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Using Immigration Law to Protect Human Rights: A Critique of Recent Legislative Proposals

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USING IMMIGRATION LAW TO PROTECT HUMAN RIGHTS: A CRITIQUE OF RECENT LEGISLATIVE PROPOSALS

· William J. Aceves*
Paul L. Hoffman**

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On August 1, 2002, a federal jury convicted Eriberto Mederos, a former Cuban psychiatric nurse, of lying to U.S. immigration officials about his role in the torture of political dissidents in Cuba.

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The authors' earlier Article, *Using Immigration Law to Protect Human Rights: A Legislative Proposal*, appears at 20 MICH. J. INT'L L. 657 (1999). This Article is based, in part, on a report prepared by Professor Aceves for Amnesty International USA. The views expressed in this Article, however, do not necessarily represent the views of Amnesty International or Amnesty International USA. Both authors have consulted with several human rights organizations regarding the legislative proposals discussed in this Article. The authors would like to thank Alina Connor, Marin Dell, Sandra Hart, Troy Jordan, Jennifer Lane, and Gina Werth for their research assistance.

Mederos entered the United States in 1984 and acquired U.S. citizenship in 1993.¹

On July 23, 2002, a federal jury issued a civil verdict against two former Salvadoran generals, Carlos Eugenio Vides Casanova and José Guillermo García, for their complicity in the torture of three Salvadoran nationals during the 1980s. Both generals entered the United States in 1989.²

INTRODUCTION

Most Americans would be surprised to learn that perpetrators of serious human rights abusers from around the world reside in the United States.³ The Immigration and Naturalization Service (INS) has investigated approximately 400 cases of modern day human rights abusers living in the United States, although it recognizes that the actual number is much higher.⁴ The INS has detained several of these individuals.⁵ Others, however, remain at large.

Nongovernmental organizations have made similar findings. In April 2002, Amnesty International USA released a report describing the problem of impunity and documenting several cases of suspected torturers living in the United States.⁶ The Center for Justice & Accountability, established in 1998 with the support of Amnesty International USA, has investigated over 100 cases of alleged human rights abusers in the United States. The International Educational Missions, established in 1987, has investigated more than 150 cases of suspected torturers residing in the

1. John-Thor Dahlburg, *U.S. May Deport Cuban Torturer*, L.A. Times, Aug. 2, 2002, at A16.

2. Luisa Yanez, *2 Salvadoran Generals Ordered to Pay Victims*, MIAMI HERALD, July 24, 2002, at 1A.

3. For purposes of this Article, the term serious human rights abuses includes the following acts: torture, extrajudicial killing, genocide, war crimes, hostage taking, and forced labor.

4. Telephone Interview with Vienna Colucci, Amnesty International USA, Dec. 11, 2001 (concerning her interview with Walter D. Cadman, Director, National Security Division, Immigration and Naturalization Service, Aug. 14, 2001).

5. See, e.g., Jody A. Benjamin, *INS Arrests 14 in Rights Abuses in Foreign Lands*, SUN-SENTINEL, Nov. 17, 2000, at 1A; Robert L. Jackson, *Setting Up a System to Pursue Alleged War Criminals in U.S.*, L.A. TIMES, Aug. 17, 1999, at A5; Noreen Marcus, *INS Arrests 7 Suspected of Rights Violations*, SUN-SENTINEL, May 9, 2001, at 7B; Del Quentin Wilber, *Rights Abusers Can Find Haven: U.S. Immigration Law Enables Torturers to Enter, Stay Safe*, BALTIMORE SUN, Aug. 28, 2000, at A1.

6. AMNESTY INTERNATIONAL USA, UNITED STATES OF AMERICA: A SAFE HAVEN FOR TORTURERS (2002) [hereinafter SAFE HAVEN REPORT], available at http://www.amnestyusa.org/stoptorture/safe_haven.html.

United States, and it estimates that approximately 1,100 human rights abusers are now in the country.⁷ Of course, these lists are not exhaustive. For each torturer identified, it is likely that many others have eluded detection.⁸

The discovery of "torturers in our midst" has led to several calls for action.⁹ The reasons proffered for action are straightforward. Serious human rights abusers should be held accountable for their actions.¹⁰ At a minimum, they should not find a safe haven in the United States. Indeed, international law precludes certain forms of immigration relief to individuals who have committed serious crimes, including crimes against humanity, war crimes, and crimes against peace. For example, individuals who have committed these crimes are ineligible for refugee status.¹¹ They are deemed unworthy of such protection and should not be permitted to find immunity for their crimes by simply crossing State borders.

Since 1999, several legislative proposals have been introduced in Congress to address this issue. These proposals have called for denying immigration relief to foreign nationals who committed serious human rights abuses abroad. In addition, some proposals have sought to establish a federal agency to investigate and take legal action against serious human rights abusers. Congress has not yet adopted any of these proposals. In light of the tragedy of September 11 and the renewed awareness of immigration law, it is likely that Congress will revisit this issue.¹²

7. Alfonso Chardy, *Nazi Hunter on Quest to Expel Other "Torturers"*, MIAMI HERALD, Mar. 15, 2001, at 7A; Bill Douthat, *Boynton-Area Man Tracks, Ousts Torturers*, PALM BEACH POST, Mar. 12, 2001, at 1A; see, e.g., Andrew Bounds, *U.S. Catches Up With Abusers of Human Rights: The Justice Department Has Begun Rounding Up Immigrants Accused of State-Sponsored Atrocities*, FIN. TIMES (London, USA ed.), May 24, 2001, at 7; Niles Lathem, *Nazi Hunter is on Their Trail*, N.Y. POST, May 14, 2001, at 7.

8. Bounds, *supra* note 7; Alfonso Chardy & Elisabeth Donovan, *Scores Accused of Atrocities Committed in Other Countries Are Quietly Living in U.S.*, MIAMI HERALD, July 22, 2001.

9. See, e.g., David Adams, *Reaching for More Foreign Criminals*, ST. PETERSBURG TIMES, Apr. 9, 2001, at 1A; Letter from Richard Krieger, President, International Educational Missions, Inc., to John Ashcroft, Attorney General (Apr. 18, 2001) (on file with author).

10. See generally STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (1997); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449 (1990).

11. See generally REFUGEE LAW IN CONTEXT: THE EXCLUSION CLAUSE (Peter J. van Krieken ed., 1999).

12. In response to the attacks of September 11, numerous calls have been made, in the United States and abroad, to restrict immigration. See, e.g., The Relationship Between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments: Commission Working Document, COM(01)743 final [hereinafter Commission Working Document]; THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM

This Article critiques several legislative proposals that sought to impose immigration restrictions on serious human rights abusers.¹³ Part I provides a brief overview of the international restrictions on immigration relief. In particular, it focuses on those restrictions that limit immigration relief available to individuals who have committed serious human rights abuses. Part II then reviews the Immigration and Nationality Act (INA) and its restrictions on immigration relief. It also examines the federal agencies charged with investigating cases of serious human rights abusers in the United States. Part III describes recent legislative proposals that have sought to deny immigration relief to serious human rights abusers. It critiques four bills and a related Justice Department proposal: (1) S. 1375: Anti-Atrocity Alien Deportation Act;¹⁴ (2) H.R. 5285: Serious Human Rights Abusers Accountability Act of 2000;¹⁵ (3) Human Rights Abusers Act of 2000;¹⁶ (4) H.R. 1449: Anti-Atrocity Alien Deportation Act;¹⁷ and (5) S. 864: Anti-Atrocity Alien Deportation Act of 2001.¹⁸ Finally, Part IV sets forth a list of recommendations for U.S. immigration policy. These recommendations seek to balance the desire to combat impunity with the need to protect the rights of legitimate immigrants.

While immigration restrictions have been the focus of recent congressional efforts to combat impunity, the United States should not use immigration law to circumvent its obligation to prosecute, extradite, or surrender serious human rights abusers. For example, the United States has signed and ratified the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture), which established the principle of extradite or prosecute (*aut*

BILL (Ronald J. Daniels et al. eds., 2001). See generally Ray Wilkinson, *After the Terror . . . The Fallout*, [2001] 4 REFUGEES 4–13.

13. See William J. Aceves & Paul L. Hoffman, *Using Immigration Law to Protect Human Rights: A Legislative Proposal*, 20 MICH. J. INT'L L. 657 (1999); Ellen Y. Chung, *A Double-Edged Sword: Reconciling the United States' International Obligations Under the Convention Against Torture*, 51 EMORY L.J. 355 (2002); Susan H. Lin, *Aliens Beware: Recent United States Legislative Efforts to Exclude and Remove Alien Human Rights Abusers*, 15 EMORY INT'L L. REV. 733 (2001), for other critiques of recent legislative proposals.

14. Anti-Atrocity Alien Deportation Act, S. 1375, 106th Cong. (1999).

15. Serious Human Rights Abusers Accountability Act of 2000, H.R. 5285, 106th Cong. (2000).

16. *Serious Human Rights Abusers Accountability Act of 2000: Hearing on H.R. 5285 Before the House Subcomm. on Immigration and Claims of the Comm. on the Judiciary, House of Representatives*, 106th Cong. (2000) [hereinafter *Serious Human Rights Abusers Hearing*], at 48 (text of the Human Rights Abusers Act of 2000).

17. Anti-Atrocity Alien Deportation Act, H.R. 1449, 107th Cong. (2001).

18. Anti-Atrocity Alien Deportation Act of 2001, S. 864, 107th Cong. (2001).

dedere aut judicare).¹⁹ If a person alleged to have committed acts of torture is found in U.S. territory, the United States is obligated to investigate and, when appropriate, to take the suspect into custody or take other legal measures to ensure his continued presence.²⁰ If the United States does not extradite the suspect, it is required to submit the case to its competent authorities for prosecution.²¹ In 1994, Congress adopted legislation to implement its obligations under the Convention Against Torture.²² The legislation, codified in 18 U.S.C. § 2340A, establishes criminal liability for acts of torture committed abroad. Despite this legislation, the United States has yet to prosecute a single case of extra-territorial torture despite several opportunities.²³

I. INTERNATIONAL RESTRICTIONS ON IMMIGRATION RELIEF

Under international law, individuals who have committed serious human rights abuses are not eligible for certain forms of immigration relief.²⁴ One of the earliest instruments to adopt this restriction was the Universal Declaration of Human Rights.²⁵ While the Universal Declaration recognizes the right to asylum from persecution, it also imposes a significant restriction. "This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."²⁶

The 1951 Convention Relating to the Status of Refugees (Refugee Convention) formally codified this restriction on asylum.²⁷ The Refugee

19. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the U.N. Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

20. *Id.* at 114.

21. *Id.* at 115. See generally M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 157-61 (1995); Colleen Enache-Brown & Ari Fried, Note, *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law*, 43 MCGILL L.J. 613 (1998).

22. 18 U.S.C. § 2340A (1994).

23. See generally Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 516, 528-29 (2000); Aaron Solomon, Note, *The Politics of Prosecutions Under the Convention Against Torture*, 2 CHI. J. INT'L L. 309 (2001).

24. See generally GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 95 (2d ed. 1996); KAREN MUSALO ET AL., *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* 30, 699-761 (2002); Symposium, *Exclusion From Protection*, 12 INT'L J. REFUGEE L. 1 (Supp. 2000).

25. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71-77, U.N. Doc. A/RES/810 (1948).

26. *Id.* at 74.

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

Convention precludes the granting of refugee status to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;²⁸
- (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.²⁹

28. The exclusion clause defines these three offenses according to "the international instruments drawn up to make provision in respect of such crimes . . ." Refugee Convention, *supra* note 27, at 156. At the time the Refugee Convention was drafted, the only international instruments relating to these offenses were the Charter for the International Military Tribunal at Nuremberg, Control Council Law No. 10, and the 1949 Geneva Conventions. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, art. 3, 59 Stat. 1544, 82 U.N.T.S. 279; Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Control Council Law No. 10, Official Gazette for the Control Council of Germany 50 (1946); Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3115, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, or Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Prisoners in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Some commentators have suggested, however, that the exclusion clause should be interpreted in a manner consistent with more recent developments. See GOODWIN-GILL, *supra* note 24, at 98. For application of these provisions in Canada and Australia, see MUSALO ET AL., *supra* note 24, at 706–21. Thus, reference should be made to the 1977 Additional Protocols to the Geneva Conventions, the Statutes for the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Rome Statute of the International Criminal Court. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; Statute of the International Criminal Tribunal of Rwanda, *annexed to* S.C. Res. 955, U.N. SCOR, 3453th mtg. at 20, U.N. Doc. S/RES/955 (1994); Statute of the International Criminal Tribunal of Yugoslavia, S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993); Rome Statute for the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, U.N. Doc. A/CONF. 183/9 [hereinafter Rome Statute].

29. *Id.*; see also GOODWIN-GILL, *supra* note 24, at 95. Even crimes committed out of a genuine political motive will not be considered non-political crimes if they are disproportionate to the objective or are of an atrocious or barbarous nature. *Id.* at 105–08. See generally James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT'L L.J. 257 (2001); Michael Kingsley Nyinah, *Exclusion Under Article 1F: Some Reflections on Context, Principles, and Practice*, 12 INT'L J. REFUGEE L. 295 (Supp. 2000).

This exclusion clause denies refugee status to individuals who, by their conduct, are not considered deserving of this protected status.³⁰ Significantly, the exclusion clause applies regardless of the possible merits of a refugee's claim.³¹

The basis for the exclusion clause can be traced to the political situation that existed at the time the Refugee Convention was drafted, when "the memory of the trials of major war criminals was still very much alive, and there was agreement on the part of States that war criminals should not be protected."³² As noted by one commentator:

Reference to the *travaux préparatoires* shows that the exclusion clauses sought to achieve two aims. The first recognizes that refugee status has to be protected from abuse by prohibiting its grant to undeserving cases. The second aim of the drafters was to ensure that those who had committed grave crimes in World War II, other serious non-political crimes or who were guilty of acts contrary to the purposes and principles of the United Nations did not escape prosecution.³³

The United Nations High Commissioner for Refugees (UNHCR) has acknowledged the importance of using the exclusion clause to protect the legitimacy of the refugee process. The Statute of the Office of the UNHCR provides that the competence of the High Commissioner shall not extend to a person "[i]n respect of whom there are serious reasons for considering that he has committed . . . a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights."³⁴ The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status makes a similar determination, noting that such individuals "are not considered to be deserving of international

30. See generally UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 23–27, HCR/IP/Eng/Rev.1 (1992) [hereinafter UNHCR HANDBOOK].

31. See GOODWIN-GILL, *supra* note 24, at 97; cf. NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS: ITS HISTORY AND INTERPRETATION 25 (1955) (discussing a convention modeled after the Refugee Convention: Section F "is couched in categorical language . . . It follows that, once a determination is made that there are sufficient reasons to consider a certain person as coming under this . . . [section], the country making the determination is barred from according him the status of a [refugee]."). See generally *Exclusion from Protection*, *supra* note 24; Nancy Weisman, *Article 1(F) of the 1951 Convention Relating to the Status of Refugees in Canadian Law*, 8 INT'L J. REFUGEE L. 111 (1996).

32. UNHCR HANDBOOK, *supra* note 30, at 24.

33. Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses 2* (2001), at <http://www.unhcr.ch>.

34. Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), U.N. GAOR, 5th Sess., Supp. No. 20, at 47, U.N. Doc. A/1775 (1950).

protection.”³⁵ The UNHCR has also noted that “the Convention, when properly applied, does not provide safe haven to criminals. On the contrary, it is carefully framed to exclude persons who committed particularly serious crimes.”³⁶ The High Commissioner has cautioned, however, that no unwarranted links should be made between refugees and crime.³⁷

Given the complex nature of exclusion cases, the UNHCR has emphasized that the exclusion clause must be narrowly interpreted.³⁸ Moreover, the UNHCR has indicated that “exclusion clauses should not be used to determine the admissibility of an application or claim for refugee status. A preliminary or automatic exclusion would have the effect of denying such individual an assessment of the claim for refugee status.”³⁹ Accordingly, the UNHCR has called for application of the inclusion before exclusion principle in cases of refugee determination—“the applicability of the exclusion clauses should be considered only once it is determined (individually or *prima facie*) that the criteria for refugee status are satisfied.”⁴⁰

Regional organizations have also adopted these restrictions on the right to asylum. For example, the 1969 Convention Governing the Spe-

35. UNHCR HANDBOOK, *supra* note 30, at 23–27.

36. Press Release, UNHCR, Lubbers: Refugee Convention No ‘Safe Haven’ for Terrorists (Oct. 5, 2001), at <http://www.unhcr.ch>; see also Wilkinson, *supra* note 12, at 9.

37. In a 1997 Resolution on Measures to Eliminate International Terrorism, the U.N. General Assembly indicated that States should take appropriate measures “before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts” G.A. Res. 210, U.N. GAOR, 51st Sess., Annex, Agenda Item 151, U.N. Doc. A/RES/51/210 (1997). In this respect, States should consider whether the asylum-seeker “is subject to investigation for or is charged with or has been convicted of offences connected with terrorism” *Id.* In addition, the resolution indicated that States should ensure that refugee status is not used to facilitate future terrorist acts. *Id.* During the General Assembly deliberations preceding the adoption of the resolution, it was evident that States were concerned “that the humanitarian institution of political asylum must not serve to benefit those who funded, organized, committed or advocated terrorism.” *Summary Record of the 10th Meeting*, U.N. GAOR 6th Comm., 51st Sess., at 3, U.N. Doc. A/C.6/51/SR.10 (1996) (statement of Tunisian representative); see also *Summary Record of the 11th Meeting*, U.N. GAOR 6th Comm., 51st Sess., at 11–12, U.N. Doc. A/C.6/51/SR.11 (1996) (statement of Egyptian representative). At the same time, however, States sought to ensure that this initiative “should not be construed as making an unwarranted link between refugees and terrorism or as in any way weakening the protection afforded by the Refugee Convention.” *Summary Record of the 10th Meeting*, *supra*, at 5 (statement of United Kingdom representative).

38. See UNHCR HANDBOOK, *supra* note 30, at 24, 35. For example, some commentators have called for limiting application of the exclusion principle in cases of child soldiers. See Michael S. Gallagher, S.J., *Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum*, 13 INT’L J. REFUGEE L. 310, 333 (2001); Nynah, *supra* note 29, at 308.

39. See Memorandum from the United Nations High Commissioner for Refugees on the Applicability of Exclusion Clauses, Inter-Office Memorandum No.83/96, Field-Office Memorandum No. 93/93, at 3 (Dec. 2, 1996) (on file with author).

40. *Id.*

cific Aspects of Refugee Problems in Africa adopted by the Organization of African Unity contains an exclusion clause that is nearly identical to that in the Refugee Convention.⁴¹ In November 2000, the Inter-American Commission on Human Rights also recognized restrictions on the right to asylum.⁴² The Inter-American Commission indicated that “the institution of asylum is totally subverted by granting such protection to persons who leave their country to elude a determination of their liability as the material or intellectual author of international crimes.”⁴³ Accordingly, the Inter-American Commission recommended to the members of the Organization of American States that they “refrain from granting asylum to any person alleged to be the material or intellectual author of international crimes.”⁴⁴

Despite these restrictions on asylum, international law protects individuals from return (*refoulement*) to countries where they will face persecution or torture.⁴⁵ For example, the Refugee Convention provides that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁴⁶ However, the Refugee Convention imposes a significant restriction on *non-refoulement* protection. It may not “be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”⁴⁷

The Convention Against Torture also codifies the principle of *non-refoulement*. In contrast to the Refugee Convention, however, the Convention Against Torture’s protection against *refoulement* is absolute. Article 3(1) provides that “[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds

41. Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45.

42. INTER-AMERICAN COMM’N ON HUMAN RIGHTS, ASYLUM AND INTERNATIONAL CRIMES, 2000 ANNUAL REPORT (forthcoming 2004), available at <http://www.oas.org>.

43. *Id.*

44. *Id.*

45. See generally Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT’L J. REFUGEE L. 533 (2001); David Weissbrodt & Isabel Hörreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1 (1999); Kathleen M. Keller, *A Comparative and International Law Perspective on the United States (Non)Compliance with its Duty of Non-Refoulement*, Note, 2 YALE HUM. RTS. & DEV. L.J. 183 (1999).

46. Refugee Convention, *supra* note 27, at 176.

47. *Id.*

for believing that he would be in danger of being subjected to torture.”⁴⁸ For the purpose of making such a determination, a State Party must take into account “all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.”⁴⁹ There is no right of derogation from this provision nor any restrictions on its application.

II. A BRIEF OVERVIEW OF U.S. IMMIGRATION LAW

The United States has incorporated some of the above principles of international law into the INA. The scope of the legal framework, however, is not extensive. Moreover, the efficacy of this legal framework is further undermined by a limited institutional framework.

A. *The Legal Framework*

The INA contains several provisions that limit the scope of immigration relief available to individuals who have committed serious human rights abuses. For example, a person who “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” may not be classified as a refugee and is barred from a grant of asylum.⁵⁰ This provision is consistent with the exclusion clause of the Refugee Convention and has been applied to deny asylum status in several cases.⁵¹

In 1978, Congress adopted the Holtzman Amendment to preclude all forms of immigration relief to individuals that participated in acts of Nazi persecution.⁵² The legislation was adopted in response to the discovery that former Nazi persecutors had entered the United States after World War II and, on several occasions, had become naturalized U.S.

48. Convention Against Torture, *supra* note 19, at 114.

49. *Id.*

50. 8 U.S.C. § 1101(a)(42)(2000); 8 U.S.C. § 1158(b)(2) (2000).

51. *See, e.g.*, Riad v. INS, No. 96-70898, 1998 U.S. App. LEXIS 21452 (9th Cir. 1998); Han v. INS, No. 94-70786, 1997 U.S. App. LEXIS 3854 (9th Cir. 1997); Ofosu v. McElroy, 98 F.3d 694 (2d Cir. 1996); McMullen v. INS, 788 F.2d 591 (9th Cir. 1986).

52. Holtzman Amendment, Pub. Law 95-549, 92 Stat. 2065 (codified as amended in scattered sections of 8 U.S.C.). *See generally* Robert A. Cohen, *United States Exclusion and Deportation of Nazi War Criminals: The Act of October 30, 1978*, 13 N.Y.U. J. INT'L L. & POL. 101 (1980); Bruce Einhorn et al., *The Prosecution of War Criminals and Violators of Human Rights in the United States*, 19 WHITTIER L. REV. 281 (1997); Jeffrey N. Mausner, *Apprehending and Prosecuting Nazi War Criminals in the United States*, 15 NOVA L. REV. 747, 764-65 (1991).

citizens.⁵³ The 1978 Holtzman Amendment precludes admission and facilitates deportation of aliens who participated in Nazi persecution.⁵⁴ It also prevents the Attorney General from authorizing cancellation of removal or granting voluntary departure to aliens who participated in Nazi persecution.

In 1990, Congress extended the 1978 Holtzman Amendment provisions to include aliens who participated in genocide.⁵⁵ It appears that this provision was added in response to U.S. ratification of the Convention on the Prevention and Punishment of the Crime of Genocide.⁵⁶ In 1998, the International Religious Freedom Act established similar immigration restrictions on any individual who, while serving as a foreign government official, was responsible for particularly severe violations of religious freedom.⁵⁷ This provision only applies, however, to foreign government officials who have committed such acts in the preceding twenty-four-month period.

In contrast, perpetrators of other human rights abuses, such as torture or extrajudicial killing, are not subject to the same set of immigration restrictions that apply to individuals who participated in severe violations of religious freedom, Nazi persecution, or genocide. Individuals who commit torture or extrajudicial killing can only be excluded or deported if they fall within the general class of excludable or deportable aliens, which includes the following categories: crimes involving moral turpitude; terrorist activities; foreign policy implications; membership in totalitarian party; and misrepresentation.⁵⁸ According to the Justice Department, however, these provisions do not provide the INS with sufficient authority to respond to serious human rights abusers.⁵⁹ “[T]he

53. Cohen, *supra* note 52, at 102. See generally ALLAN A. RYAN, JR., *QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN AMERICA* (1984); Stephen J. Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 MINN. L. REV. 97 (1986).

54. 8 U.S.C. § 1182(a)(3)(E)(i) (2000); 8 U.S.C. § 1227(a)(4)(D) (2000).

55. See 8 U.S.C. § 1182(a)(3)(E)(ii). See generally Paul John Chrisopoulos, Note, *Giving Meaning to the Term “Genocide” as It Applies to U.S. Immigration Policy*, 17 LOY. L.A. INT’L & COMP. L. REV. 925 (1995).

56. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted by United Nations General Assembly* Dec. 9, 1948, 78 U.N.T.S. 277.

57. See 8 U.S.C. § 1182(a)(2)(G). See also T. Jeremy Gunn, *A Preliminary Response to Criticisms of the International Religious Freedom Act of 1998*, 3 BYU L. REV. 841 (2000), for a discussion of criticisms levied against the act.

58. See 8 U.S.C. § 1182(a)(2)(A)(acts of moral turpitude), (a)(3)(B)(terrorist activity), (a)(3)(C)(foreign policy consequences), (a)(2)(D)(membership in totalitarian party), (a)(6)(C)(misrepresentation). It is unclear, however, why some of these provisions would not apply to serious human rights abusers.

59. *Adopted Orphans Citizenship Act and Anti-Atrocity Alien Deportation Act: Hearing on H.R. 2833 and H.R. 3058 Before the Subcomm. on Immigration and Claims of the Comm. on the Judiciary*, 106th Cong. 22 (2000) [hereinafter *Anti-Atrocity Hearing*] (statement of James Castello, Associate Deputy Attorney General, U.S. Department of Justice).

present state of immigration law often does not provide the INS with the necessary tools to remove individuals from the United States, even when they have allegedly committed acts considered to be atrocious human rights abuses.”⁶⁰ Indeed, these limitations even apply to acts of genocide or violations of religious freedom:

For example, genocide applies only to actions committed against a national, ethnic, racial or religious group. To constitute genocide, those actions also have to be committed with the specific intent of destroying a protected group in whole or in part. Further, the genocide bar applies only to those “engaged” in genocide, which arguably does not include those who may have incited, assisted, conspired or attempted to engage in genocide. Similarly, to be barred for particularly severe violations of religious freedom, the individual must be a foreign official who has engaged in those violations in the last twenty-four months. Those who have “ordered, incited, assisted or otherwise participated in” persecution are statutorily barred from admission as a refugee and from obtaining asylum status or withholding of removal, but they are eligible to enter the United States, to adjust their status to lawful permanent residence, and to obtain United States citizenship.⁶¹

While the INA precludes immigration relief to foreign nationals in certain situations, federal regulations establish safeguards for aliens in the removal process. For example, the Justice Department has adopted regulations to comply with the rule of *non-refoulement* as set forth in the Convention Against Torture.⁶² These regulations permit individuals to raise a claim of *non-refoulement* during the course of removal proceedings.⁶³ Most cases involving *non-refoulement* are initially determined by Immigration Judges of the Executive Office for Immigration Review and are subject to review by the Board of Immigration Appeals. In these cases, the applicant must “establish that it is more likely than not that he . . . would be tortured if removed to the proposed country of removal.”⁶⁴ In

60. *Id.*; see also Adams, *supra* note 9, at 1A.

61. *Anti-Atrocity Hearing*, *supra* note 59, at 22 (statement of Castello).

62. These regulations were adopted pursuant to the Foreign Affairs Reform and Restructuring Act of 1998. See 8 C.F.R. pts. 3, 103, 208, 235, 238, 240, 241, 253 (2002). These provisions are distinct from the protections against *non-refoulement* established by Congress pursuant to the Refugee Convention. See 8 U.S.C. § 1158 (2000); see also DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES 465 (3d ed. 1999); REGINA GERMAIN, AILA’S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 183–213 (2d ed. 2000).

63. See, e.g., *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001); *Al-Saher v. INS*, 268 F.3d 1143 (9th Cir. 2001); *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000).

64. 8 C.F.R. § 208.16(c)(2)(2002).

assessing whether an applicant would be tortured in the proposed country of removal, the regulations list the following criteria for consideration:

- (1) Evidence of past torture inflicted upon the applicant;
- (2) [e]vidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
- (3) [e]vidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
- (4) [o]ther relevant information regarding conditions in the country of removal.⁶⁵

If an individual meets these criteria, he is entitled to withholding of removal.

If an individual is ineligible for withholding of removal because of certain activity, such as his participation in acts of genocide or Nazi persecution, the regulations authorize deferral of removal, a more temporary form of protection.⁶⁶ Deferral of removal differs from withholding of removal in several respects. Perhaps most significantly, the termination process for deferral of removal is quicker than for withholding of deportation.

In cases of either withholding or deferral of removal, the Secretary of State may forward to the Attorney General assurances obtained from the government of a specific country that an individual would not be tortured if removed to that country.⁶⁷ The Attorney General must consider whether these assurances are sufficiently reliable to allow the individual's removal to that country.⁶⁸

B. *The Institutional Framework*

In 1979, the Attorney General established the Office of Special Investigations (OSI) in the Justice Department to investigate and prosecute any individual who had assisted or participated in Nazi persecution.⁶⁹ Pursuant to the terms of the 1979 Order, the OSI was granted the principal responsibility for "detecting, investigating, and . . . taking legal action to deport, denaturalize, or prosecute any individual who was admitted as an alien into or became a naturalized citizen of the United States and who had assisted the Nazis by persecuting any person

65. 8 C.F.R. § 208.16(c)(3).

66. *Id.* § 208.17; *see also* GERMAIN, *supra* note 62, at 201.

67. *Id.* § 208.18(c).

68. *Id.* § 208.18(c)(2).

