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THE EFFECT OF CRIMINAL CONDUCT UPON REFUGEE AND ASYLUM STATUS

Evangeline G. Abrielt†

I. INTRODUCTION

The connection between transboundary crime and refugees may not be immediately apparent. However, they are linked: refugees make up a significant percentage of international migration, and some refugees have criminal backgrounds. This has given rise to U.S. legislation and international conventions limiting or denying protection to refugees on the basis of criminal background.

The estimated number of refugees ranges between thirteen and eighteen million globally, not including persons who are “internally displaced” because of upheaval in their countries.¹ Within the United States alone, the number of refugees is significant. The United States has determined that it will admit 78,000 refugees during 1997,² and that number may increase if special humanitarian concerns arise.³ There are also several thousand people each year who seek asylum and other forms of protection within the United States or at its borders.

† Clinical Professor, Loyola New Orleans School of Law. I thank the *Southwestern Journal of Law and Trade in the Americas* for arranging the excellent conference at which this essay was originally presented. I would also like to thank Catherine Reynolds, J.D. Loyola 1995, for her invaluable research assistance. In addition, I thank Eve Weisberg, Jacqui Henderson, and Jane Kochman of the UNHCR Washington office for the generous advice and provision of documents.

1. See Guy S. Goodwin-Gill, *Towards a Comprehensive Regional Policy Approach: The Case for Closer Inter-Agency Cooperation* 5 INT'L J. REFUGEE L. 347 (1993) (observing that there are 18 million refugees worldwide and another 24 million internally displaced persons, that is, one in every 135 human beings on earth); Raneer K.L. Panjabi, *International Politics in the 1990s: Some Implications for Human Rights and the Refugee Crisis*, 10 DICK. J. INT'L L. 1, 4-5 (1991) (noting that approximately 15 million people have fled from their homes in recent years to escape violence and excruciating poverty).

2. 61 Fed. Reg. 56,869 (1996).

3. Immigration and Naturalization Act § 207(b), 8 U.S.C. § 1157(b) (1994).

What to do with persons who qualify for protection, but who have committed crimes, is an important question. The United States has devoted considerable energy to the question of criminal aliens in general⁴ and, in doing so, has severely restricted the availability of refugee status and other protection to persons with criminal backgrounds.

The concern with criminal aliens coincides with another concern: that the U.S. asylum system is open to abuse and many aliens come to the United States to request asylum, knowing there will be a long delay in the determination of the claim, and that the alien will be allowed to remain and work in the United States while the claim is pending. The combination of these two concerns, criminal aliens and the abuses of the asylum system, has culminated in legislation with quite drastic results for applicants for asylum.⁵

United States law, United Nations conventions on refugees, and regional documents all mention the issue of refugees who have engaged in criminal behavior. This essay will provide an overview of the international conventions concerning refugees and U.S. refugee and asylum law. It will also discuss the effects of criminal behavior under both bodies of law. Finally, this essay explains why the current U.S. treatment of refugees with criminal backgrounds is not always appropriate.

II. THE UNITED NATIONS CONVENTION AND PROTOCOL PERTAINING TO THE STATUS OF REFUGEES

The principal international document concerning refugees is the 1951 United Nations Convention Pertaining to the Status of Refugees.⁶ This document was written to address the needs of post-World War II European refugees. To make the Convention more widely ap-

4. See Olivia T. Ibarra, *Criminalization of Immigration Laws, Enforcement and the Criminal Alien* (1994) (unpublished manuscript, on file with the author).

5. Recent regulations and legislation have made extensive changes to the asylum application process for all applicants. See in particular, 50 Fed. Reg. 62,284-303 (1994) (codified at 8 C.F.R. pt. 208), the Immigration and Naturalization Service's final rule on asylum reform; the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Act of Sept. 30, 1996, Pub. L. 104-208, § 604 *et seq.*, 101 Stat. 3009 (to be codified as Immigration and Nationality Act No. 208) (requiring, *inter alia*, that an asylum application be filed within one year of the alien's arrival in the United States, unless there are changed circumstances, and making an alien found to have filed a frivolous application permanently ineligible for any immigration benefit) (effective date April 1, 1997); and, Illegal Immigration Reform and Immigration Responsibility Act of 1996 §302 (summary exclusion procedures, under which asylum officers must screen applicants for a credible fear of persecution and under which persons found to have a credible fear must be detained pending final determination of their claims) (effective date April 1, 1997).

