2006); *In re N-A-M-*, 24 I. & N. Dec. 336, 341 (B.I.A. 2007), *aff’d*, 587 F.3d 1052 (10th Cir. 2009).

language to allow the Attorney General to classify aggravated felonies, notwithstanding the sentence imposed, as particularly serious without affecting the Attorney General's prior discretion to classify nonaggravated felonies as particularly serious.²¹⁷ However, the Seventh Circuit and BIA overlooked the cardinal rule of statutory construction, which requires that a statute be interpreted "so that no words shall be discarded as being meaningless, redundant, or mere surplusage."²¹⁸ Assuming, arguendo, that the interpretation of the Seventh Circuit and the BIA is correct, then the second sentence would be stripped of all meaning. The Seventh Circuit and the BIA reasoned that the second sentence of the statute simply allows the Attorney General to classify aggravated felonies that result in prison sentences of less than five years as particularly serious crimes without restricting his pre-existing authority to designate *any* crime as particularly serious. However, if Congress had intended to leave the Attorney General's discretion to classify *any* crime as particularly serious untouched, then the Attorney General would have retained the discretion to determine any crime as particularly serious, regardless of the sentence imposed or its classification as an aggravated felony or not. And if that was the case, there would be no need for the second sentence of the statute in which Congress expressly allows the Attorney General to classify aggravated felonies, regardless of the length of the sentence imposed, as particularly serious because the Attorney General would already have that discretion. Thus, the BIA's interpretation, which subsequent courts have found reasonable,²¹⁹ effectively nullifies the second sentence as redundant and meaningless. In light of the principle that statutes should be interpreted to give meaning and effect to "every clause and word of a statute," the BIA's interpretation is neither correct nor reasonable.

Another argument the BIA forwarded, which subsequent courts have echoed, is that Congress could not have possibly intended to limit particularly serious crimes to aggravated felonies because there are crimes that are "particularly serious" that have not been defined as aggravated felonies.²²⁰ Specifically, they mention that the possession of biological

217. *Ali*, 468 F.3d at 470; *N-A-M-*, 24 I. & N. Dec. at 341.

218. *United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991). *See also* *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (holding that "[t]he cardinal principle of statutory construction is to save and not destroy. It is [the court's] duty to give effect, if possible to every clause and word of a statute . . ." (citation omitted) (internal quotation marks omitted)); *Miller v. United States*, 363 F.3d 999, 1008 (9th Cir. 2004) (indicating that "[c]ourts must aspire to give meaning to every word of a legislative enactment").

219. *E.g.*, *Delgado v. Holder*, 648 F.3d 1095, 1102–05 (9th Cir. 2011) (en banc).

220. *Gao v. Holder*, 595 F.3d 549, 555 (4th Cir. 2010). *See also* *Delgado*, 648 F.3d at 1105 n.13; *N-A-M-*, 24 I. & N. Dec. at 341 n.6.

weapons is “potentially quite serious yet do[es] not meet the technical requirements of being [an] aggravated felon[y].”²²¹ However, this argument is extremely disingenuous. While, the particularly serious crime exception may not cover the possession of biological weapons if the aggravated felony provision is interpreted as suggested in this Note, Congress has provided for other exceptions, including 8 U.S.C. § 1231(b)(3)(B)(iv), which provides that an alien is not entitled to withholding of removal if “there are reasonable grounds to believe that the alien is a danger to the security of the United States.”²²² Accordingly, an alien convicted or suspected of possession of biological weapons could be removed on the grounds that the alien is a danger to the security of the United States.²²³

B. RESOLUTION OF THE PARTICULARLY SERIOUS CRIME AND DANGEROUSNESS TO THE COMMUNITY CONFLATION

Similarly, the BIA’s holding in *Carballe*²²⁴—that a separate finding of ongoing dangerousness to the community is not required—is at odds with (1) the Convention and the intent of those who drafted it, and (2) the language of the statute itself as interpreted in light of principles of statutory construction. As discussed in Part II.B, Dr. Weis, who was intimately involved in the drafting of the Convention,²²⁵ stated that the particularly serious crime exception required a separate finding of “danger[ousness] to the community.”²²⁶ Additionally, in light of the exception’s intended narrowness²²⁷ and the Convention’s primary goal of protecting refugees,²²⁸ the interpretation requiring a separate and distinct finding of ongoing or future dangerousness to the community most closely promotes the policy behind the Convention.