69. Transfer of Functions of the Special Litigation Unit Within the Immigration and Naturalization Service of the Department of Justice to the Criminal Division of the Department of Justice, Order of the U.S. Attorney General, No. 851-79, (Sept. 4, 1979) [hereinafter Transfer of Functions Order].

because of race, religion, national origin or political opinion.”⁷⁰ Specifically, the OSI was authorized to perform the following functions:

1. Review pending and new allegations that individuals, who prior to and during World War II, under the supervision or in association with the Nazi government of Germany, its allies, and other affiliated governments, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin or political opinion;
2. Investigate, as appropriate, each allegation to determine whether there is sufficient evidence to file a complaint to revoke citizenship, support a show cause order to deport, or seek an indictment or any other judicial process against any such individuals;
3. Maintain liaison with foreign prosecution, investigation and intelligence offices;
4. Use appropriate Government agency resources and personnel for investigations, guidance, information and analysis; and
5. Direct and coordinate the investigation, prosecution, and any other legal actions instituted in these cases with the Immigration and Naturalization Service, the Federal Bureau of Investigation, the United States Attorneys Offices, and other relevant Federal agencies.⁷¹

To date, the OSI has investigated over 1,600 people and filed approximately 100 cases seeking denaturalization or deportation of former Nazis.⁷² It has also used the 1978 Holtzman Amendment to deny entry to former Nazis and individuals who participated in acts of Nazi persecution.⁷³ The OSI has also used the Nazi persecution statutes to prevent Japanese war criminals from entering the United States.⁷⁴

70. *Id.* at 3.

71. *Id.*

72. *See, e.g.*, *United States v. Balsys*, 524 U.S. 666 (1998); *Kungys v. United States*, 485 U.S. 759 (1988); *United States v. Gecas*, 120 F.3d 1419 (11th Cir. 1997); *Schellong v. INS*, 805 F.2d 655 (7th Cir. 1986).

73. *See, e.g.*, Philip Shenon, *U.S. Disputes Waldheim Assertions*, N.Y. TIMES, Feb. 17, 1998, at A3; Glen Elsasser, *U.S. Bars Kurt Waldheim, Cites Service with Nazis*, CHIC. TRIB., Apr. 28, 1987, at C1; *see also* Michael Janofsky, *Chilean Equestrian Sued in U.S. Court*, N.Y. TIMES, Aug. 15, 1987, at A48; Michael Janofsky, *Visa Denial: A Basic Conflict*, N.Y. TIMES, Aug. 14, 1987, at B14.

74. *See* James Dao, *U.S. Bars Japanese Who Admits War Crime*, N.Y. TIMES, June 27, 1998, at A3; Ronald J. Ostrow, *U.S. Bars 2 Repentant Japan Veterans*, L.A. TIMES, June 25, 1998, at A9.

In 1997, the Justice Department established the National Security Unit (NSU) within the Investigations Division of the Office of Field Operations.⁷⁵ When fully staffed, the NSU consists of approximately twenty-five personnel, including immigration officers, intelligence analysts, and support personnel. The NSU is responsible for three substantive areas: modern day war crimes, international terrorism, and foreign counterintelligence.⁷⁶ The NSU is responsible for coordinating investigations of modern day war crimes.⁷⁷ Investigations are undertaken by INS field agents when there are reasonable grounds to believe that a violation of immigration law or criminal law has occurred.⁷⁸ In addition to the NSU, the Justice Department also established the National Security Law Division in the INS General Counsel's Office. The National Security Law Division is responsible for cases involving national security, including modern day human rights abusers. Both of these INS agencies work with other government agencies, including the Terrorism and Violent Crime Section in the Justice Department's Criminal Division and the International Terrorism Operations Section in the Federal Bureau of Investigation (FBI).

In order to coordinate government action, the INS and FBI signed a Memorandum of Understanding (MOU) regarding the investigation and prosecution of human rights abuse crimes,⁷⁹ which are defined primarily as torture, war crimes, and genocide.⁸⁰ The MOU was motivated, in part, by Executive Order 13,107, which required federal agencies to "maintain a current awareness of United States international human rights obligations . . ."⁸¹ According to the Justice Department, "[t]he MOU promotes the effective and efficient investigation and prosecution of human rights abuses by setting out the procedures to be followed and the respective responsibilities of each agency."⁸² For this reason, both the INS and the FBI agreed to notify each other when they receive information regarding a human rights abuse crime. They also agreed to coordinate their investigations of these cases, which could include prosecution for immigration violations as well as the underlying criminal offense. In addition, representatives of various government agencies, including the FBI and INS, have held comprehensive training conferences as part of the Joint

75. See SAFE HAVEN REPORT, *supra* note 6, app. 3 at 160. The NSU was formerly known as the "Office of Counterterrorism." *Anti-Atrocity Hearing*, *supra* note 59, at 22 (statement of Castello).

76. SAFE HAVEN REPORT, *supra* note 6, app. 3 at 152.

77. *Id.* at 153.

78. See *id.* at 159.

79. See *id.* at 156-57.

80. See *Anti-Atrocity Hearing*, *supra* note 59, at 22 (statement of Castello).

81. Exec. Order No. 13,107, 3 C.F.R. 236 (1999).

82. *Anti-Atrocity Hearing*, *supra* note 59, at 23 (statement of Castello).

Terrorism Task Force (JTTF).⁸³ Finally, a Statement of Mutual Understanding was also signed with Canada “setting out the policies and procedures for the exchange of information between the two countries” with respect to cases of human rights abusers.⁸⁴

In November 2000, the INS conducted a high profile sweep in south Florida to detain and deport serious human rights abusers. The operation led to the arrest of fifteen foreign nationals from Angola, Haiti, Honduras, and Peru who had allegedly engaged in kidnapping, torture, and murder.⁸⁵ Following the operation, the INS noted that one of its highest enforcement priorities was the investigation, prosecution, and removal of aliens who are human rights abusers.⁸⁶ A subsequent operation in May 2001 resulted in the capture of an additional seven suspects, six from Haiti and one from Peru.⁸⁷

Despite these developments, the ability of INS to identify, detain, prosecute, and remove serious human rights abusers remains unclear. The NSU has expressed concern that U.S. immigration laws are insufficient for addressing all cases of serious human rights abusers. According to the NSU, “[p]resent immigration law does not provide the INS with the necessary tools to remove individuals from the United States, even when they have allegedly committed acts considered to be atrocious human rights abuse[s].”⁸⁸ The NSU has recommended amending the INA to address this limitation. The NSU has also suggested that the federal criminal code should be amended to expand the scope of liability for serious human rights abuses.⁸⁹

At the institutional level, the NSU may lack sufficient resources and personnel to effectively carry out its existing mandate toward modern day war crimes. For example, the NSU has several other responsibilities, including international terrorism and foreign counterintelligence. As a result, it cannot focus exclusively on modern day war crimes. In addition, there are no specific appropriations for coordinating investigations of human rights abusers. When international developments so compel, the NSU must downgrade its focus on human rights abuse cases in order to address other significant cases. Finally, funding for human rights

83. SAFE HAVEN REPORT, *supra* note 6, app. 3 at 156.

84. *Id.*

85. Colleen Mastony, *INS Roundup Links 14 to Human Rights Abuses*, PALM BEACH POST, Nov. 17, 2000, at 1B.

86. Press Release, Immigration and Naturalization Service, INS Special Agents Arrest Human Rights Persecutors (Nov. 28, 2000) (on file with author).

87. Marcus, *supra* note 5, at 7B.

88. SAFE HAVEN REPORT, *supra* note 6, app. 3 at 162.

89. *Id.* at 162.

abuse cases is leveraged from the overall budget.⁹⁰ This further limits the ability of the NSU to work on these cases.

III. A CRITIQUE OF RECENT LEGISLATIVE PROPOSALS

Since 1999, seven bills have been introduced in the House and Senate to address the problem of serious human rights abusers residing in the United States. In addition, the Justice Department prepared its own legislative proposal for consideration by Congress. This Part critiques the four principal bills and the Justice Department proposal: (1) S. 1375: Anti-Atrocity Alien Deportation Act; (2) H.R. 5285: Serious Human Rights Abusers Accountability Act of 2000; (3) Human Rights Abusers Act of 2000; (4) H.R. 1449: Anti-Atrocity Alien Deportation Act; and (5) S. 864: Anti-Atrocity Alien Deportation Act of 2001.⁹¹

A. S. 1375: *Anti-Atrocity Alien Deportation Act*

On July 15, 1999, Senator Patrick Leahy (D-Vt.) introduced the Anti-Atrocity Alien Deportation Act (S. 1375) in the Senate.⁹² According to Senator Leahy, existing immigration law contained a significant loophole: while former Nazi war criminals and individuals suspected of genocide were inadmissible and removable, individuals who had committed acts of torture were not:

We should not repeat the mistake of waiting decades before tracking down war criminals and human rights abusers who have settled in this country. War criminals should find no sanctuary in loopholes in our current immigration policies and enforcement. No war criminal should ever come to believe that he is going to find safe harbor in the United States.⁹³

S. 1375 proposed two changes in U.S. immigration law.⁹⁴ First, the bill imposed immigration restrictions on any alien who had committed an act of torture outside the United States.⁹⁵ Aliens who had committed acts of torture were deemed inadmissible if located outside the United States and removable if located in the United States. These revisions to

90. Walter D. Cadman, Director, National Security Division, Immigration and Naturalization Service, Remarks at the Forensic Training Institute: Torture Survivors and the Legal Process (Nov. 16, 2001).

91. These legislative proposals are provided in the Appendices.

92. 145 CONG. REC. S8636 (daily ed. July 15, 1999).

93. *Id.* at S8637.

94. S. 1375.

95. *Id.* § 2. The bill uses the definition of torture set forth in 18 U.S.C. § 2340, which imposes criminal liability for acts of torture committed abroad.

the INA applied to offenses committed before, on, or after the effective date of the Act.⁹⁶ Second, the bill proposed the establishment of an Office of Special Investigations within the Criminal Division of the Department of Justice.⁹⁷ Under the proposal, this office had the authority to investigate and, when appropriate, to take legal action to remove, denaturalize, or prosecute any alien found to be in violation of INA section 212(a)(3)(E). This Office of Special Investigations did not supplant the existing Office of Special Investigations. Rather, the proposal authorized sufficient appropriations to ensure that the Office of Special Investigations “fulfills its continuing obligations regarding Nazi war criminals.”⁹⁸

On October 20, 1999, the Anti-Atrocity Alien Deportation Act was added to the Denying Safe Havens to International and War Criminals Act of 1999 (S. 1754).⁹⁹ On November 4, 1999, the Senate passed S. 1754, inserting only a technical amendment to the Anti-Atrocity Alien Deportation Act.¹⁰⁰

Identical versions of S. 1375 were introduced in the House on July 29, 1999 (H.R. 2642) and October 12, 1999 (H.R. 3058).¹⁰¹ On February 17, 2000, the House Subcommittee on Immigration and Claims held hearings on H.R. 3058, a bill proposed by Representative Mark Foley (R-Fl.) that mirrored the provisions of S. 1375.¹⁰² Representative Lamar Smith (R-Tx.), who chaired the meeting, noted that three issues had been raised with respect to H.R. 3058 (which was also titled the Anti-Atrocity Alien Deportation Act):

First, some advocates have suggested expanding the bill beyond torture to include other kinds of repression and wrongdoing. Second, some have advocated going beyond deportation to make alien war criminals susceptible to criminal prosecution in the United States as well. Finally, there is the issue of which Agency is the appropriate one to enforce the bill’s provisions. Advocates

96. S. 1375, § 2(c).

97. *Id.* § 3(a).

98. *Id.* § 3(b)(1).

99. Denying Safe Havens to International and War Criminals Act of 1999, S. 1754, 106th Cong. (1999). The bill was introduced by Senators Orrin Hatch (R-Ut.) and Leahy. The bill contained three sections: Title I (Denying Safe Havens to International Criminals); Title II (Promoting Global Cooperation in the Fight Against International Crime); and Title III (Anti-Atrocity Alien Deportation).

100. 145 CONG. REC. S1,4007, S1,4011 (1999).

101. H.R. 2642, 106th Cong. (1999); H.R. 3058, 106th Cong. (1999).

102. See *Anti-Atrocity Hearing*, *supra* note 59. Two members of the Subcommittee were present: Representatives Lamar Smith and Edward Pease. Presenters at the hearing included: James Castello; Representative Mark Foley; and Richard Krieger, President, International Educational Missions, Inc.

of the Office of Special Investigations, including American Jewish organizations that value OSI's Nazi-hunting mission, think highly of OSI's work and maintain close affiliations with OSI. These organizations favor the approach taken by H.R. 3058 and claim the INS has been ineffective in dealing with foreign war criminals. Others argue that immigration enforcement should be carried out by the Immigration and Naturalization Service which has the necessary jurisdiction and expertise.¹⁰³

Perhaps the most contentious issue at the hearing concerned the institutional component of H.R. 3058: the designation of the Office of Special Investigations as the lead agency. While the INS and the OSI are both located within the Justice Department, each organization sought responsibility for investigating and prosecuting serious human rights abusers.

According to Representative Foley, who introduced the bill and testified at the hearing, the OSI had proven successful in pursuing Nazi war criminals and, therefore, it should be used to investigate cases of modern day human rights abusers. "Rather than . . . creating a new area of jurisdiction, it seems to me to be the most appropriate—since they are functional, they are working and they have been skilled in the task of seeking these people—that they would continue in the same vein with this added category."¹⁰⁴ Richard Krieger, President of International Educational Missions, a nonprofit organization that has played an increasingly prominent role in investigating cases of modern day human rights abusers, echoed Representative Foley's position. Indeed, Krieger was even more critical than Representative Foley in his remarks concerning the institutional capacity of INS to address cases of modern day human rights abusers.¹⁰⁵

In contrast, James Castello, Associate Deputy Attorney General, expressed the Justice Department's opposition to expanded OSI jurisdiction.¹⁰⁶ "We think the criminal jurisdiction in this area should rest with the Terrorism and Violent Crime Section of the Criminal Division and

103. *Id.* at 4 (statement of Representative Smith)

104. *Id.* at 11 (statement of Representative Foley).

105. In his testimony, Krieger noted that, unlike the INS, the OSI had succeeded in pursuing cases of former Nazis. "The I.N.S. had this opportunity prior to the formation of OSI in 1979. While the OSI has gained acclaim as the foremost Nazi war criminal investigative and prosecutorial organization in the world, the I.N.S. failed at the task." *Id.* at 39 (statement of Krieger).

106. During his testimony, Castello indicated that the Justice Department was preparing comprehensive legislation to address cases of modern day human rights abusers and that the legislation would be forwarded to the Subcommittee by the end of February. *Id.* at 23 (statement of Castello). In fact, however, the Justice Department proposal was not submitted to Congress until September.

we think the INS should continue to have responsibility for immigration cases in this area.”¹⁰⁷ In support, he noted the existing personnel and expertise of the INS in immigration matters as well as the practical realities of these cases. “A lot of the information that we acquire with respect to modern human rights abusers comes to us in the course of asylum hearings, for example.”¹⁰⁸ In addition, the INS already has detention authority.¹⁰⁹ Therefore, Castello argued it would be more efficient to allow the INS to pursue these cases rather than transfer them to the OSI. While the Anti-Atrocity Alien Deportation Act was adopted by the Senate, the House failed to act on the bill.

*B. H.R. 5285: Serious Human Rights
Abusers Accountability Act of 2000*

On September 25, 2000, Representative Smith introduced the Serious Human Rights Abusers Accountability Act of 2000 (H.R. 5285) in the House.¹¹⁰ H.R. 5285 proposed significant restrictions on immigration relief well beyond the parameters of Senator Leahy’s Anti-Atrocity Alien Deportation Act (S. 1375).