6. United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 606 U.N.T.S. 268 [hereinafter U.N. Convention].

plicable, the 1967 Protocol Relating to the Status of Refugees⁷ was enacted. Under these two documents, a refugee is defined as a person who has a well-founded fear of persecution in his or her country on the basis of race, religion, nationality, political opinion, or membership in a particular social group.⁸ Thus, many individuals who might be considered refugees by a layman, such as persons fleeing war or economic disaster, would not be included under the United Nations definition.

Although the Convention and Protocol define the term "refugee," they do not require signatories to grant asylum to refugees. Instead, the Convention and Protocol prohibit signatories from returning a refugee to a country where his life or liberty would be in danger on account of race, religion, nationality, political opinion, or membership in a particular social group.⁹ This practice is known as "non-refoulement" and is a crucial concept in refugee law.¹⁰

Although the United States did not accede to the 1951 Convention, the United States did accede to the 1967 Protocol, which, by its terms, binds its signatories to honor the 1951 convention as well.¹¹

III. UNITED STATES PROTECTION LAW

United States refugee law is an extensive body of law and contains a number of diverse protection programs for persons fleeing danger in their countries of origin.¹² For convenience, these programs may be collectively called "protection measures". These measures fall into two principal categories, the first consisting of protection measures designed to apply to persons in general, and the second, of measures which apply only to specific nationalities or groups of persons.

The first category includes four protection measures: refugee status, asylum, withholding of deportation, and temporary protected status. United States law defines "refugee" in almost the same terms

7. United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6233, 606 U.N.T.S. 267 [hereinafter U.N. Protocol].

8. U.N. Convention, *supra* note 6, art. 1(A)(2); U.N. Protocol, *supra* note 7, art. 1(2), (3).

9. U.N. Convention, *supra* note 6, art. 33(1).

10. Paul Weis, *The Development of Refugee Law*, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES, 27, 31 (Univ. of Mich. 1982); GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 99 (1983).

11. U.N. Protocol, *supra* note 7, art 1(1).

12. See Evangeline G. Abriel, *The Diversification of Protection Laws in the United States*, in *Immigration Law: United States and International Perspectives on Asylum and Refugee Status*, 1 AM. U. J. INT'L L. & POL'Y 1 (1994).

used by the United Nations Convention and Protocol. Under U.S. law, a refugee is a person who has been persecuted or who has a well-founded fear of persecution in his country on the basis of race, religion, nationality, political opinion, or membership in a particular social group.¹³ A refugee applies for refugee status at a U.S. consulate abroad or through an international or voluntary organization.

Persons in the United States or at its borders who meet the definition of refugee may be granted asylum at the discretion of the Attorney General, through her delegates, the Immigration and Naturalization Service and Immigration Judges.¹⁴

In addition, the Attorney General is prohibited from returning a person to a country where his life or freedom would be threatened on account of race, religion, nationality, political opinion, or membership in a particular social group.¹⁵ This is known as "withholding of deportation" and it is the U.S. counterpart to the United Nations' principle of "non-refoulement." Withholding is mandatory as long as the applicant does not fall within one of the statutory or regulatory bars to withholding.¹⁶

The fourth measure of general protection for persons fleeing danger in their countries is Temporary Protected Status, enacted in the Immigration Act of 1990.¹⁷ The Attorney General is authorized to identify certain countries which are experiencing armed conflict, environmental disaster, or other extraordinary and temporary conditions which prevent nationals from returning in safety. Persons from countries designated in this way are allowed to remain in the United States on a temporary basis until a date fixed by the Attorney General. This program differs from asylum and withholding of deportation in several ways; arguably the two most important are that persons are eligible on the basis of their nationality, rather than on the basis of their own experiences, and that this status lasts only for a specified period of time.

In addition to the general protection measures of refugee status, asylum, withholding, and temporary protected status, there are a number of diversified programs instituted by statute or by executive order which provide specific relief to specific groups of persons.¹⁸

13. Immigration and Naturalization Act (Act), 8 U.S.C. § 1101(a)(42) (1994).

14. *Id.* § 208.