The particularly serious crime exception states that “[an] alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States [is not eligible for

221. *E.g.*, *Gao*, 595 F.3d at 555.

222. 8 U.S.C § 1231(b)(3)(B)(iv) (2012).

223. *See generally* *Malkandi v. Holder*, 576 F.3d 906 (9th Cir. 2009) (holding removable an alien suspected of having ties to terrorist organizations pursuant to § 1231(b)(3)(B)(iv), which required only a finding that a “reasonable person” would believe the alien poses a danger to the United States).

224. *In re Carballe*, 19 I. & N. Dec. 357, 360 (B.I.A. 1986).

225. *Ogata*, *supra* note 44, at 4.

226. *WEIS*, *supra* note 44, at 246.

227. *See supra* text accompanying notes 57–72.

228. *See* U.N. Convention, *supra* note 12, at 150–52 (indicating that one of the primary reasons for the Convention is the “profound concern for refugees and [the Convention’s intent] to assure refugees the widest possible . . . fundamental rights and freedoms”).

withholding of removal].”²²⁹ While most of the Courts of Appeals to consider the BIA’s interpretation of this language have upheld it as reasonable under *Chevron*,²³⁰ some courts have questioned the BIA’s holding.²³¹ As discussed in Part III,²³² the BIA reasoned that, had Congress intended the exception to require two separate findings—namely (1) that the alien was convicted of a particularly serious crime and (2) that he constituted a danger to the community—Congress could have easily indicated such by including the conjunctive “and” in the statute.²³³ Additionally, the BIA interpreted statements made in a House Judiciary Committee Report to support its position.²³⁴ The House Judiciary Committee Report references “aliens . . . who have been convicted of particularly serious crimes *which* make them a danger to the community of the United States,”²³⁵ which according to the BIA shows that Congress understood and intended the language of the statute to mean that a person who is convicted of a particularly serious crime is necessarily a danger to the community.²³⁶ However, this statement in the House Judiciary Committee Report is more obviously read to mean that the particularly serious crime exception applies to aliens “who have been convicted of particularly serious crimes *which* make them a danger to the community of the United States,” as opposed to aliens convicted of particularly serious crimes *which do not* make them a danger to the community. Moreover, in a letter to the INS, the late Senator Edward Kennedy, then Chairman of the Senate Subcommittee on Immigration and Refugee Affairs, specifically stated that Congress intended that the language of the statute require a separate finding of dangerousness to the community.²³⁷

However, a statute’s legislative history is a secondary consideration when the language itself is neither ambiguous nor unclear. As Judge Henry noted in his concurring opinion in *N-A-M*, the BIA’s interpretation

229. 8 U.S.C. § 1231(b)(3)(B)(ii) (2012).

230. See *supra* note 141 and accompanying text.

231. *Choeum v. INS*, 129 F.3d 29, 40–41 (1st Cir. 1997); *N-A-M v. Holder*, 587 F.3d 1052, 1058, 1060–63 (10th Cir. 2009) (Henry, J., concurring).

232. See *supra* text accompanying notes 134–38.

233. *In re Carballe*, 19 I. & N. Dec. 357, 359 (B.I.A. 1986).

234. *Id.*

235. *Id.* (quoting H.R. REP. NO. 96-608, at 17 (1979)).

236. *Id.* at 359–60.