H.R. 5285 began by defining a serious human rights abuser as any alien who:

- (i) 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;
- (ii) while serving as a foreign government official, was responsible for, or directly carried out, particularly severe violations of religious freedom (as defined in section 3 of the International Religious Freedom Act of 1998 (22 U.S.C. 6402));
- (iii) during an armed conflict, ordered, incited, assisted, or otherwise participated in a war crime (as defined in section 2441(c) of title 18, United States Code);
- (iv) ordered, incited, assisted, otherwise participated in, attempted to commit, or conspired to commit conduct that would constitute genocide (as defined in section 1091(a) of title 18, United States Code), if the conduct were committed in the United States or by a United States national;

107. *Id.* at 21.

108. *Id.* at 25.

109. *Id.* at 26.

110. H.R. 5285.

- (v) ordered, incited, assisted, or otherwise participated in any act of torture (as defined in the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention); or
- (vi) ordered, incited, assisted, or otherwise participated in a crime against humanity (including the commission of murder, extermination, enslavement, deportation, imprisonment, torture, rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, forced sterilization, or acts of a similar character), when committed as part of a widespread or systematic attack, whether international or internal in character, and directed against any civilian population, with actual or constructive knowledge of the attack.¹¹¹

The definition of “serious human rights abuser” was qualified, however, by two conditions. It did not apply to an alien who demonstrated that: “(i) the conduct was committed under extreme duress; and (ii) the harm reasonably feared by the alien substantially exceeded the harm attributable to the alien’s conduct.”¹¹²

Under H.R. 5285, an individual who was found to be a serious human rights abuser faced significant restrictions on immigration relief. For example, serious human rights abusers were inadmissible and deportable.¹¹³ In addition, serious human rights abusers were ineligible for refugee status or asylum, adjustment of status, or cancellation of removal.¹¹⁴ They were also barred from claiming good moral character.¹¹⁵ Serious human rights abusers who reentered the United States after exclusion or removal, or individuals who aided or assisted such individuals in entering the United States, were subject to criminal penalties.¹¹⁶

H.R. 5285 also sought to impose significant restrictions on the right of *non-refoulement*. It rendered serious human rights abusers ineligible for withholding of removal or deferral of removal, protections established by Congress to comply with the Convention Against Torture.¹¹⁷ It also declared that “the burden of proof is on the applicant

111. *Id.* § 2.

112. *Id.*

113. *Id.* § 3.

114. *Id.* §§ 4–6, 8, 9.

115. *Id.* § 7.

116. *Id.* §§ 10, 11.

117. *Id.* § 12(a).

for withholding or deferral of removal under the Convention to establish by clear and convincing evidence that he or she would be tortured if removed to the proposed country of removal.”¹¹⁸ Finally, this section precluded judicial review of regulations adopted to implement these provisions with respect to *non-refoulement*.¹¹⁹

On September 28, 2000, the House Subcommittee on Immigration and Claims held hearings on H.R. 5285.¹²⁰ While the bill addressed a large number of immigration issues, most of the discussion focused on the proposed restrictions to *non-refoulement* protection. In his prepared statement, Representative Smith criticized the existing *non-refoulement* provisions in U.S. law, which allegedly allow “criminals and human rights violators, who are ineligible for all other forms of immigration relief,” to apply for deferral of removal.¹²¹ He added that these provisions had been abused:

In conversations with INS staff and others who are involved in trying and adjudicating torture claims, we have been told that claims of torture are proliferating unchecked. Torture is being watered down to the level of harm. And because an applicant need not show the “on account of” nexus, some aliens are being granted torture relief when they cannot even meet the asylum standard, but only have to show that it is more likely than not that they will be harmed (not true torture) for any reason.¹²²

While the Convention Against Torture prohibited *refoulement*, Representative Smith argued that Congress could enact legislation that was more restrictive than the treaty. Accordingly, H.R. 5285 was designed to preclude relief from deportation for serious human rights abusers, even in cases where the foreign national alleged a fear of torture if deported. Two witnesses at the hearings, Genevieve Augustin, a former INS trial attorney, and Dan Stein, Executive Director of the Federation for American Immigration Reform, shared Representative Smith’s criticism of the *non-refoulement* program in the United States. Both expressed concern that claims for relief under the Convention Against Torture were subject

118. *Id.*

119. *Id.* § 12(b).

120. *Serious Human Rights Abusers Hearing*, *supra* note 16. Six members of the Subcommittee were present: Lamar Smith, Edward Pease, Charles Canady, Bob Goodlatte, Sheila Jackson Lee, and Barney Frank. Presentations were made at the hearing by: Genevieve Augustin, former INS Trial Attorney; Bo Cooper, General Counsel, INS; Representative Mark Foley; Elisa Massimino, Director, Washington Office, Lawyers Committee for Human Rights; Kevin Rooney, Director, Executive Office for Immigration Review, U.S. Department of Justice; and Dan Stein, Executive Director, Federation for American Immigration Reform.

121. *Id.* at 6 (statement of Representative Smith).

122. *Id.*

to fraud and provided an opportunity for serious human rights abusers to remain in the United States.¹²³

In contrast, several officials from the Justice Department challenged the assertion that the *non-refoulement* process had been abused. According to Kevin Rooney, Director of the Executive Office for Immigration Review in the Justice Department, claims for *non-refoulement* protection had not been excessive and had “no noticeable impact on the courts.”¹²⁴ In fiscal year 1999, for example, immigration judges granted withholding of removal in only seventy-nine cases and deferral of removal in only ninety cases.¹²⁵ In short, “[t]he impact from the workload perspective has been extremely minimal.”¹²⁶ Bo Cooper, General Counsel for the Immigration and Naturalization Service, affirmed these findings by indicating that U.S. compliance with the Convention Against Torture “has not impeded our ability to enforce expeditiously the immigration laws.”¹²⁷ Moreover, imposing new restrictions on *non-refoulement* protection would have significant implications. Unlike the Refugee Convention, which imposes limitations on the right to *non-refoulement*, the Convention Against Torture contains no such restrictions. In this respect, the Convention Against Torture provides an absolute prohibition on *refoulement*, even if the suspected torturer would otherwise be barred from the protection of *non-refoulement* under the Refugee Convention.¹²⁸ Thus, Cooper testified that removing *non-refoulement* protection would be inconsistent with the treaty obligations. It would also “generate a great deal of litigation, and internationally, it would impair our record and our efforts to play a role as a world leader in the campaign against torture.”¹²⁹ For these reasons, the Clinton administration strongly opposed the *non-refoulement* restrictions in H.R. 5285.¹³⁰

These concerns were echoed by Elisa Massimino, Director of the Washington office of the Lawyers Committee for Human Rights. Massimino argued that infringement of the *non-refoulement* obligation would place the United States in clear breach of its international obligations. “More importantly, perhaps, it would undermine the international consensus that torture is such an abhorrent practice that no

123. *Id.* at 67 (statement of Augustin), 72 (statement of Stein).

124. *Id.* at 10 (statement of Rooney). Between March 22, 1999 and September 14, 2000, approximately 20,000 Convention Against Torture claims were filed with the Immigration Courts. Of these 20,000, the Immigration Judges had reviewed approximately 13,000 of these applications. *Id.* at 11 (statement of Rooney).

125. *Id.* at 36 (attachment to statement of Rooney).

126. *Id.* at 60 (statement of Rooney).

127. *Id.* at 40 (statement of Cooper).

128. *Id.* at 6 (statement of Representative Smith).

129. *Id.* at 40 (statement of Cooper).

130. *Id.* at 47 (statement of Cooper).

one—not even those guilty of the worst human rights crimes themselves—should be subjected to it.”¹³¹

Following the Subcommittee hearings on H.R. 5285, a mark-up session was held on October 3, 2000. During the mark-up session, Representative Smith introduced an amendment in the nature of a substitute to H.R. 5285.¹³² The amendment differed from H.R. 5285 in several respects. First, the amendment authorized the Attorney General to arrest and detain any alien present in the United States or applying for admission who is a serious human rights abuser.¹³³ The amendment obligated the Attorney General to notify the Criminal Division of the Justice Department that the alien had been arrested and detained. Second, the amendment added an extensive reporting requirement.¹³⁴ It required the Attorney General to submit a semiannual report to Congress describing: the number of removal proceedings initiated, pending, and completed; and the number of criminal prosecutions initiated, pending, and completed.

Third, the amendment established a complaint process that allowed any U.S. citizen or permanent resident to file a complaint with the Attorney General alleging that an alien present in the United States is a serious human rights abuser.¹³⁵ The complaint process required the Attorney General to investigate the allegations and make a determination within ninety days whether to initiate removal proceedings or provide an explanation why the alien is not a serious human rights abuser. If the Attorney General failed to act, the individual filing the original complaint could commence a civil action in federal court to compel the Attorney General to comply.

Fourth, the amendment revised the provisions of H.R. 5285 with respect to *non-refoulement* protection. The amendment provided that serious human rights abusers were ineligible for withholding or deferral of removal under the Convention Against Torture.¹³⁶ It added, however, that this provision “shall not be interpreted or implemented in a manner that would cause the United States to violate its obligations under the Convention or the policy of the United States expressed in section 2242 of the Foreign Relations Authorization Act, Fiscal [Y]ears 1998 and 1999”¹³⁷ In addition, the amendment purported to exclude *non-*

131. *Id.* at 80 (statement of Massimino).

132. Amendment in the Nature of a Substitute to H.R. 5285, *offered by Rep. Smith*, 105th Cong., 2d Sess. (Oct. 3, 2000) (on file with author).

133. *Id.* § 4.

134. *Id.*

135. *Id.* § 6.

136. *Id.* § 14(a)(2).

137. *Id.* § 14(a)(3). This provision is inconsistent with the other provisions of the amendment because it maintains *non-refoulement* protection for serious human rights abusers.

refoulement protection from serious human rights abusers even if the Attorney General decided that the alien's life or freedom would be threatened due to race, religion, nationality, membership in a particular social group, or political opinion.¹³⁸

H.R. 5285 was eventually forwarded to the Judiciary Committee for consideration. However, the Judiciary Committee did not act on the proposal.

C. Human Rights Abusers Act of 2000

On September 25, 2000, the Justice Department submitted its own legislative proposal to Congress.¹³⁹ The release of this proposal was clearly related to the introduction of H.R. 5285.¹⁴⁰ Indeed, the proposal was not publicly released or discussed until September 28, 2000, the date of the House Subcommittee hearings on H.R. 5285.¹⁴¹

The Human Rights Abusers Act of 2000 provided that an alien who "has committed, ordered, incited, assisted, or otherwise knowingly participated in or been responsible for any of the following acts, undertaken in whole or in significant part for a political, religious, or discriminatory purpose" is inadmissible and deportable: (1) homicide; (2) disappearance; (3) genocide; (4) rape; (5) torture; (6) kidnapping; (7) mutilation; (8) prolonged, arbitrary detention; (9) enslavement; (10) forced pregnancy; (11) forced sterilization; or (12) recruitment of persons under the age of fifteen for use in armed conflict.¹⁴² The Human Rights Abusers

138. *Id.* § 5.

139. *Serious Human Rights Abusers Hearing*, *supra* note 16, at 48 (text of the Human Rights Abusers Act of 2000). Although the proposal was entitled the "Human Rights Abusers Act," the section-by-section analysis provided by the Justice Department indicated that it was designed to cover aliens that had also committed violations of international humanitarian law. *Id.* at 52 (Section-By-Section Analysis of the Human Rights Abusers Act of 2000).

140. In his February 17, 2000 testimony to the House Subcommittee on Immigration and Claims, Castello indicated that the Justice Department was preparing its own legislative proposal and that it would be forwarded to Congress by the end of February. *See Anti-Atrocity Hearing*, *supra* note 59, at 21 (statement of Castello).

141. According to Cooper, the Justice Department had hoped to forward the proposal to Congress earlier. "As is often the case with complex legislation and a difficult problem, the process was time consuming and involved a great number of agencies in the development of legal principles that both achieved our policy objectives and are workable for those on the line who actually have to administer the provisions." *Serious Human Rights Abusers Hearing*, *supra* note 16, at 41 (statement of Cooper).

142. *Id.* at 48-49 (text of the Human Rights Abusers Act of 2000). Each of these terms was defined more fully in section 15. *See id.* at 52 (text of the Human Rights Abusers Act of 2000). According to the Justice Department, the burden of proof in immigration proceedings remained unchanged. *Id.* (Section-By-Section Analysis of the Human Rights Abusers Act of 2000). Thus, aliens seeking admission must establish "clearly and beyond doubt" that they are admissible. In contrast, the United States seeking deportation of an admitted alien must establish removability by "clear and convincing" evidence. *Id.* Significantly, "[n]either a criminal conviction nor criminal charge nor a confession is required in order for an alien to be

Act imposed a knowledge requirement—individuals must have knowingly participated in these acts.¹⁴³ The proposal also extended liability to an alien who, while in a position of power or authority, knew or should have known that such acts were likely to be committed and failed to take reasonable steps to prevent such acts.¹⁴⁴ Discriminatory purpose was defined as an act “undertaken because of the victim’s political opinion, nationality, race, religion, gender, sexual orientation, or membership in a particular clan, tribe, caste, or ethnic group.”¹⁴⁵ Finally, the proposal granted the Secretary of State authority to find an alien inadmissible or deportable if the alien’s presence in the United States would be incompatible with U.S. policy regarding the promotion of international human rights or humanitarian law.¹⁴⁶

The Human Rights Abusers Act provided several waivers to these provisions on inadmissibility and deportability.¹⁴⁷ First, the Attorney General could waive the application of these provisions if the alien was the parent, spouse, son, or daughter of a U.S. citizen or lawful permanent resident and was under the age of eighteen when the alleged acts were committed.¹⁴⁸ Second, the proposed grounds for inadmissibility and deportability did not apply to the diplomatic visas (A and G) enumerated in INA section 102.¹⁴⁹ Third, the Act authorized the Attorney General to waive the inadmissibility of a nonimmigrant who was otherwise inadmissible under the Human Rights Abusers Act.¹⁵⁰ According to the Justice Department, this allowed the United States to admit an alien temporarily “when it may be in the interests of the United States” and “is

inadmissible or removable . . .” *Id.* at 53 (Section-By-Section Analysis of the Human Rights Abusers Act of 2000).

143. *Id.* at 53.

144. *Id.* at 48–49 (text of the Human Rights Abusers Act of 2000).

145. *Id.*

146. *Id.*

147. *Id.* 52–55 (Section-By-Section Analysis of the Human Rights Abusers Act of 2000).

The Human Rights Abusers Act did not insert its new category of human rights abusers into INA section 212(a)(3) “Security and Related Grounds.” Accordingly, these foreign nationals were not subject to the same level of restrictions that apply to inadmissible aliens under INA section 212(a)(3). In addition, the Human Rights Abusers Act relocated the genocide ground of inadmissibility out of INA section 212(a)(3), thereby making these foreign nationals eligible for certain forms of waiver relief.

148. *Serious Human Rights Abusers Hearing*, *supra* note 16, at 48–49 (text of the Human Rights Abusers Act of 2000).

149. These visas are applied to ambassadors, public ministers, diplomatic or consular officers, and the members of their immediate family. “This ensures that the legislation will not interfere with the President’s constitutional authorities to receive ambassadors and conduct foreign relations, and that the new provisions will be administered in a manner consistent with U.S. obligations to the United Nations under international law.” *Id.* at 53 (Section-By-Section Analysis of the Human Rights Abusers Act of 2000).