15. *Id.* § 243(h).

16. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

17. Immigration Act of 1990, Pub. L. No. 101-649, § 302(a), 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1254(a) (1994)).

18. Abriel, *supra* note 12, at 2.

One example is the Cuban Adjustment Act of 1966, which provides that Cubans who are admitted or paroled into the United States may adjust their status to that of permanent resident one year after arrival.¹⁹ A second example is the Chinese Student Protection Act of 1992, which grants specific relief to certain Chinese nationals in the United States.²⁰

IV. REGIONAL CONVENTIONS AND DECLARATIONS

There are several regional conventions and declarations in the Americas which also discuss protection of refugees.²¹ These include the 1954 Caracas Convention on Territorial Asylum,²² the 1969 American Convention on Human Rights,²³ and the 1984 Cartagena Declaration on Refugees.²⁴ Both the Caracas Convention and the American Convention on Human Rights set forth a universal right to seek and enjoy asylum in other countries. The Cartagena Declaration adopts the Convention and Protocol's definition of refugee, but also includes a broader definition. Under this broader definition, the term "refugees" includes persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.²⁵ The three conventions do not impose a requirement to grant asylum, but the Cartagena Declaration emphasizes the importance of non-refoulement as the cornerstone of international protection of refugees.²⁶

19. Cuban Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966) (not codified), as amended by Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 606.

20. Chinese Student Protection Act Pub. L. No. 102-404, 106 Stat. 1969 (1992).

21. See Fernando M. Olguin, *Guatemalan Refugees in Mexico: International Legal Standards*, 13 FLETCHER F. WORLD AFF. 327 (1989).

22. Convention on Territorial Asylum, Tenth Inter-American Conference, Caracas, Mar. 20, 1954, 19 OASTS, OASOR OAS/Ser.A/10.

23. American Convention on Human Rights, Nov. 22, 1969, 36 OASTS, OASOR OAS/Ser.A/16.

24. Cartagena Declaration on Refugees (Cartagena de Indias, 22 Nov. 1984) OAS/Ser.L/V/II.66.

25. *Id.* at Conclusions and Recommendations III(3).

26. *Id.* at Conclusions and Recommendations III(5).

V. CRIMINAL CONDUCT BARS PROTECTION UNDER THE UNITED NATIONS CONVENTION AND PROTOCOL AND REGIONAL CONVENTIONS

Each of these bodies of law, the United Nations Convention and Protocol, the U.S. protection law, and the regional conventions and declarations, acknowledges the problem raised by criminal conduct on the part of an applicant for protection and sets forth provisions under which certain types of criminal conduct will render the applicant ineligible for protection.

The question arises as to why protection measures should be made available at all to persons who have committed criminal acts. This question was extensively considered by the drafters of the United Nations Convention and Protocol, and a conscious decision was made to strike a balance between protecting the community of a receiving country from the danger of admitting a criminal and the desire to render justice to a refugee who has committed a common crime or a crime of a less serious nature or a political offense.²⁷ The U.S. laws, based upon the Convention and Protocol, were drafted with this goal in mind.²⁸

The United Nations Convention includes grounds for declaring a person unworthy of refugee status on the basis of criminal conduct.²⁹ The Convention also includes grounds for expelling a refugee, that is, for denying non-refoulement.³⁰ The difference between these two

27.

The aim of [Article 1(F)(b) of the Convention] . . . is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. It also seeks to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature or has committed a political offense.

Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, ¶ 151 [hereinafter Handbook].

28. See S. REP. NO. 96-590, at 2, 20 (1980); H.R. REP. NO. 96-781, at 1, 20 (1980) ("The conference substitute adopted the House provision [mandating withholding except under certain specific conditions] with the understanding that it is based directly upon the language of the Protocol and it is intended that the language be construed consistent with the Protocol."). See generally Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 56, 63 (1981).

29. The term refugee does not include a person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

U.N. Convention, *supra* note 6, art. 1(F).