237. *Mosquera-Perez v. INS*, 3 F.3d 553, 556 (1st Cir. 1993). Notwithstanding Senator Kennedy’s letter, courts have continued to uphold the BIA’s decision in *Carballe* on the grounds that, generally, “post-enactment legislative history is accorded less weight than contemporary commentary.” *Al-Salehi v. INS*, 47 F.3d 390, 395 (10th Cir. 1995) (quoting *Mosquera-Perez*, 3 F.3d at 558). See also *Martins v. INS*, 972 F.2d 657, 661 (5th Cir. 1992) (rejecting Kennedy’s letter based on contrary indications of legislative intent).

effectively renders the “dangerous to the community” language meaningless, violating the basic principle of statutory construction that “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”²³⁸ The Supreme Court has consistently held that, “in determining the meaning of the statute, [courts] look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.”²³⁹ Accordingly, the BIA’s interpretation that “the phrase ‘danger to the community’ is an aid to defining a ‘particularly serious crime’”²⁴⁰ must be incorrect when the statute is considered as a whole. Consider 8 U.S.C. § 1231(b)(3)(B)(iii), which bars aliens from withholding of removal if “there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States.”²⁴¹ This provision calls for a simple inquiry: whether there is reason to believe that an alien committed a serious nonpolitical crime. Conversely, the particularly serious crime exception requires two inquiries: (1) whether the alien committed a “particularly serious crime;” and (2) whether the alien constitutes a “danger to the community.”²⁴² If Congress intended the exception to require only a “particularly serious crime” inquiry, it could have omitted the “danger to the community” clause entirely and allowed the “particularly serious crime” clause to stand on its own, just as it does in the “serious nonpolitical crime” provision. Or, if Congress wanted the “danger to the community” clause to be read, as the BIA suggests, as an “aid to defining a ‘particularly serious crime,’”²⁴³ it could have included language such as, “a particularly serious crime is a crime that makes the alien a danger to the community.”

However, speculating as to what Congress could have or should have said is a futile exercise. What is clear is that Congress enacted the exception to mirror the language of the Convention in order to comply with the United States’ obligation under the Protocol.²⁴⁴ As discussed in Part II,²⁴⁵ there is a strong consensus among scholars that the particularly serious crime exception, as embodied in the Convention and the INA, requires a separate finding of ongoing dangerousness.²⁴⁶ As Judge Henry

238. *N-A-M v. Holder*, 587 F.3d 1052, 1061 (Henry, J., concurring) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)) (internal quotation marks omitted).

239. *Crandon v. United States*, 494 U.S. 152, 158 (1990).

240. *Carballe*, 19 I. & N. Dec. at 360.

241. 8 U.S.C. § 1231(b)(3)(B)(iii) (2012).

242. *N-A-M*, 587 F.3d at 1061 (Henry, J., concurring).

243. *Carballe*, 19 I. & N. Dec. at 360.

244. See *supra* notes 113–14 and accompanying text.

245. See *supra* notes 84–100 and accompanying text.

246. See WEIS, *supra* note 44, at 246 (noting that, for the exception to apply, “[t]wo conditions

noted in his concurring opinion in *N-A-M*, according to the UNHCR, the “decisive factor is not the seriousness or categorization of the crime that the refugee has committed, but, rather, whether the refugee, in light of the crime and conviction, poses a *future* danger to the community.”²⁴⁷ In the past, the Supreme Court has accorded due deference to the UNHCR in interpreting U.S. statutes that implement the Convention and Protocol.²⁴⁸ Similarly, the Supreme Court has repeatedly held that the “the opinions of our sister signatories [are] entitled to considerable weight.”²⁴⁹ At least two of our “sister signatories,” Canada and the United Kingdom, have held that the exception requires a separate finding that the alien poses an ongoing or future danger to the community before the alien is returned to the country of likely persecution.²⁵⁰ Accordingly, the BIA’s interpretation of the particularly serious crime exception is contrary to the language of the statute in light of principles of statutory construction and the overwhelming international and scholarly consensus.