150. *Id.* at 54–55 (Section-By-Section Analysis of the Human Rights Abusers Act of 2000).

consistent with how other serious past conduct, such as participation in past terrorist acts, is handled.”¹⁵¹

In addition to the provisions on inadmissibility and deportability, the Act rendered individuals who committed any of the twelve enumerated acts ineligible for a variety of other immigration benefits. For example, human rights abusers who committed these acts were barred from refugee and asylum status, adjustment of status, Special Agricultural Worker status, withholding of removal, and cancellation of removal.¹⁵² These aliens were also ineligible for claiming good moral character.¹⁵³ Finally, the Act subjected human rights abusers who reentered the United States after exclusion or removal, or individuals who aided or assisted such individuals to enter the United States, to criminal penalties.¹⁵⁴

According to Bo Cooper, General Counsel for the INS, the Human Rights Abusers Act sought to provide an immigration policy that could be applied by both consular officials abroad and immigration officers in the United States. It sought to accomplish this goal by reducing the complexity of the review process. For example, the Human Rights Abusers Act replaced references to international crimes, such as war crimes or crimes against humanity, with the underlying acts that gave rise to these offenses. “We wanted to find a way to exclude abusers without turning consular and immigration proceedings into criminal proceedings, and without having to coordinate the application of substantive international criminal law by courts martial or international criminal tribunals with consular or immigration proceedings.”¹⁵⁵ Despite its support by the Administration, the Human Rights Abusers Act was never formally introduced as a bill in Congress.

D. H.R. 1449: *Anti-Atrocity Alien Deportation Act*

On April 4, 2001, Representative Foley introduced the Anti-Atrocity Alien Deportation Act (H.R. 1449) in the House.¹⁵⁶ H.R. 1449 was similar to the original Leahy proposal (S. 1375) except it provided for two categories of inadmissible and excludable aliens: those who had

151. *Id.* at 54 (Section-By-Section Analysis of the Human Rights Abusers Act of 2000). With respect to waivers under INA section 212(d)(1), the Justice Department indicated “there may be instances in which it is appropriate for the Attorney General to exercise her broad discretionary authority to admit aliens who will provide information concerning a criminal or terrorist organization, enterprise or operation.” *Id.* at 54–55 (Section-By-Section Analysis of the Human Rights Abusers Act of 2000).

152. *See id.* at 49–50 (text of the Human Abusers Act of 2000).

153. *Id.* at 50. A determination of good moral character is required for certain immigration benefits, including naturalization, cancellation of removal, and voluntary departure.

154. *Id.* at 50–51 (text of the Human Abusers Rights Act of 2000).

155. *Id.* at 45 (statement of Cooper).

156. *See* H.R. 1449.

committed torture or war crimes abroad.¹⁵⁷ The bill used the definition of torture as defined in 18 U.S.C. § 2340 and the definition of war crimes set forth at 18 U.S.C. § 2441(c).¹⁵⁸ The House did not act on this bill.

E. S. 864: Anti-Atrocity Alien Deportation Act of 2001

On May 10, 2001, Senator Leahy introduced the Anti-Atrocity Alien Deportation Act of 2001 (S. 864) in the Senate.¹⁵⁹ According to Senator Leahy, similar legislation had already received bipartisan support in both the House and Senate, and the rationale for the legislation remained the same: “[t]he problem of human rights abusers seeking and obtaining refuge in this country is real, and requires an effective response with the legal and enforcement changes proposed in this legislation.”¹⁶⁰ On April 18, 2002, the Senate Judiciary Committee approved S. 864 with minor amendments.

S. 864 differed from earlier versions of the Anti-Atrocity Alien Deportation Act in several respects.¹⁶¹ First, S. 864 expanded the categories of aliens who were subject to inadmissibility or removability.¹⁶² Aliens who had committed acts of torture or extrajudicial killing abroad were inadmissible and removable. The definitions for torture and extrajudicial killing were derived from existing legislation, including the Torture Victim Protection Act.¹⁶³ As noted by Senator Leahy, these definitions had already been sanctioned by Congress and, therefore, should not prove to be controversial.¹⁶⁴

Second, S. 864 revised the existing definition of aliens that were already subject to inadmissibility and removability.¹⁶⁵ Under existing immigration law, individuals who have engaged in genocide are inadmissible and removable. The bill extended these immigration restrictions to include individuals that had “ordered, incited, assisted, or otherwise participated in” genocide.¹⁶⁶ Thus, this revision sought to broaden the reach of existing legislation. In addition, existing immigration law prohibits the granting of immigration relief to foreign government officials who committed particularly severe violations of religious freedom within the past twenty-four months. These restrictions also extend to the individ-

157. *Id.* § 2.

158. *Id.*

159. Anti-Atrocity Alien Deportation Act of 2001, S. 864, 107th Cong. (2001).

160. 147 CONG. REC. S4835 (daily ed. May 10, 2001) (statement of Senator Leahy).

161. *See* S. 864.

162. *Id.* § 2. The amendments made by this section would apply to offenses committed before, on, or after the date of the enactment of the Act. *Id.* § 2(c).

163. 28 U.S.C. § 1350 (2000) (notes).

164. 147 CONG. REC. at S4836.

165. *Id.*

166. S. 864, § 2(a)(1).

ual's spouse and children. The bill revised these restrictions by removing the temporal requirement and eliminating the bar to admission for family members.

Third, S. 864 expanded the category of aliens who were barred from claiming good moral character.¹⁶⁷ It provided that an alien who at any time engaged in Nazi persecution, participated in genocide, committed acts of torture or extrajudicial killings was barred from claiming good moral character. Foreign government officials who committed particularly severe violations of religious freedom were also affected.

Fourth, S. 864 provided additional responsibilities for the newly proposed Office of Special Investigations. The bill authorized the OSI to investigate and, where appropriate, take legal action to remove, denaturalize, prosecute, or extradite any alien found to be in violation of these provisions.¹⁶⁸ In addition, S. 864 provided specific guidance for the agency on these matters. Specifically, the agency was required to consider: "(1) the availability of prosecution under the laws of the United States for any conduct that may form the basis for removal and denaturalization; or (2) removal of the alien to a foreign jurisdiction that is prepared to undertake a prosecution for such conduct."¹⁶⁹ In addition, the bill required the Attorney General to submit a report on the implementation of S. 864 to the Judiciary Committees of the House and Senate within 180 days after the date of enactment.¹⁷⁰ The report was required to include: (1) descriptions of the procedures used to refer matters to the OSI; (2) the revisions made to immigration forms that reflect any changes made to the INA; and (3) the procedures developed to obtain sufficient evidence to determine whether an alien may be inadmissible under the terms of S. 864.

According to the Congressional Budget Office (CBO), implementation of S. 864 would cost \$32 million from 2003–2007.¹⁷¹ This amount was based on the historical spending pattern of the OSI. Interestingly, the CBO estimated "that implementing S. 864 would have no significant effect on spending by the INS because of the small number of cases affected."¹⁷²

167. *Id.* § 4.

168. *See id.* § 5(a) (authorizing the OSI to extradite).

169. *Id.* § 5(a).

170. *Id.* § 6.

171. S. REP. NO. 107-144, at 14 (2002).

172. *Id.* at 15.

F. Current Situation

To date, Congress has not adopted any of these proposals.¹⁷³ There are several explanations for this situation. First, immigration advocates expressed concern about broadening the exclusion and deportation provisions of the INA. While the proposed restrictions targeted serious human rights abusers, they might also affect legitimate immigrants. The UNHCR has expressed similar concerns, stating that “exclusion clauses should not become another avenue by which deserving cases are denied international protection.”¹⁷⁴ Second, human rights advocates criticized the exclusive focus on immigration restrictions, to the exclusion of criminal prosecution. An impunity regime focusing exclusively on immigration restrictions would provide only limited sanctions to serious human rights abusers. As noted by one commentator, “[d]eportation is relocation of the criminal but not punishment of the crime. A person who comes . . . and then is told to move on has received a temporary haven and then a temporary inconvenience.”¹⁷⁵ Third, immigration and human rights advocates raised significant concerns about efforts to limit *non-refoulement* protection. They argued that restrictions on *non-refoulement* protection would violate U.S. obligations under the Refugee Convention and the Convention Against Torture. Fourth, the jurisdictional struggle between the INS and the OSI prevented agreement on the institutional component. While the INS wanted to maintain jurisdiction over cases of serious human rights abusers, advocates of the OSI argued in favor of that agency.

Despite these problems, it is likely that Congress will revisit this issue. The tragedy of September 11 has led to a renewed awareness of the importance of immigration law. Indeed, Congress has already imposed immigration restrictions in response to the terrorist attacks of September 11.¹⁷⁶ (Unfortunately, this legislation has also restricted the rights of immigrants in a manner inconsistent with international law.)¹⁷⁷ September 11 has also led to an awareness of the importance of the institutional

173. However, both H.R. 1449 and S. 864 may still be addressed by the 107th Congress. See Larry Lipman, *Put a Lock on the Back Door*, PALM BEACH POST, Dec. 2, 2001, at 3E.

174. UNHCR, *Exclusion: To Exclude or Not to Exclude*, [2001] 2 REFUGEES 18, 19.

175. David Matas, *Canada as a Haven for Torturers*, FIRST LIGHT, Spring 2000, at <http://www.icomm.ca/ccvt/haven.html>.

176. See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), 8 U.S.C. § 1 (2002).

177. See generally LAWYERS COMM. FOR HUMAN RIGHTS, A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11 (2002), available at <http://www.lchr.org>; AMNESTY INT'L, UNITED STATES OF AMERICA, MEMORANDUM TO THE U.S. ATTORNEY GENERAL—AMNESTY INTERNATIONAL'S CONCERNS RELATING TO THE POST 11 SEPTEMBER INVESTIGATIONS (2001), available at <http://www.amnestyusa.org>.

framework. In this respect, Congress has considered restructuring the INS and the U.S. Customs Service. The establishment of the Department of Homeland Security will also affect the manner in which the United States responds to serious human rights abusers.¹⁷⁸

IV. RECOMMENDATIONS FOR U.S. IMMIGRATION POLICY

This Part presents a set of recommendations for U.S. immigration policy. It proposes a multi-track strategy to combat impunity. Immigration restrictions are only one part of an effective impunity strategy.¹⁷⁹ Immigration law must not be used to circumvent the obligation to extradite, surrender, or prosecute individuals who have committed serious human rights abuses.

A. *The Recommendations*

The following recommendations are designed to address the legal and institutional limitations of U.S. immigration policy. Given the complexity and the serious nature of the issues addressed, these recommendations should be applied *in toto*.

1. Legal Recommendations

1.0 The United States should limit the scope of immigration relief available to individuals who have committed serious human rights abuses. The term “serious human rights abuses” includes the following acts, as defined by Title 18 of the United States Code: torture, extrajudicial killing, genocide, war crimes, hostage taking, and forced labor.¹⁸⁰

1.1 Congress should adopt and the President should sign a bill revising the INA to limit the scope of immigration relief available to individuals who have committed serious human rights abuses.

1.2 These immigration restrictions should be subject to a narrow waiver in cases involving national security or when necessary to promote the greater interests of justice.

178. See generally Ivo H. Daalder & I.M. Destler, *Advisors, Czars and Councils: Organizing for Homeland Security*, NAT'L INTEREST, Summer 2002, at 66–78; David Firestone, *Traces of Terror: The Reorganization Plan*, N.Y. TIMES, Sept. 4, 2002, at A11.

179. SAFE HAVEN REPORT, *supra* note 6, *passim*.

180. This list is not exhaustive. To facilitate implementation, it only identifies those crimes that are already codified in the U.S. Code.

1.3 The United States should not use immigration restrictions to circumvent its obligation to extradite, surrender, or prosecute individuals who have committed serious human rights abuses.¹⁸¹

1.4 The United States should expand its criminal jurisdiction to prosecute torture, extrajudicial killing, genocide, war crimes, hostage taking, and forced labor. These crimes should be subject to universal jurisdiction. They should not be subject to any statute of limitations; crimes committed prior to adoption of the legislation should be prosecuted.

1.5 The United States should investigate any individual located in territory under its jurisdiction or control alleged to have committed serious human rights abuses.

1.6 The United States should immediately take into custody or take other legal measures to ensure the continued presence of any individual located in territory under its jurisdiction or control who is alleged to have committed serious human rights abuses, upon being satisfied that the circumstances and evidence so warrant. Detention must comply with all applicable national and international standards on detention.¹⁸²

1.7 Any effort to limit the scope of immigration relief available to individuals who have committed serious human rights abuses should be carefully implemented to ensure full compliance with national and international standards on immigration relief, including the Refugee Convention and the Convention Against Torture.¹⁸³

1.8 Any effort to limit the scope of immigration relief available to individuals who have committed serious human rights abuses should comply with the inclusion before exclusion principle. Thus, exclusion provisions should not be used to determine the initial admissibility of an application or claim for refugee status.¹⁸⁴

1.9 Any effort to limit the scope of immigration relief available to individuals who have committed serious human rights abuses should be required to establish that there are serious reasons for considering that an

181. See, e.g., Jordan J. Paust, *Universality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals*, 11 Hous. J. INT'L L. 337, 342 (1989).

182. See, e.g., UNHCR, GUIDELINES ON APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM-SEEKERS (1999), at <http://www.unhcr.ch>.

183. While the Refugee Convention precludes the granting of refugee status to individuals who have committed egregious human rights violations, the UNHCR has indicated that "interpretation of these exclusion clauses must be restrictive." UNHCR HANDBOOK, *supra* note 30, at 24.

184. See, e.g., Michael Bliss, 'Serious Reasons for Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses, 12 INT'L J. REFUGEE L. 92, 106-08 (Supp. 2000); Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 44-45 (2001).

individual has committed the alleged acts. This standard of proof should be interpreted to require clear and convincing evidence.

1.10 Individuals should only be held responsible for acts constituting serious human rights abuses if the material elements of the acts were committed with knowledge and intent. Accordingly, family members should not bear the consequences of a relative's responsibility for serious human rights abuses. In contrast, individuals with command responsibility should be held responsible for the acts of subordinates in appropriate circumstances.

1.11 Immigration proceedings should be conducted in a manner consistent with international law and standards guaranteeing the right to a fair trial.

1.12 Immigration proceedings should not be based upon evidence obtained in violation of international human rights law.

1.13 All decisions on immigration relief should be subject to judicial review.

1.14 The INS should not deport or otherwise remove an individual found to have committed serious human rights abuses to a country where there are substantial grounds for believing he would be subjected to the death penalty, torture, or cruel, inhuman or degrading treatment or punishment.

1.15 When the INS deports or otherwise removes an individual found to have committed serious human rights abuses, the United States should ensure that the receiving country agrees to investigate the case and, when appropriate, to initiate criminal proceedings.

2. Institutional Recommendations

2.0 The United States should establish and adequately fund an office within the Justice Department with primary responsibility for investigating and prosecuting cases of serious human rights abuses.

2.1 This federal office should build upon the experiences of the OSI, which is currently devoted exclusively to pursuing Nazi war criminals. This office should also build upon the experiences of the NSU, which is currently devoted to pursuing cases of modern day human rights abusers as well as cases of international terrorism and foreign counterintelligence.