30. Expulsion is allowed under the Convention where there are reasonable grounds for regarding the refugee as a danger to the security of the country of refuge or where, the refugee,

rules is that while a serious crime may be sufficient to deny refugee status, it takes a "particularly serious crime" to deny non-refoulement. To provide guidance for the terms used in the Convention and Protocol, the United Nations High Commissioner for Refugees has issued a *Handbook on the Procedures and Criteria for Determining Refugee Status*. The Handbook defines a serious crime under the act as a "capital crime or a very grave punishable act."³¹

The Handbook also sets forth a principle of proportionality. Under this principle, two considerations must be undertaken in determining whether a particular crime is serious. First, all relevant factors, including mitigating and aggravating circumstances, must be taken into account.³² Second, the seriousness of the crime must be balanced against the severity of persecution the applicant would likely experience in the country of origin.³³ Thus, in determining whether a crime is serious enough to result in the denial of refugee status or the denial of non-refoulement, the crime must satisfy a particular degree of seriousness, and all relevant factors must be taken into account when making this determination. Even if the crime is a serious or particularly serious one, the severity of the expected persecution in the applicant's country may outweigh the seriousness of the crime for purposes of granting refugee status or non-refoulement.

There are particular criteria for denying protection to refugees on criminal grounds under American regional conventions as well. These are set forth in the "Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees, and Displaced Persons in Latin America," drafted by the International Conference on Central American Refugees (CIREFCA) in May 1989.³⁴ These principles provide that persons are not deserving of international protection as refugees if they have committed a crime against humanity, or a serious non-political crime outside the country of refuge prior to admission to that country as a refugee, or any acts contrary to the purposes and principles of the United Nations.³⁵

The CIREFCA criteria for denying protection on the basis of criminal conduct are very similar to those set forth in the United Nations Convention and Protocol. The CIREFCA principles and crite-

having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. *Id.* art. 33(2).

31. Handbook, *supra* note 27, ¶ 155.

32. *Id.* ¶ 157.

33. *Id.* ¶ 156.

34. U.N. Doc. A/43/874 (1988) [hereinafter CIREFCA Principles and Criteria].

35. *Id.* ¶ 41.

ria, however, do not provide separate requirements for denial of non-refoulement. Under the CIREFCA principles and criteria, a refugee may be expelled on the basis of a serious non-political crime committed prior to admission to the country of refuge, in contrast to the Convention's rule that to justify expulsion of a refugee, the crime must be particularly serious.

VI. CRIMINAL BASES FOR DENIAL OF REFUGEE STATUS, ASYLUM, AND WITHHOLDING OF DEPORTATION UNDER U.S. LAW

United States law, like the international conventions discussed above, denies protection to persons with certain criminal backgrounds.³⁶ The grounds for denial depend upon the form of protection in question.

United States law does not refer to the Convention and Protocol for criminal grounds for denying refugee status. Instead, refugee status may be denied under U.S. law if the refugee falls under the criminal grounds for exclusion from the United States.³⁷ The Attorney General has the discretion to waive most of the exclusion grounds for refugee applicants for humanitarian reasons, to ensure family unity, or when waiver would be in the public interest.³⁸

The U.S. provisions for asylum and withholding of deportation closely track the United Nations bases for denying refugee status and non-refoulement on criminal grounds. However, there are several distinctions between the Convention and U.S. law, particularly in light of the United States' continuing efforts during the last ten years to make the immigration consequences of criminal conduct more severe.

According to the statutes and INS's implementing regulations, asylum must be denied if:

- the alien has participated in persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.³⁹

36. See Evangeline G. Abriel, *Presumed Ineligible: the Effect of Criminal Convictions on Applicants for Asylum and Withholding of Deportation Under Section 515 of the Immigration Act of 1990*, 6 GEO. IMMIGR. L. J. 27, 37-46 (1992).

37. 8 U.S.C. § 1157(c)(3) (1976); INA § 208(c)(3) (1995).

38. *Id.* The exclusion grounds which are not waivable for refugee applicants are those found at 8 U.S.C. § 1182(a)(2)(c) (1976), INA § 212(a)(2)(C) (1995) (controlled substance traffickers), and 8 U.S.C. §§ 1182(a)(3)(A), (B), (C), and (E) (1976) (espionage, sabotage, terrorism, foreign policy grounds, and participants in Nazi persecutions or in genocide).

39. 8 U.S.C. § 1101(a)(42) (1976); 8 U.S.C. § 1158(a) (1976). Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (effective Apr. 1, 1997) [hereinafter IIRIRA], Section 604, this provision is included as well at Section 208(b)(2)(A)(i).