VI. GETTING AROUND *CHEVRON*: A PATH TO A COHERENT INTERPRETATION AND APPLICATION OF THE PARTICULARLY SERIOUS CRIME EXCEPTION

Despite the BIA’s flawed reasoning and interpretation of both the aggravated felony and danger to community provisions of the particularly serious crime exception, courts have repeatedly upheld these interpretations on the grounds that *Chevron* requires them to defer to the BIA’s

must be fulfilled: the refugee must have been convicted by final judgment for a particularly serious crime, and he must constitute a danger the community of the country”); Farbenblum, *supra* note 95, at 1080–85 (“Under the hazy cover of *Chevron*, each court sidestepped the task of meaningfully reconciling the BIA’s construction with congressional intent that the statute comport with U.S. obligations under Article 33.”); GRAHL-MADSEN, *supra* note 95, at 139 (noting that the exception “can clearly not refer to a past danger, but only to a present or future danger”); Lauterpacht & Bethlehem, *supra* note 95, at 129 (“[I]t must be established that the refugee constitutes a danger to the security or to the community of the country of refuge.”).

247. *N-A-M*, 587 F.3d at 1062 (Henry, J., concurring) (quoting Brief for the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner at 17, *N-A-M v. Holder*, 587 F.3d 1052 (10th Cir. 2009) (No. 08-9527, 07-9580)) (internal quotation marks omitted).

248. *Id.* at 1061 (citing *Negusie v. Holder*, 555 U.S. 511, 536–37 (2009)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438–39 (1987) (“In interpreting the Protocol[] . . . we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status . . .”). *See also Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 179–83 (1993) (analyzing the text of the Convention and Protocol while interpreting the INA).

249. *Air France v. Saks*, 470 U.S. 392, 404 (1985) (quoting *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978)) (internal quotation marks omitted).

250. *N-A-M*, 587 F.3d at 1062–63 (Henry, J., concurring). *See supra* notes 96–98 and accompanying text.

“reasonable” interpretations of an “ambiguous” statute.²⁵¹ However, the question of whether the BIA’s decisions in these contexts are entitled to *Chevron* deference is not as clear-cut as it may seem. In fact, for the reasons discussed below, the Courts of Appeals’ reflexive invocation of *Chevron* deference toward BIA decisions is both unnecessary and unwarranted.

In 1984, the United States Supreme Court decided *Chevron, U.S.A., Inc., v. National Resources Defense Council, Inc.*²⁵² In *Chevron*, the Court considered a provision of the Clean Air Act and the Environmental Protection Agency’s (“EPA”) interpretation of that provision as promulgated by regulation. In challenging the EPA’s interpretation of the provision, the NRDC filed a petition for review at the Court of Appeals for the District of Columbia, which held that the EPA’s interpretation was “inappropriate” in light of the purpose and policy underlying the Clean Air Act.²⁵³ However, in reversing the lower court’s ruling, the Supreme Court held that a court’s consideration of an agency’s interpretation of a statute, which it administers, must be guided by two questions. First, if either the plain language of the statute or Congress’s intent with regard to the issue is clear, both the agency and the court must comply with the “expressed intent of Congress.”²⁵⁴ Conversely, if Congress’s intent is unclear and the statute is “silent or ambiguous,” the court may not “simply impose its own construction on the statute” in lieu of the agency’s; rather, it must determine whether the agency’s interpretation is “based on a permissible construction of the statute.”²⁵⁵ The Court further held that when Congress implicitly delegates authority to an agency, courts may not substitute their interpretation of a statute for that of an agency’s unless the agency’s interpretation is unreasonable.²⁵⁶ In a footnote, the Court maintained that “[t]he judiciary is the final authority on issues of statutory construction and

251. *Delgado v. Holder*, 648 F.3d 1095, 1102–05 (9th Cir. 2011) (en banc) (upholding the BIA’s reasoning with regard to the aggravated felony issue as reasonable and permissible); *Gao v. Holder*, 595 F.3d 549, 553–55 (4th Cir. 2010) (same); *Nethagani v. Mukasey*, 532 F.3d 150, 156–57 (2d Cir. 2008) (same); *N-A-M*, 587 F.3d at 1056–57 (same and also upholding the BIA’s conclusion in *Carballe* that the statute does not require a separate finding of ongoing or future dangerousness to the community).

252. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

253. *Id.* at 841–42.