2.2 Congress should allocate sufficient funding and resources to ensure effective investigations and prosecutions.¹⁸⁵

185. For example, the Canadian government has allocated approximately \$15 million per year to investigate and prosecute war crimes and related matters. In contrast, the OSI receives approximately \$3 million per year in funding to investigate Nazi war crimes. *See CAN. WAR*

2.3 This federal office should have a highly trained and diverse staff of investigators and prosecutors.

2.4 This federal office should pursue a multi-track strategy against serious human right abusers. Its primary responsibility should be to investigate and prosecute these individuals.

2.5 This federal office should consult and cooperate on a regular basis with all federal agencies.¹⁸⁶

2.6 This federal office should consult and cooperate on a regular basis with nongovernmental organizations.

2.7 This federal office should issue annual reports on its activities. These reports should describe the procedures by which the agency operates in criminal and administrative proceedings. They should identify the number of individuals investigated by the agency and what action, if any, has been taken against them.

B. *Implementing the Recommendations*

Throughout the implementation of these recommendations, all relevant human rights principles must be respected. The purpose of these recommendations is to combat impunity.¹⁸⁷ They are not designed to make it more difficult for legitimate immigrants and refugees to enter and remain in the United States. The United States has benefited greatly from allowing immigrants to enter the country. It also has a responsibility under national and international law to protect individuals fleeing war and persecution.

Accusing someone of committing a serious human rights abuse can have serious consequences.¹⁸⁸ Such charges have profound personal implications on the accused. It can affect family and social relations. It can also lead to civil and criminal liability. For these reasons, allegations of serious human rights abuses must be treated with caution and circumspection.

CRIMES PROGRAM, 2000–2001 ANNUAL REPORT, available at <http://www.cic.gc.ca/english/pub/war2001.html>.

186. See, e.g., Exec. Order No. 13,107, 3 C.F.R. 236 (1999).

187. For a similar approach developed by the European Commission that seeks to protect bona fide immigrants and yet not provide a safe haven for human rights abusers, see Commission Working Document, *supra* note 12, *passim*.

The two main premises on which this Document is built are: firstly, that bona fide refugees and asylum seekers should not become victims of the recent events, and secondly that there should be no avenue for those supporting or committing terrorist acts to secure access to the territory of the Member States of the European Union.

Id. at 6.

188. AMNESTY INT'L, TORTURE IN THE EIGHTIES 90 (1984).

Individuals can only be held responsible for acts constituting serious human rights abuses if the material elements of the acts were committed with intent and knowledge.¹⁸⁹ A person has “intent” if he means to engage in the conduct or means to cause that consequence or is aware that it will occur in the ordinary course of events. A person has “knowledge” when he is aware that a circumstance exists or a consequence will occur in the ordinary course of events.¹⁹⁰ Therefore, persons who suffer from mental disabilities or other impairments that significantly influence their capacity to appreciate the unlawfulness or nature of their conduct should not be held responsible for their actions.¹⁹¹ Similarly, persons under the age of eighteen should be dealt with in a manner that takes into account their age and situation.¹⁹²

It must be emphasized that *individual* responsibility is required. Family members of serious human rights abusers should not bear the consequences of a relative’s responsibility. Similarly, mere membership in a suspect group or organization should not result in automatic responsibility for the acts of that group or organization.

In contrast, individuals with command responsibility, whether military or political, should be held responsible for the acts of subordinates in appropriate circumstances.¹⁹³ Indeed, the U.S. Senate’s understanding of the Convention Against Torture makes clear that liability for acts of torture extends to a public official that has awareness of activity constituting torture and thereafter breaches “his legal responsibility to

189. According to the Rome Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Rome Statute, *supra* note 35, art. 30. A person has “intent” where: “(a) [i]n relation to conduct, that person means to engage in the conduct; (b) [i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events . . . [k]nowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.” *Id.*

190. *Id.*

191. See generally Peter Krug, *The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation*, 94 AM. J. INT’L L. 317 (2000).

192. Cf. Rome Statute, *supra* note 35, art. 26; see also Convention on the Rights of the Child, adopted by U.N. General Assembly Nov. 20, 1989, 1577 U.N.T.S. 3.

193. See Rome Statute, *supra* note 35, art. 28. Under international law, a military commander or person effectively acting as a military commander may be criminally responsible for crimes committed by forces under his effective command and control, or effective authority and control as the case may be, as a result of his failure to exercise control properly over such forces. See *In re Yamashita*, 327 U.S. 1, 14–16 (1946). See generally L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT’L L. & CONTEMP. PROBS. 319 (1995); Andrew D. Mitchell, *Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 SYDNEY L. REV. 381 (2000); Danesh Sarooshi, *Command Responsibility and the Blaskic Case*, in *Decisions of International Tribunals*, 50 INT’L & COMP. L.Q. 452 (2001); Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT’L L. 89 (2000).

intervene to prevent such activity.”¹⁹⁴ Recent case law has affirmed the status of command responsibility in national and international law.¹⁹⁵

Defenses that preclude or limit criminal responsibility must be carefully regulated in a manner consistent with international law.¹⁹⁶ For example, international law restricts the availability of defenses based upon claims of superior orders or self-defense.¹⁹⁷ Similarly, claims of duress are also severely limited under international law.¹⁹⁸ Moreover, neither official immunity nor national amnesty should bar prosecution for serious human rights abuses.¹⁹⁹

194. The Initial Report of the United States to the Committee Against Torture indicates that the purpose of the Senate understanding is “to make it clear that both actual knowledge and ‘willful blindness’ fall within the definition of ‘acquiescence’ in Article 1.” *Consideration of Reports Submitted By Parties*, U.N. Comm. Against Torture, ¶ 98, CAT/C/28/Add.5 (2000) [hereinafter Initial Report], available at <http://www.unhchr.ch>.

195. See, e.g., *Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002).

196. See generally AMNESTY INT’L, *THE INTERNATIONAL CRIMINAL COURT: MAKING THE RIGHT CHOICES* (1997). The Rome Statute recognizes limited grounds for excluding criminal responsibility. See Rome Statute, *supra* note 35, arts. 27, 28, 31, 33.

197. Article 2(3) of the Convention Against Torture, for example, provides that superior orders may not be invoked as a justification for torture. Convention Against Torture, *supra* note 19, at 114. In contrast, the Rome Statute provides that superior orders shall not relieve a person from criminal responsibility unless: “(a) [t]he person was under a legal obligation to obey the orders . . . ; (b) [t]he person did not know that the order was unlawful; and (c) [t]he order was not manifestly unlawful. For purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.” Rome Statute, *supra* note 35, art. 33. See generally Hilaire McCoubrey, *From Nuremberg to Rome: Restoring the Defence of Superior Orders*, 50 INT’L & COMP. L.Q. 386 (2001). Additionally, the Rome Statute provides that a claim of self-defense shall preclude criminal responsibility if “[t]he person acts reasonably to defend himself or herself or another person . . . against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.” Rome Statute, *supra* note 35, art. 31(1)(c).

198. The Rome Statute provides that a claim of duress shall preclude criminal responsibility if the duress resulted “from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.” *Id.* art. 31(1)(d).

199. For a discussion of Head of State immunity, see Peter Evan Bass, Note, *Ex-Head of State Immunity: A Proposed Statutory Tool of Foreign Policy*, 97 YALE L.J. 299 (1987); Amber Fitzgerald, *The Pinochet Case: Head of State Immunity Within the United States*, 22 WHITTIER L. REV. 987 (2001); Salvatore Zappalà, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation*, 12 EUR. J. INT’L L. 595 (2001). For a discussion of amnesty decrees, see *General Comments Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights*, Hum. Rts. Comm., 44th Sess., at 4, U.N. Doc. CCPR/C/21/Rev.1/Add.3 (1992) (“Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.”). See also Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT’L L.J. 297 (2000); Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, LAW & CONTEMP. PROBS., Autumn 1996, at 93.

Throughout immigration proceedings, the rights of individuals under national and international law must be fully respected. All individuals, whether in criminal or administrative proceedings, are innocent until proven guilty.²⁰⁰ They must have fair notice of any charges and a reasonable opportunity to respond. In criminal proceedings, defendants must be provided with defense counsel and adequate resources to properly defend themselves.²⁰¹ When necessary, they must have access to an interpreter.²⁰² They must be notified of their right to communicate with consular officials.²⁰³ Proceedings by a competent, independent, and impartial tribunal must be open and fully accessible.²⁰⁴ Individuals cannot be compelled to testify against themselves.²⁰⁵ No one should be punished on the basis of charges, testimony, or evidence that are not made available to them.²⁰⁶ Thus, the use of secret evidence cannot be allowed. In sum, proceedings must comply with international law and standards guaranteeing the right to a fair trial.

Direct evidence must be used whenever possible. Independent corroboration by international or nongovernmental organizations is desirable. Evidence must be carefully scrutinized to determine its internal consistency and overall credibility. These rules apply with equal rigor to evidence acquired from foreign sources. In addition, evidence acquired in violation of international human rights norms should be inadmissible in any proceeding.²⁰⁷

The United States should have the burden of proof in establishing that an individual has committed serious human rights abuses. In criminal cases, the standard of proof should remain beyond a reasonable doubt. In immigration proceedings, the government must show that there are serious reasons for considering that an individual has committed human rights abuses.²⁰⁸ This standard of proof is consistent with the

200. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 14(2), 999 U.N.T.S. 171, 176 [hereinafter ICCPR].

201. *Id.* at 177.

202. *Id.*

203. Vienna Convention on Consular Relations and Optional Protocol on Disputes, *opened for signature* Apr. 24, 1963, art. 36, 21 U.S.T. 77, 100, 596 U.N.T.S. 261, 292; *see also* LaGrand Case (F.R.G. v. U.S.), June 27, 2001, at <http://www.icj-cij.org>. *See generally* AMNESTY INT'L, UNITED STATES OF AMERICA: A TIME FOR ACTION—PROTECTING THE CONSULAR RIGHTS OF FOREIGN NATIONALS FACING THE DEATH PENALTY (2001), available at <http://web.amnesty.org>.

204. ICCPR, *supra* note 200, at 176.

205. *Id.* at 177.

206. *See generally* D. Mark Jackson, Note, *Exposing Secret Evidence: Eliminating a New Hardship of United States Immigration Policy*, 19 BUFF. PUB. INT. L.J. 25 (2000–2001).

207. *See* Robert Currie, *Human Rights and International Mutual Legal Assistance: Resolving the Tension*, 11 CRIM. L.F. 143, 177–81 (2000).

208. The “serious reasons for considering” test is lower than the criminal standard of “proof beyond a reasonable doubt” but higher than probable cause. Bliss, *supra* note 184, at

Refugee Convention. Given the profound implications of immigration restrictions, however, this standard of proof should be interpreted to require clear and convincing evidence.²⁰⁹

The rule of *non-refoulement* should be applied in cases where an individual faces the threat of torture or other cruel, inhuman or degrading treatment or punishment.²¹⁰ Any effort to restrict the principle of *non-refoulement* would place the United States in direct conflict with international law. The protections set forth in the Convention Against Torture apply to all individuals. Unlike the Refugee Convention, which limits the principle of *non-refoulement*, the Convention Against Torture contains no such restriction. Presumably, the drafters of the Convention Against Torture were familiar with the exclusion clause contained in the Refugee Convention and chose not to include such a provision.²¹¹ Thus, the Convention Against Torture contains an absolute prohibition on returning an individual to a country where there are substantial grounds for believing that he would be in danger of torture.²¹² Any effort to eliminate the principle of *non-refoulement* would place the United States in direct violation of the Convention Against Torture. Moreover, it would

115; cf. Andrea Montavon-McKillip, *CAT Among Pigeons: The Convention Against Torture, A Precarious Intersection Between International Human Rights Law and U.S. Immigration Law*, 44 ARIZ. L. REV. 247, 260 (2002). *But see* ANKER, *supra* note 62, at 423.

209. See Lawyers Comm. for Human Rights, *Safeguarding the Rights of Refugees Under the Exclusionary Clauses: Summary Findings of the Project and a Lawyers Committee for Human Rights Perspective*, 12 INT'L J. REFUGEE L. 315, 329 (Supp. 2000).

210. In determining whether there are substantial grounds for believing that an individual would be in danger of torture, the United States should examine both the particularized and generalized human rights conditions in the receiving country.

The question as to whether or not such substantial grounds exist in a given case must be assessed in the light of the particular circumstances of that case. It may be of great importance, for instance, whether it can be established that the person concerned belonged to a certain opposition group in his home country or whether he was a member of a persecuted minority group of some kind. In such matters, questions of evidence may often be difficult, and while the affirmations of the person concerned must have some credible appearance in order to be accepted, it would often be unreasonable and contrary to the spirit of the *Convention* to require full proof of the truthfulness of the alleged facts.

In addition, to the facts of the specific case, it is important also to take into account what is known about the general human rights situation in the country concerned and about the way relevant minority or opposition groups are treated in that country.

J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 127 (1998).

211. See *id.* at 125.

212. *Convention Against Torture, supra* note 19, at 114.

significantly undermine U.S. foreign policy, which has long emphasized the importance of the Convention Against Torture.²¹³

Indeed, the rule of *non-refoulement* should be extended to preclude deportation to a country that fails to provide basic due process rights, including standards guaranteeing the right to a fair trial. The current U.S. policy on *non-refoulement*, while providing protection, raises some concerns. For example, an individual may be deported to a country if the United States receives diplomatic assurances that the individual will not be tortured or that the individual will be relocated to a part of the country where he is not likely to be tortured.²¹⁴ These exceptions must be carefully regulated to ensure they comply with the letter and spirit of the Convention Against Torture and the rule of *non-refoulement*. Finally, the United States should not deport an individual to a country unless the requesting country agrees to forego the imposition of the death penalty.²¹⁵

In addition, individuals seeking withholding or deferral of removal under the Convention Against Torture should not be required to establish proof by clear and convincing evidence. Such an elevated standard is inconsistent with the explicit language of the Convention Against Torture, which requires *non-refoulement* protection for an individual when there are substantial grounds for believing that he would be in danger of torture. To date, this has been interpreted to require a showing of "more likely than not."²¹⁶ It is important to recall that victims of torture will seldom have access to government records or medical records located in their home countries. Foreign governments with a history of torture will be unlikely to assist torture victims in corroborating their cases. Accordingly, a standard of clear and convincing evidence would make it extremely difficult for many legitimate applicants to prove their claims. In the context of *non-refoulement* protection, therefore, the standard of proof should not be excessive.

Finally, all proceedings should be subject to judicial review. Any effort to restrict this basic right is inconsistent with fundamental principles

213. The application of *non-refoulement* in U.S. immigration and extradition policy was forcefully highlighted by the United States in its Initial Report to the U.N. Committee Against Torture in October 1999. See Initial Report, *supra* note 194, ¶¶ 156–77. The Committee Against Torture acknowledged and applauded U.S. policy in this area. *Conclusions and Recommendations of the Committee Against Torture: United States of America*, U.N. Comm. Against Torture, 24th Sess., ¶¶ 175–80, U.N. Doc. A/55/44 (2000).