- the alien, having been convicted by a final judgment of a particularly serious crime in the United States, constitutes a danger to the community.⁴⁰
- there are reasonable grounds for regarding the alien as a danger to the security of the United States.⁴¹

Furthermore, withholding of deportation may not be granted under Section 243(h)(2) of the Immigration and Nationality Act if:

- the alien, having ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.⁴²
- the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the United States.⁴³ An alien who has been convicted of an aggravated felony is considered to have committed a particularly serious crime for purposes of withholding.⁴⁴
- there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States.⁴⁵
- there are reasonable grounds for regarding the alien as a danger to the security of the United States.⁴⁶

In the Anti-Drug Abuse Act of 1988,⁴⁷ Congress included a definition of the term "aggravated felony" specifically for immigration purposes. That definition affects applications for protection measures. Aggravated felony, as defined in Section 101(a)(43) of the Immigra-

40. 8 C.F.R. § 208.14(d)(1) (1994). Under the IIRIRA, *supra* note 39, § 604, this provision will also be included in the Immigration and Nationality Act at § 208(b)(2)(A)(ii).

41. 8 C.F.R. § 208.14(d)(3). Section 604 of the IIRIRA, *supra* note 39, incorporates this provision into the Immigration and Nationality Act at § 208(b)(2)(A)(iv). In addition, effective April 1, 1997, one further crime-based bar to asylum will be made part of the Immigration and Nationality Act: an alien may not be granted asylum if there are serious reasons for believing that he has committed a serious nonpolitical crime outside the U.S. prior to his arrival in the U.S. (to be codified at Immigration and Nationality Act § 208(b)(2)(A)(iii)).

42. 8 U.S.C. § 1253(h)(2)(A) (1994). This provision will be redesignated as INA § 241(b)(3)(B)(i), under the IIRIRA, *supra* note 39.

43. 8 U.S.C. § 1253(h)(2)(B). This provision will be redesignated as INA § 241(b)(3)(B)(i), under the IIRIRA, *supra* note 39.

44. 8 C.F.R. § 208.16(c)(2)(i) (1995); 8 U.S.C. § 1253(h)(2) (1994). This provision has been modified by § 305 of the IIRIRA, *supra* note 39. Under that section, an aggravated felony or aggravated felonies for which an alien has been sentenced to an aggregate term of imprisonment of at least five years are considered particularly serious crimes (to be codified as INA § 241(B)).

45. 8 U.S.C. § 1253(h)(2)(C) (1994). This provision will be redesignated as INA § 241(b)(3)(B)(iii), under the IIRIRA, *supra* note 39.

46. 8 U.S.C. § 1253(h)(2)(D) (1994). This provision will be redesignated as INA § 241(b)(3)(B)(iv) under the IIRIRA, *supra* note 39.

47. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181.

tion and Nationality Act, is a very broad term, and has been expanded continuously since its inception.⁴⁸ The list of crimes now included in the term "aggravated felonies" includes crimes such as murder.⁴⁹ However, it also includes crimes which ordinarily would not be considered aggravated felonies. Among these are illicit trafficking in any controlled substance, firearms, or destructive devices;⁵⁰ theft or burglary offenses for which at least one year imprisonment is imposed;⁵¹ crimes of violence for which at least one year imprisonment is imposed;⁵² owning, controlling, managing, or supervising a prostitution business;⁵³ offenses involving fraud or deceit in which loss to the victim is at least \$10,000;⁵⁴ and, perhaps most important for refugees, offenses relating to document fraud for which at least one year imprisonment is imposed.⁵⁵

Conviction of an aggravated felony has severe consequences for both asylum applicants and applicants for withholding of deportation. An alien who has been convicted of an aggravated felony, as defined under the immigration laws, is statutorily precluded from even applying for asylum.⁵⁶ For purposes of withholding of deportation, aggra-

48. The list was expanded in the Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978; in the Immigration and Nationality Technical Corrections Act of 1994, Act of Oct. 25, 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305; in the Anti-Terrorism and Effective Death Penalty Act of 1996, Act of Apr. 24, 1996, Pub. L. No. 104-132, § 440(e), 100 Stat. 1277-78; and in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Act of Sept. 30, 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009.