254. *Id.* at 842–43.

255. *Id.* at 843.

256. *Id.* at 844. The Court also held that

[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Id. at 843–44.

must reject administrative constructions that are contrary to clear congressional intent.”²⁵⁷ Thus, the Court concluded that if a court could ascertain Congress’s intent “on the precise question at issue” using traditional principles of statutory construction, “that intention is the law and must be given effect.”²⁵⁸

Three years later, in *INS v. Cardoza-Fonseca* the Court declined to give the BIA the high level of deference called for under *Chevron*.²⁵⁹ In *Cardoza-Fonseca*, the Court was considering the evidentiary standard that aliens must show to be eligible for asylum. The BIA held, and the government argued, that the proper standard was the “clear probability of persecution,” relying on pre-1986 law,²⁶⁰ as opposed to the “well-founded fear of persecution” standard articulated in the Convention and Protocol.²⁶¹ In declining to accord the BIA’s decision *Chevron* deference, the Court held that the issue presented was “a pure question of statutory construction for the courts to decide,” which it distinguished from *Chevron* on the grounds that *Chevron* involved a policy judgment about how to address a statutory gap, as opposed to a pure question of statutory construction.²⁶² It also distinguished questions of statutory construction from cases in which agencies must fill a statutory gap left by Congress through “case-by-case adjudication,” with only the latter warranting *Chevron* deference.²⁶³ Notably, in determining the relevant evidentiary standard, the Court relied heavily on statements made by the drafters of the Convention, the Convention itself, the UNHCR Handbook, and the interpretations of “scholars who have studied the matter.”²⁶⁴ The Court also considered the legislative history of the 1980 amendment to the INA, which essentially enacted the language of the Convention.²⁶⁵ The Court found “particularly compelling” the evidence that Congress clearly sought “to conform the definition of ‘refugee’ and our asylum law to the United Nations Protocol.”²⁶⁶ As one commentator has suggested, the Court’s decision in this case is significant in three ways: (1) it holds that *Chevron* deference does not apply to BIA decisions that address “pure issues of statutory

257. *Id.* at 843 n.9.

258. *Id.*

259. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448–50 (1987).

260. *INS v. Stevic*, 467 U.S. 407, 429–30 (1984) (relying on the Refugee Act of 1980 to hold that the correct evidentiary standard was “the clear probability of persecution”).

261. *Cardoza-Fonseca*, 480 U.S. at 430.

262. *Id.* at 446–48.

263. *Id.* at 448.

264. *Id.* at 438–39, 440 & n.24.

265. *Id.* at 432–33, 436–38.

266. *Id.* at 432–33.

construction;” (2) it allows courts to consider international sources interpreting the language adopted from the Convention in issues of statutory construction; and (3) it “arguably provides support for lower courts to resolve, under the first step of *Chevron*, any ‘pure question[s] of statutory construction’ concerning an [INA] provision in conformity with clear congressional intent to comply with the Convention.”²⁶⁷

In *INS v. Aguirre-Aguirre*,²⁶⁸ the Supreme Court once again considered a provision of the INA which was adopted from the Convention.²⁶⁹ *Aguirre-Aguirre* concerned the definition of a “serious nonpolitical crime,” which, if committed before entering the United States, renders an alien ineligible for withholding of deportation.²⁷⁰ Not surprisingly, but in stark contrast to *Cardoza-Fonseca*, the Court accorded the BIA’s balancing test deference under *Chevron*.²⁷¹ The Court reasoned that, in contrast to *Cardoza-Fonseca*, the issue presented in *Aguirre-Aguirre* was not one of pure statutory construction.²⁷² Rather, the issue implicated the BIA’s interpretation of ambiguous statutory terms, which the BIA was giving “concrete meaning [to] through a process of case-by-case adjudication.”²⁷³ While some have argued that *Aguirre-Aguirre* constituted a significant retreat from the Court’s decision in *Cardoza-Fonseca*,²⁷⁴ the Court’s decision is actually perfectly consistent with *Cardoza-Fonseca*. As previously discussed, *Cardoza-Fonseca* was concerned with determining which of the two evidentiary standards Congress intended to require, as opposed to a term that would be defined “through a process of case-by-case adjudication,”²⁷⁵ which according to both *Cardoza-Fonseca* and *Chevron* requires deferential treatment by the courts.²⁷⁶ Additionally, in *Aguirre-Aguirre*, the Court affirmed the usefulness of interpreting INA provisions that are drawn from the Convention in light of the Handbook and Congress’s intent to implement the Protocol.²⁷⁷ Moreover, the Court again endorsed the consideration of