214. Relocation does not necessarily ensure avoidance of persecution. See generally ROBERTA COHEN & FRANCIS M. DENG, *MASSSES IN FLIGHT: THE GLOBAL CRISIS OF INTERNAL DISPLACEMENT* (1998); *THE FORSAKEN PEOPLE: CASE STUDIES OF THE INTERNALLY DISPLACED* (Roberta Cohen & Frances M. Deng eds., 1998).

215. Cf. Ved P. Nanda, *Bases for Refusing International Extradition Requests—Capital Punishment and Torture*, 23 *FORDHAM INT'L L.J.* 1369, 1379 (2000).

216. GERMAIN, *supra* note 62, at 201 (discussing deferral of removal); MUSALO ET AL., *supra* note 24, at 326–27 (discussing withholding of deportation).

of due process. Judicial review is an integral check against unfettered executive power and must be provided in all proceedings. Accordingly, efforts to preclude judicial review of either criminal or administrative proceedings cannot be allowed.²¹⁷

CONCLUSION

A multi-track strategy is required to combat impunity. Immigration restrictions are an important part of this strategy. However, they are only one mechanism; they should not be used to the exclusion of other mechanisms. If the United States is truly committed to combating impunity, it should ensure that individuals suspected of having committed serious human rights abuses are prosecuted. If extradition or surrender for purposes of prosecution are unavailable, the United States should initiate criminal proceedings.

Interestingly, the obligation to prosecute serious human rights abusers was recognized by the State Department following the U.S. renunciation of the Rome Statute of the International Criminal Court. On May 6, 2002, U.S. Undersecretary for Political Affairs Marc Grossman acknowledged that there must be accountability for serious violations of international law and that States should be responsible for pursuing accountability. He announced that the United States would “take steps to ensure that gaps in United States’ law do not allow persons wanted or indicted for genocide, war crimes, or crimes against humanity to seek safe haven on our soil in hopes of evading justice.”²¹⁸

Accordingly, efforts to revise the INA must be accompanied by a renewed commitment to prosecute serious human rights abusers. In the absence of a multi-track strategy, the United States will perpetuate a haphazard policy that creates a safe haven for serious human rights abusers.

217. See ICCPR, *supra* note 200, at 177.

218. Marc Grossman, U.S. Undersecretary for Political Affairs, Remarks to the Center for Strategic and International Studies (May 6, 2002) (on file with author).

APPENDIX I:
SELECTED PROPOSALS TO AMEND THE IMMIGRATION AND
NATIONALITY ACT

This Appendix contains five documents: (1) S. 1375: Anti-Atrocity Alien Deportation Act; (2) H.R. 5285: Serious Human Rights Abusers Accountability Act of 2000; (3) Human Rights Abusers Act of 2000; (4) H.R. 1449: Anti-Atrocity Alien Deportation Act; and (5) S. 864: Anti-Atrocity Alien Deportation Act of 2001.

1. S. 1375: ANTI-ATROCITY ALIEN DEPORTATION ACT [JULY 15, 1999]

A BILL

To amend the Immigration and Nationality Act to provide that aliens who commit acts of torture abroad are inadmissible and removable and to establish within the Criminal Division of the Department of Justice an Office of Special Investigations having responsibilities under that Act with respect to all alien participants in acts of genocide and torture abroad.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the "Anti-Atrocity Alien Deportation Act".

SECTION 2. INADMISSIBILITY AND REMOVABILITY OF ALIENS WHO HAVE COMMITTED ACTS OF TORTURE ABROAD.

(a) **INADMISSIBILITY.**—Section 212(a)(3)(E) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(E)) is amended by adding at the end the following:

“(iii) **COMMISSION OF ACTS OF TORTURE.**—Any alien who, outside the United States, has committed any act of torture, as defined in section 2340 of title 18, United States Code, is inadmissible.”

(b) **REMOVABILITY.**—Section 237(a)(4)(D) of that Act (8 U.S.C. 1227(a)(4)(D)) is amended by striking “clause (i) or (ii)” and inserting “clause (i), (ii), or (iii)”.

- (c) **EFFECTIVE DATE.**—The amendments made by this section shall apply to offenses committed before, on, or after the date of enactment of this Act.

SECTION 3. ESTABLISHMENT OF THE OFFICE OF SPECIAL INVESTIGATIONS.

- (a) **AMENDMENT OF THE IMMIGRATION AND NATIONALITY ACT.**—Section 103 of the Immigration and Nationality Act (8 U.S.C. 1103) is amended by adding at the end the following:

“(g) The Attorney General shall establish within the Criminal Division of the Department of Justice an Office of Special Investigations with the authority of investigating, and, where appropriate, taking legal action to remove, denaturalize, or prosecute any alien found to be in violation of clause (i), (ii), or (iii) of section 212(a)(3)(E).”

- (b) **AUTHORIZATION OF APPROPRIATIONS.**—

- (1) **IN GENERAL.**—There are authorized to be appropriated to the Department of Justice for the fiscal year 2000 such sums as may be necessary to carry out the additional duties established under section 103(g) of the Immigration and Nationality Act (as added by this Act) in order to ensure that the Office of Special Investigations fulfills its continuing obligations regarding Nazi war criminals.
- (2) **AVAILABILITY OF FUNDS.**—Amounts appropriated pursuant to paragraph (1) are authorized to remain available until expended.

2. H.R. 5285: SERIOUS HUMAN RIGHTS ABUSERS ACCOUNTABILITY ACT OF 2000 [SEPT. 25, 2000]**A BILL**

To amend the Immigration and Nationality Act to prevent human rights abusers from being eligible for admission into the United States and other forms of immigration relief, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Serious Human Rights Abusers Accountability Act of 2000".

SECTION 2. SERIOUS HUMAN RIGHTS ABUSER DEFINED.

(a) DEFINITION.—Section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)) is amended by adding at the end the following:

"(50)(A) The term 'serious human rights abuser' means any alien who—

"(i) 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;

"(ii) while serving as a foreign government official, was responsible for, or directly carried out, particularly severe violations of religious freedom (as defined in section 3 of the International Religious Freedom Act of 1998 (22 U.S.C. 6402));

"(iii) during an armed conflict, ordered, incited, assisted, or otherwise participated in a war crime (as defined in section 2441(c) of title 18, United States Code);

"(iv) ordered, incited, assisted, otherwise participated in, attempted to commit, or conspired to commit conduct that would constitute genocide (as defined in section 1091(a) of title 18, United States Code), if the conduct were committed in the United States or by a United States national;

“(v) ordered, incited, assisted, or otherwise participated in any act of torture (as defined in the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention); or

“(vi) ordered, incited, assisted, or otherwise participated in a crime against humanity (including the commission of murder, extermination, enslavement, deportation, imprisonment, torture, rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, forced sterilization, or acts of a similar character), when committed as part of a widespread or systematic attack, whether international or internal in character, and directed against any civilian population, with actual or constructive knowledge of the attack.

(B) Subparagraph (A) shall not apply to an alien who demonstrates that—

“(i) the conduct was committed under extreme duress; and

“(ii) the harm reasonably feared by the alien substantially exceeded the harm attributable to the alien’s conduct.

SECTION 3. SERIOUS HUMAN RIGHT ABUSERS INADMISSIBLE AND DEPORTABLE.

(a) **INADMISSIBILITY OF SERIOUS HUMAN RIGHTS ABUSERS.—**

(1) **IN GENERAL.**—Section 212(a)(2)(G) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(2)(G)) is amended to read as follows:

“(G) **SERIOUS HUMAN RIGHTS ABUSERS.**—Any serious human rights abuser is inadmissible.”

(2) **CONFORMING AMENDMENT.**—Section 212(a)(3)(E) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(E)) is amended to read as follows:

“(E) PARTICIPANTS IN NAZI PERSECUTIONS.—Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

“(i) the Nazi government of Germany,

“(ii) any government in any area occupied by the military forces of the Nazi government of Germany,

“(iii) any government established with the assistance or cooperation of the Nazi government of Germany, or

“(iv) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.”

(b) **DEPORTABLE ALIENS TO INCLUDE SERIOUS HUMAN RIGHTS ABUSERS.—**

(1) **IN GENERAL.**—Section 237(a) of the Immigration and Nationality Act (8 U.S.C. 1227(a)) is amended by adding at the end the following:

“(7) SERIOUS HUMAN RIGHTS ABUSERS.—Any serious human rights abuser is deportable.”

(2) **CONFORMING AMENDMENT.**—Section 237(a)(4)(D) of the Immigration and Nationality Act (8 U.S.C. 1227(a)(4)(D)) is amended to read as follows:

“(D) ASSISTED IN NAZI PERSECUTION.—Any alien described in section 212(a)(3)(E) is deportable.”.

SECTION 4. BARS TO REFUGEE STATUS AND ASYLUM FOR SERIOUS HUMAN RIGHTS ABUSERS.

(a) **REFUGEE DEFINED.**—Section 101(a)(42) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(42)) is amended by striking the second sentence and inserting the following:

“The term ‘refugee’ does not include any person who is a serious human rights abuser.”

- (b) **NO WAIVER OF GROUND OF INADMISSIBILITY FOR REFUGEE SEEKERS.**—Section 207(c)(3) of the Immigration and Nationality Act (8 U.S.C. 1157(c)(3)) is amended by inserting “or (2)(G)” after “(2)(C)”.
- (c) **EXCEPTIONS TO GRANTING ASYLUM.**—Section 208(b)(2)(A)(i) of the Immigration and Nationality Act (8 U.S.C. 1158(b)(2)(A)(i)) is amended to read as follows:
 - “(i) the alien is a serious human rights abuser;”.
- (d) **EXTENSION TO SPOUSES AND CHILDREN OF EXCEPTIONS TO GRANTING ASYLUM.**—Section 208(b)(3) of the Immigration and Nationality Act (8 U.S.C. 1158(b)(3)) is amended by striking “such alien.” and inserting “such alien, unless the Attorney General determines that one of the exceptions in clauses (i) through (v) of paragraph (2)(A) applies to the spouse or child.”

SECTION 5. BAR TO ADJUSTMENT OF STATUS OF REFUGEES FOR SERIOUS HUMAN RIGHTS ABUSERS.

Section 209(c) of the Immigration and Nationality Act (8 U.S.C. 1159(c)) is amended by inserting ‘or (2)(G)’ after “(2)(c)”.

SECTION 6. EXCEPTION TO RESTRICTION ON REMOVAL FOR SERIOUS HUMAN RIGHTS ABUSERS AND TERRORISTS.

Section 241(b)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)(B)) is amended—

- (1) in the matter preceding clause (i), by striking “section 237(a)(4)(D)” and inserting “subparagraph (B) or (D) of section 237(a)(4)”;
- (2) by amending clause (i) to read as follows:
 - “(i) the alien is a serious human rights abuser;”.

SECTION 7. BAR TO FINDING OF GOOD MORAL CHARACTER FOR SERIOUS HUMAN RIGHTS ABUSERS.

Section 101(f) of the Immigration and Nationality Act (8 U.S.C. 1101(f)) is amended by inserting after paragraph (1) the following:

“(2) a serious human rights abuser;”.

SECTION 8. BAR TO CANCELLATION OF REMOVAL FOR SERIOUS HUMAN RIGHTS ABUSERS.

Section 240A(c)(4) of the Immigration and Nationality Act (8 U.S.C. 2339b(c)(4)) is amended—

- (1) by striking “section 212(a)(3)” and inserting “paragraph (2)(G) or (3) of section 212(a)”;
- (2) by striking “section 237(a)(4).” and inserting “paragraph (4) or (7) of section 237(a).”

SECTION 9. BAR TO ADJUSTMENT OF STATUS WITH RESPECT TO CERTAIN SPECIAL IMMIGRANTS.

Section 245(h)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1255(h)(2)(B)) is amended by inserting “(2)(G),” before “(3)(A)”.

SECTION 10. CRIMINAL PENALTIES FOR REENTRY FOR REMOVED SERIOUS HUMAN RIGHTS ABUSERS.

Section 276(b) of the Immigration and Nationality Act (8 U.S.C. 1326(b)) is amended—

- (1) in paragraph (3), by striking “sentence. Or” and inserting “sentence;”;
- (2) in paragraph (4), by striking the period at the end and inserting “; or”; and
- (3) by inserting after paragraph (4) the following:

“(5) who was removed from the United States pursuant to section 212(a)(2)(G) or 237(a)(7), and who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States shall be fined under title 18, United States Code, imprisoned not more than 10 years, or both.”

SECTION 11. AIDING OR ASSISTING SERIOUS HUMAN RIGHTS ABUSERS TO ENTER THE UNITED STATES.

Section 277 of the Immigration and Nationality Act (8 U.S.C. 1327) is amended by striking “felony)” and inserting “felony or is a serious human rights abuser)”.

SECTION 12. REVISION OF REGULATIONS WITH RESPECT TO THE INVOLUNTARY RETURN OF PERSONS IN DANGER OF SUBJECTION TO TORTURE.

- (a) **REGULATIONS.**—Not later than 120 days after the date of the enactment of this Act, the Attorney General shall revise the regulations prescribed by the Attorney General to implement the Convention. Such revision shall render ineligible for withholding or deferral of removal under the Convention aliens to whom the relief described in subparagraph (A) of section 241(b)(3) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)) does not apply by reason of subparagraph (B) of such section (as amended by section 6 of this Act). Such revision shall also ensure that the burden of proof is on the applicant for withholding or deferral of removal under the Convention to establish by clear and convincing evidence that he or she would be tortured if removed to the proposed country of removal.
- (b) **JUDICIAL REVIEW.**—Notwithstanding any other provision of law, no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).
- (c) **AUTHORITY TO DETAIN.**—Nothing in this section shall be construed as limiting the authority of the Attorney General to detain any person under any provision of law, including, but not limited to, any provision of the Immigration and Nationality Act.
- (d) **CONVENTION DEFINED.**—In this section, the term “Convention” means the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984.

3. INS PROPOSAL: HUMAN RIGHTS ABUSERS ACT OF 2000 [SEPT. 25, 2000]**A BILL**

To amend the Immigration and Nationality Act to prevent serious human rights or humanitarian law violators from being eligible for admission and other forms of immigration relief and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Human Rights Abusers Act of 2000."

SECTION 2. GROUNDS OF INADMISSIBILITY FOR HUMAN RIGHTS OR HUMANITARIAN LAW VIOLATORS.

- (a) Section 212(a) of the Immigration and Nationality Act of 1952, as amended, (the "INA") (8 U.S.C. 1182(a)) is amended by adding the following new paragraph at the end—

"(11) HUMAN RIGHTS AND RELATED GROUNDS.—

"(A) IN GENERAL.—Any alien who a consular officer or immigration officer knows, or has reasonable grounds to believe, has committed, ordered, incited, assisted, or otherwise knowingly participated in or been responsible for any of the following acts, undertaken in whole or in significant part for a political, religious, or discriminatory purpose:

"(i) homicide,

"(ii) disappearance,

"(iii) genocide,

"(iv) rape,

"(v) torture,

"(vi) kidnapping,

"(vii) mutilation,

"(viii) prolonged, arbitrary detention,

"(ix) enslavement,

"(x) forced pregnancy,

“(xi) forced sterilization, or

“(xii) recruitment of persons under the age of 15 for use in armed conflict,

“is inadmissible.