49. Immigration and Nationality Act §101(a)(43)(A), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 321(a)(1) (effective Apr. 1, 1997).

50. *Id.* §101(a)(43)(C).

51. *Id.* §101(a)(43)(G), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 321(a)(3).

52. *Id.* §101(a)(43)(F), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 321(a)(3).

53. *Id.* § 101(a)(43)(M)(i), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 321(a)(5).

54. *Id.* § 101(a)(43)(M)(i), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 321(a)(7).

55. 8 U.S.C. § 1101(a)(43)(P), INA § 101(a)(43)(P), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 § 440(e)(4) and (6), and by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 321(a)(9). An offense which the alien commits only to aid his spouse, parent, or child to violate the immigration laws is excepted.

56. 8 U.S.C. § 1158(d), INA § 208(d). This provision will change on April 1, 1997. As amended by § 604 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 208 of the Immigration and Nationality Act will no longer prohibit *application* for asylum by an alien convicted of an aggravated felony. Nonetheless, under the 1996 Act, aggravated felonies will be considered to be particularly serious crimes for purposes of asylum, IIRIRA § 604, to be codified at INA § 208(b)(2)(B)(i), so that an alien convicted of an aggravated felony remains statutorily ineligible to be granted asylum. The amended version of Section 208 becomes effective on April 1, 1997. IIRIRA §604(c).

vated felonies are considered by statute to be "particularly serious crimes."⁵⁷ Because a person who has been convicted of a particularly serious crime is statutorily ineligible for withholding,⁵⁸ conviction of an aggravated felony also results in statutory ineligibility for withholding of deportation. Moreover, the Attorney General may now designate by regulation additional offenses to be considered particularly serious crimes or serious non-political crimes.⁵⁹

VII. COMPARISON OF U.S. LAW WITH THE UNITED NATIONS CONVENTION AND PROTOCOL PROVISIONS PERTAINING TO THE EFFECT OF CRIMINAL CONDUCT ON REFUGEE STATUS

The consequences of criminal conduct for persons seeking protection in the United States are much more severe under U.S. law than they would be under the United Nations Convention and Protocol. This is unfortunate because, although the United States has acceded to the Protocol, the results under U.S. law are nonetheless quite different from those which would be recommended under the United Nations Handbook.

There are two main areas in which U.S. refugee law differs from the United Nations principles. First, U.S. law considers a serious crime to be something much less serious than contemplated under the United Nations Handbook. In particular, some of the crimes considered particularly serious under U.S. law, because they meet the immigration definition of aggravated felony, are less heinous than the concept of particularly serious crime held by the drafters of the Convention, Protocol, and Handbook.⁶⁰ Second, U.S. courts have rejected the United Nations requirement of proportionality.⁶¹ Thus, a person who has been convicted of an aggravated felony is conclusively pre-

57. 8 U.S.C. § 1253(h), INA § 243(h). This provision has also been amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Under § 305 of the 1996 Act, aggravated felonies are considered particularly serious crimes for purposes of withholding of deportation only if the alien has been sentenced to an aggregate term of at least five years. (To be codified at INA § 241(b)(3).) Under § 604 of the 1996 Act, conviction of an aggravated felony, regardless of the length of the sentence, is considered conviction of a particularly serious crime for purposes of asylum. (Effective Apr. 1, 1997, IIRIRA § 309(a)).

58. 8 U.S.C. § 1253(h)(2)(B) (1994); INA § 243(h)(2)(B) (1995). This provision will be re-codified as INA § 241(b)(3)(B)(ii), IIRIRA § 305. In addition, under IIRIRA § 604, conviction of a particularly serious crime is also a statutory bar to eligibility for asylum (to be codified as INA § 208(b)(2)(B)(i)).

59. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 604 (effective Apr. 1, 1997).

60. See text accompanying note 30. See also Abriel, *supra* note 36, at 49-53.

61. *In re Rodriguez-Coto*, 19 I. & N. Dec. 208, 209 (1983-1989).

sumed to be ineligible for asylum and withholding. There is no taking into account any mitigating factors, nor is any consideration given to the severity of the persecution the applicant may face if returned to his country.