267. Farbenblum, *supra* note 95, at 1086–88 (footnote omitted).

268. *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999).

269. *Id.* at 418, 427.

270. *Id.* at 419.

271. *Id.* at 424.

272. *See id.* at 424–25.

273. *Id.* at 425 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448–49 (1987)) (internal quotation marks omitted).

274. Farbenblum, *supra* note 95, at 1089 (arguing that *Aguirre-Aguirre* is a significant departure from *Cardoza-Fonseca* because the Court in *Aguirre-Aguirre* allowed for greater capabilities of redefinition for statutory construction).

275. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987).

276. *Id.*

277. *Aguirre-Aguirre*, 526 U.S. at 427–28. *See also id.* at 428–31 (noting that the Handbook is

another state party's construction of the same provision.²⁷⁸

Some have suggested that the Court's reasoning in *Negusie v. Holder*,²⁷⁹ may call into question the continued validity of *Cardoza-Fonseca*. In *Negusie*, the BIA considered whether "[t]he so-called 'persecutor bar'" applies to withholding of removal.²⁸⁰ The "persecutor bar" provision states that an alien is ineligible for withholding of removal if "the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion."²⁸¹ Believing it was bound by Supreme Court precedent, the BIA concluded that the "persecutor bar" applied regardless of whether an alien persecuted another under duress or coercion.²⁸² However, the Court concluded that the BIA had erroneously relied on Supreme Court precedent that was not controlling on the issue.²⁸³ In so concluding, the Court stated the BIA's decision was not entitled to *Chevron* deference because it improperly relied on noncontrolling precedent which "prevented it from a full consideration of the statutory question here presented."²⁸⁴ Accordingly, and in light of *INS v. Orlando Ventura*,²⁸⁵ the Court remanded the case to the BIA.²⁸⁶ Given the similarities between *Negusie* and *Cardoza-Fonseca*, one commentator has questioned why "the sources relied upon in *Cardoza-Fonseca* did not give rise to the same conclusion of clear congressional intent in *Negusie*."²⁸⁷ However, the Court's divergence from *Cardoza-Fonseca* lies simply in the fact that the BIA did not fully consider the question presented because it felt, albeit erroneously, bound by Supreme Court precedent. Thus the "ordinary remand" rule dictated that the case be remanded.²⁸⁸

Under the line of Supreme Court cases set forth above, the Courts of

consistent with the BIA's test for determining whether an act constitutes a "serious non-political crime").

278. *See id.* at 428 (citing a case from the United Kingdom).

279. *Negusie v. Holder*, 555 U.S. 511 (2009).

280. *Id.* at 514.

281. 8 U.S.C. § 1231(b)(3)(B)(i) (2012).

282. *Negusie*, 555 U.S. at 516.

283. *Id.* at 520.

284. *Id.* at 521.

285. *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (holding that when the BIA has not yet considered an issue, "[courts] should remand [the] case to [the] agency for decision of a matter that statutes place primarily in agency hands").

286. *Negusie*, 555 U.S. at 523.

287. Farbenblum, *supra* note 95, at 1094–95 (footnote omitted).

288. *Negusie*, 555 U.S. at 523.

Appeals, or the Supreme Court, could consider both issues without being hamstrung by *Chevron*. First, whether the particularly serious crime provision limits the class of potential particularly serious crimes to aggravated felonies. Second, whether the language of the particularly serious crime exception requires a separate finding of dangerousness to the community.