VIII. A HUMANE SOLUTION—THE SECTION 413(F) WAIVER OF THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

Under an extraordinary provision of the Anti-Terrorism and Effective Death Penalty Act of 1996, the distinctions between U.S. law and United Nations principles, described in the preceding section, were considerably eased. Section 413(f) authorizes the Attorney General to withhold an alien's deportation, notwithstanding any other provision of law, if the Attorney General determines that two conditions are met. Those conditions are that:

(A) the alien's life or freedom would be threatened, in the country to which he or she would be deported or returned, on account of race, religion, nationality, membership in a particular social group, or political opinion, and

(B) the grant of withholding is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees.⁶²

This provision takes an enormous step towards reconciling U.S. refugee law and United Nations principles on the protection of refugees. Under the Section 413(f) waiver, the statutory bar to withholding created by the conviction of a particularly serious crime may be waived by the Attorney General, so that a refugee could be granted withholding, despite a criminal conviction. Thus, the Attorney General has the power to ensure that a decision on whether or not to return a refugee to a country where he would be persecuted is in accordance with our obligations under the Convention and Protocol.⁶³

Unfortunately, the Section 413(f) waiver provision will have only a short existence. The Illegal Immigration Reform and Immigrant Re-

62. Anti-Terrorism and Effective Death Penalty Act of 1996, § 413(f), Act of Apr. 24, 1996, Pub. L. No. 104-132, 110 Stat. 1214 (adding new § 243(h)(2) to the Immigration and Nationality Act).

63. See "Withholding of Deportation/Restriction on Removal," information sheet prepared by the United Nations High Commissioner on Refugees' Washington Office (copy on file with author). The United Nations has taken the position that the Section 413(f) waiver allows all noncitizens to apply for withholding of deportation if their lives or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion if returned to their home countries.

sponsibility Act of September 30, 1996 replaced Section 243(h) of the Immigration and Nationality Act, which contained the withholding of deportation provisions, with new INA Section 241.⁶⁴ The new provisions, which contain no waiver comparable to Section 413(f), become effective on April 1, 1997.⁶⁵ For the brief period between the enactment of the Anti-Terrorism and Effective Death Penalty Act on April 24, 1996, and the April 1, 1997 effective date of new Section 241, however, the possibility of a waiver to the criminal bars to withholding of deportation exists. At the end of that period, on April 1, 1997, U.S. law will return to its pre-Section 413(f) state of conflict with the United Nations refugee provisions.

IX. CONCLUSION

There will be situations where an individual convicted of an aggravated felony will seem deserving of relief, and where denial of asylum or withholding on the basis of the conviction will seem unduly harsh. One practical example is the case of a woman whose minor son was involved in drug dealing. The police stopped the woman's car and found drugs belonging to her son in the car. The woman believed that, in order to protect her son, she had to say that the drugs were hers and she plead guilty to possession with the intent to distribute. This was her only arrest and conviction. Under current law, the conviction would make her ineligible to apply for asylum. Under the law, as it will be effective on April 1, 1997, she would be statutorily ineligible for asylum and, if sentenced to five or more years' imprisonment, for withholding of deportation as well. There would be no possibility of consideration of the mitigating factors in her case, which were considerable: the son who she tried to protect was killed in a drug fight, another daughter died shortly afterwards, and the woman was given custody of the deceased daughter's four U.S. citizen children all under the age of twelve, and, finally, her second daughter and her son-in-law were both sent overseas in Operation Desert Storm and needed her to care for their infant son, who was a U.S. citizen.

This essay does not advocate that we should allow all criminal aliens to be granted refugee or asylum status or other protection in the United States. It is essential that crime be curtailed, regardless of whether it is committed by U.S. citizens or by aliens. Nonetheless, a

64. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 305. The new equivalent of the former withholding provisions, which will be called "restriction on removal", will be found at § 241(b)(3) of the Immigration and Nationality Act.

65. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 309(a).

uniform rule with no opportunity for consideration of factors other than the conviction of a particular crime is not necessarily the answer. Congress has shown, by its enactment of the Section 413(f) waiver, that it can develop a humane solution to this problem. United States law, once the effective period of the Section 413(f) waiver ends, will result in the preclusion of many asylum and withholding claims on the basis of relatively minor crimes, and the return of persons to countries where their lives and liberty are in danger.