A. AGGRAVATED FELONIES

With regard to the aggravated felony issue, it clearly seems to be a question of statutory construction. Whether the statute purports to limit the class of particularly serious crimes to aggravated felonies “is the kind of ‘pure question of statutory construction for the courts to decide that [was] answered in *Cardoza-Fonseca*, rather than a fact-intensive question of the kind [that was] addressed in *Aguirre-Aguirre*.”²⁸⁹ To reiterate, as stated in *Chevron* and affirmed in *Cardoza-Fonseca*, “If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”²⁹⁰ Thus, in light of the reasoning in Part V.A which was based on principles of statutory construction, and in addition to the sources cited and endorsed by *Cardoza-Fonseca*,²⁹¹ courts should resolve this issue in two ways: first, by finding that the class of potential particularly serious crimes are limited to aggravated felonies as a matter of statutory construction unhindered by *Chevron* deference, and second, by overturning *N-A-M*.

B. DANGEROUSNESS TO THE COMMUNITY

Similarly, the dangerousness to the community issue also seems to be a question of pure statutory construction. Despite the analysis set forth in Part V.B, one might erroneously conclude that this issue is more closely analogous to the issue in *Aguirre-Aguirre*, which involved the BIA’s construction of a test to determine whether a person had committed a serious nonpolitical crime.²⁹² However, this Note has focused entirely on the question of statutory interpretation; in particular, whether the statute should be interpreted to require a separate and distinct finding of

289. *Id.* at 534 (Stevens, J., concurring in part and dissenting in part) (citation omitted).

290. *Cardoza-Fonseca*, 480 U.S. at 448 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

291. *Id.* at 432, 436, 438–39, 440 & n.24.

292. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *Cardoza-Fonseca*, 480 U.S. at 448–49).

dangerousness to the community apart from the finding that an alien has been convicted of a particularly serious crime.²⁹³ As the Court noted in *Cardoza-Fonseca*, “[t]he narrow legal question whether [a statute should be interpreted one way or another] is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either [interpretation] to a particular set of facts.”²⁹⁴ Accordingly, the issue being one of statutory interpretation, the courts should consider it without *Chevron* deference to the BIA’s prior decisions. And in light of the reasoning set forth in Part V.B the courts ought to conclude that the language of the statute does, in fact, require a separate finding of dangerousness to the community.

VII. CONCLUSION

Given the flaw in the BIA’s reasoning of both the aggravated felony and dangerousness to the community issue, it is puzzling that courts have continued to rubberstamp these BIA decisions, even under *Chevron* deference. This Note provides a framework for analyzing both issues in light of the considerations the Court considered so important in *Cardoza-Fonseca*. In light of those considerations, elementary principles of statutory construction, and the Supreme Court’s line of cases applying *Chevron* to the immigration context, both *N-A-M-* and *Carballe* should be overturned.

The Supreme Court may have the opportunity to do just that—on the aggravated felony issue—if both the BIA and the Ninth Circuit render a decision adverse to appellant-Delgado on the remaining issues. If that is the case, appellant-Delgado will likely appeal to the Supreme Court, providing the Court with the perfect opportunity to finally address the circuit split.

It is worth repeating that individuals affected by these decisions are people who, if returned to their home countries, are likely to face persecution or death. As one Syrian refugee recently stated, “[w]e cannot count how many people have been killed, arrested or disappeared [in Syria] . . . [w]e don’t ask anymore because we don’t want to know.”²⁹⁵ The particularly serious consequences inherent in the particularly serious crime exception warrant a narrow reading of the exception and an expansive reading of the non-refoulement principle embodied in Article 33(1) of the Convention. As the U.S. delegate suggested in drafting the Convention,

293. This Note takes no position on what test the BIA or courts should adopt in determining whether an alien constitutes a danger to the community.

294. *Cardoza-Fonseca*, 480 U.S. at 448.

295. Batha, *supra* note 1.

serious pause should be given in considering cases, “even highly exceptional cases, where a man might be sent to death or persecution.”²⁹⁶

296. WEIS, *supra* note 44, at 234.