“An alien shall be considered responsible for an act listed above if, while in a position of power or authority, he knew or should have known that such acts were being or were likely to be committed, and he failed to take all necessary and reasonable steps within his power or authority to prevent or stop such acts. An act has been undertaken for discriminatory purpose if the act was undertaken because of the victim’s political opinion, nationality, race, religion, gender, sexual orientation, or membership in a particular clan, tribe, caste or ethnic group.

“(B) WAIVER.—The Attorney General may, in the Attorney General’s discretion, waive the application of subsection (A) in the case of an alien who is the parent, spouse, son or daughter of a United States citizen or lawful permanent resident and who was under eighteen years of age during all such participation in or responsibility for an act listed in subsection (A)(i)–(xii).

“(C) SECRETARY OF STATE DETERMINATION.—Any alien whose presence in the United States the Secretary of State determines would be incompatible with United States policy regarding the promotion of international human rights or humanitarian law is inadmissible.”

(b) Section 212(a)(3)(E) of the INA (8 U.S.C. 1182(a)(3)(E)) is amended by—

- (1) striking “OR GENOCIDE” from the title;
- (2) striking clause (ii) of subparagraph (E);
- (3) striking the heading for clause (i); and
- (4) redesignating clauses (i)(I) through (i)(IV) as (i) through (iv), respectively.”

SECTION 3. GROUNDS OF REMOVAL FOR HUMAN RIGHTS OR HUMANITARIAN LAW VIOLATORS.

- (a) Section 237(a) of the INA (8 U.S.C. 1227(a)) is amended by adding the following new paragraph—

“(7) HUMAN RIGHTS AND RELATED GROUNDS.—

“(A) IN GENERAL.—Any alien who has committed, ordered, incited, assisted, or otherwise knowingly participated in or been responsible for any of the following acts, undertaken in whole or in significant part for a political, religious, or discriminatory purpose:

“(i) homicide,

“(ii) disappearance,

“(iii) genocide,

“(iv) rape,

“(v) torture,

“(vi) kidnapping,

“(vii) mutilation,

“(viii) prolonged, arbitrary detention,

“(ix) enslavement,

“(x) forced pregnancy,

“(xi) forced sterilization, or

“(xii) recruitment of persons under the age of 15 for use in armed conflict,

“is deportable.

“An alien shall be considered responsible for an act listed above if, while in a position of power or authority, he knew or should have known that such acts were being or were likely to be committed, and he failed to take all necessary and reasonable steps within his power or authority to prevent or stop such acts. An act was undertaken for a discriminatory purpose if the act was undertaken because of the victim’s political opinion, nationality, race, religion, gender, sexual orientation, or membership in a particular clan, tribe, caste or ethnic group.

“(B) WAIVER.—The Attorney General may, in the Attorney General’s discretion, waive the application of subsection (A) in the case of an alien who is the parent, spouse, son or daughter of a United States citizen or lawful permanent resident and who was under eighteen years of age during all such participation in or responsibility for an act listed in subsection (A)(i)–(xii).

“(C) SECRETARY OF STATE DETERMINATION.—Any alien whose presence in the United States the Secretary of State determines is incompatible with United States policy regarding the promotion of international human rights or humanitarian law is deportable.

- (b) Section 237(a)(4)(D) of the INA (8 U.S.C. 1227(a)(4)(D)) is amended to read as follows:

“(D) ASSISTED IN NAZI PERSECUTION—Any alien described in section 212(a)(3)(E) is deportable.”

SECTION 4. BAR TO REFUGEE STATUS FOR HUMAN RIGHTS OR HUMANITARIAN LAW VIOLATORS.

Section 207(c)(3) of the INA (8 U.S.C. 1157(c)(3)) is amended by striking “paragraph 2(c)” and inserting in lieu thereof “paragraph 2(c) or (11) unless the waiver in section 212(a)(11)(B) or 237(a)(7)(B) is granted.”

SECTION 5. BAR TO ASYLUM FOR HUMAN RIGHTS OR HUMANITARIAN LAW VIOLATORS.

- (a) Section 208(b)(2)(A) of the INA (8 U.S.C. 1158(b)(2)(A)) is amended by—

- (1) striking the “or” at the end of clause (v);
- (2) striking the period at the end of clause (vi) and inserting in lieu thereof “; or”; and
- (3) adding the following new subparagraph at the end:

“(vii) the alien is, or at any time has been, within the class of persons described in section 212(a)(11)(A) or (C) or 237(a)(7)(A) or (C), unless the waiver in section 212(a)(11)(B) or 237(a)(7)(B) is granted.”

- (b) Section 208(b)(3) of the INA (8 U.S.C. 1158(b)(3)) is amended by inserting “, provided the spouse or child does not fall within one of the exceptions in paragraph

(b)(2)(A)(i)–(v) or (vii) of this subsection” before the period at the end of the paragraph.

- (c) Section 208(c) of the INA (8 U.S.C. 1158(c)) is amended by redesignating paragraph (3) as paragraph (4), and by adding the following new paragraph (3):

“(3) SPECIAL RULE.—Asylum granted to an alien described in subsection (b)(2)(A) of this section may be terminated by the Attorney General regardless of whether the application was filed before, on, or after the enactment of this paragraph.”

SECTION 6. BAR TO ADJUSTMENT OF STATUS OF REFUGEES FOR HUMAN RIGHTS OR HUMANITARIAN LAW VIOLATORS.

Section 209(c) of the INA (8 U.S.C. 1159(c)) is amended by striking “paragraph 2(c)” and inserting in lieu thereof “paragraph 2(c) or (11) unless the waiver in section 212(a)(11)(B) or 237(a)(11)(B) is granted.”

SECTION 7. BAR TO WITHHOLDING FOR HUMAN RIGHTS OR HUMANITARIAN LAW VIOLATORS.

Section 241(b)(3)(B) of the INA (8 U.S.C. 1231(b)(3)(B)) is amended by—

- (1) striking the “or” at the end of clause (iii);
- (2) striking the period at the end of clause (iv) and inserting “; or”; and
- (3) adding the following new clause at the end:

“(v) the alien is, or at any time has been, within the class of persons described in section 212(a)(11)(A) or 237(a)(7)(A) unless the waiver in section 212(a)(11)(B) or 237(a)(7)(B) is granted.”

SECTION 8. BAR TO GOOD MORAL CHARACTER FOR HUMAN RIGHTS OR HUMANITARIAN LAW VIOLATORS.

Section 101(f) of the INA (8 U.S.C. 1101(f)) is amended by—

- (1) striking the period and inserting a semicolon at the end of paragraph (f)(8); and
- (2) adding the following new paragraph (f)(9) at the end:

“(9) one who is, or who at any time has been, within the class of persons described in section 212(a)(11)(A) or (C)

or 237(a)(7)(A) or (C) of this Act, unless the waiver in section 212(a)(11)(B) or 237(a)(7)(B) is granted.”

SECTION 9. BAR TO CANCELLATION OF REMOVAL FOR HUMAN RIGHTS OR HUMANITARIAN LAW VIOLATORS.

Section 240A(a) of the INA (8 U.S.C. 1229b(a)) is amended by—

- (1) striking “and” in paragraph (2);
- (2) striking the period at the end of paragraph (3) and inserting in lieu thereof “, and”; and
- (3) adding the following new paragraph (4) at the end:

“(4) is not one who is, or who at any time has been, within the class of persons described in section 212(a)(11)(A) or (C) or 237(a)(7)(A) or (C), unless the waiver in section 212(a)(11)(B) or 237(a)(7)(B) is granted.”

SECTION 10. BAR TO SPECIAL AGRICULTURAL WORKERS FOR HUMAN RIGHTS OR HUMANITARIAN LAW VIOLATORS.

Section 210(c)(2)(B)(ii) of the INA (8 U.S.C. 1160(c)(2)(B)) is amended by adding the following subclause (V) at the end:

“(V) Paragraph (11) (relating to human rights and humanitarian law violators), unless the waiver in section 212(a)(11)(B) or 237(a)(7)(B) is granted.”

SECTION 11. BAR TO ADJUSTMENT OF CERTAIN ENTRANTS BEFORE JANUARY 1, 1982, TO THAT OF PERSON ADMITTED FOR LAWFUL RESIDENCE FOR HUMAN RIGHTS OR HUMANITARIAN LAW VIOLATORS.

Section 245A(d)(2)(B)(ii) of the INA (8 U.S.C. 1255a(d)(2)(B)(ii)) is amended by inserting the following new subclause (V) after subclause (IV):

“(V) Paragraph (11) (relating to human rights and humanitarian law violators), unless the waiver in section 212(a)(11)(B) or 237(a)(7)(B) is granted.”

SECTION 12. BAR TO ADJUSTMENT OF STATUS WITH RESPECT TO CERTAIN SPECIAL IMMIGRANTS.

Section 245(h)(2)(B) of the INA (8 U.S.C. 1255(h)(2)(B)) is amended by striking “and (3)(E)” and inserting “(3)(E), and (11)

unless the waiver in section 212(a)(11)(B) or 237(a)(7)(B) is granted.”

SECTION 13. CRIMINAL PENALTIES FOR REENTRY BY HUMAN RIGHTS OR HUMANITARIAN LAW VIOLATORS.

Section 276(b) of the INA (8 U.S.C. 1326(b)) is amended by—

- (1) striking “or” at the end of paragraph (b)(3) and inserting a “;”;
- (2) striking the period at the end of paragraph (b)(4) and inserting in lieu thereof “; or”; and
- (3) adding the following new paragraph (5):

“(5) who has been excluded from the United States pursuant to section 212(a)(11) or has been removed from the United States pursuant to section 237(a)(7) who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States shall be fined under title 18, United States Code, and imprisoned not more than ten years, or both.”

SECTION 14. AIDING OR ASSISTING CERTAIN ALIENS TO ENTER THE UNITED STATES.

Section 277 of the INA is amended by striking “or 212(a)(3) (other than subparagraph (E) thereof)” and inserting “, 212(a)(3) (other than subparagraph (E) thereof), or 212(a)(11)”.

SECTION 15. DEFINITIONS.

Section 101 of the INA (8 U.S.C. 1101)) is amended by adding the following new subsection—

“(i) As used in sections 212(a)(11)(A) and 237(a)(7)(A)—

“(1) The term ‘homicide’ means the unlawful and intentional killing, extrajudicially or otherwise, of a person. A homicide is unlawful if it is unlawful under the laws of the place where it is committed or if it would have been unlawful under the laws of the United States or any State, had it been committed in the United States.

“(2) The term ‘disappearance’ means the arrest, detention, or abduction of a person carried out on behalf of, or with the authorization, support, or acquiescence of, a

government or political organization that has failed to disclose the fate or whereabouts of the missing person.

“(3) The term ‘genocide’ means conduct that is genocide as defined in section 1091(a) of title 18, United States Code, or that would be genocide as defined in that section if the conduct were committed in the United States or by a United States national.

“(4) The term ‘rape’ means invading the body of a person by conduct resulting in penetration of any part of the body of the victim or perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or other part of the body, by force, or by threat of force or coercion (such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment), or when the person invaded was incapable of giving genuine consent.

“(5) The term ‘torture’ has the meaning in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, or declarations adopted by the Senate upon ratification of the Convention.

“(6) The term ‘kidnapping’ means the unlawful seizure, confinement, decoy, abduction, or carrying away and holding for ransom or reward or otherwise of a person. A kidnapping is unlawful if it is unlawful under the laws of the place where it is committed or if it would have been unlawful under the laws of the United States or any State had it been committed in the United States.

“(7) The term ‘mutilation’ means any nonconsensual act (other than one pursuant to lawful judicial sanctions) resulting in the permanent disfiguring or the permanent disabling of a person or removing of an organ or appendage from a person, where such action causes death or seriously endangers the physical or mental health of that person and is not justified by his or her medical condition.

“(8) The term ‘prolonged, arbitrary detention’ means the protracted and arbitrary deprivation of physical liberty.

“(9) The term ‘enslavement’ means the exercise of any and all powers attaching to a claimed right of ownership over a person, such as purchasing, selling, lending or bartering a person, or imposing on a person a similar deprivation of liberty. The term does not include lawful confinement pursuant to due process of law.

“(10) The term ‘forced pregnancy’ means the confinement of a woman who has been forcibly made pregnant, with the intention to force her to give birth in order to affect the ethnic or racial composition of the population.

“(11) The term ‘forced sterilization’ means the nonconsensual deprivation of biological reproductive capacity that is not justified by the person’s medical condition.

“(12) The term ‘recruitment of persons under the age of 15 for use in armed conflict’ includes the use of such persons in armed conflict.”

SECTION 16. EFFECTIVE DATE.

The provisions of this Act shall be effective on the date of enactment, and shall apply without exception to all decisions and actions taken on or after the date of enactment, regardless of whether the conduct occurred before, on, or after the date of enactment.

4. H. R. 1449: ANTI-ATROCITY ALIEN DEPORTATION ACT [APR. 4, 2001]**A BILL**

To amend the Immigration and Nationality Act to provide that aliens who commit acts of torture or war crimes abroad are inadmissible and removable and to establish within the Criminal Division of the Department of Justice an Office of Special Investigations having responsibilities under that Act with respect to all alien participants in war crimes or acts of genocide or torture abroad.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Anti-Atrocity Alien Deportation Act”.

SECTION 2. INADMISSIBILITY AND REMOVABILITY OF ALIENS WHO HAVE COMMITTED ACTS OF TORTURE OR WAR CRIMES ABROAD.

(a) **INADMISSIBILITY.**—Section 212(a)(3)(E) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(E)) is amended by adding at the end the following:

“(iii) **COMMISSION OF ACTS OF TORTURE OR WAR CRIMES.**— Any alien who, outside the United States, has committed—

“(I) any act of torture, as defined in section 2340 of title 18, United States Code; or

“(II) any war crime, as defined in section 2441(c) of title 18, United States Code; is inadmissible.”

(b) **REMOVABILITY.**—Section 237(a)(4)(D) of such Act (8 U.S.C. 1227(a)(4)(D)) is amended by striking “clause (i) or (ii)” and inserting “clause (i), (ii), or (iii)”.

(c) **EFFECTIVE DATE.**—The amendments made by this section shall apply to offenses committed before, on, or after the date of the enactment of this Act.

SECTION 3. ESTABLISHMENT OF THE OFFICE OF SPECIAL INVESTIGATIONS.

(a) **AMENDMENT OF THE IMMIGRATION AND NATIONALITY ACT.**—Section 103 of the Immigration and Nationality Act

(8 U.S.C. 1103) is amended by adding at the end the following:

“(g) The Attorney General shall establish within the Criminal Division of the Department of Justice an Office of Special Investigations with the authority of investigating, and, where appropriate, taking legal action to remove, denaturalize, or prosecute any alien found to be in violation of clause (i), (ii), or (iii) of section 212(a)(3)(E).”

(b) AUTHORIZATION OF APPROPRIATIONS.—

- (1) IN GENERAL.—There are authorized to be appropriated to the Department of Justice for the fiscal year 2002 such sums as may be necessary to carry out the additional duties established under section 103(g) of the Immigration and Nationality Act (as added by this Act) in order to ensure that the Office of Special Investigations fulfills its continuing obligations regarding Nazi war criminals.
- (2) AVAILABILITY OF FUNDS.—Amounts appropriated pursuant to paragraph (1) are authorized to remain available until expended.

5. S. 864: ANTI-ATROCITY ALIEN DEPORTATION ACT OF 2002 [MAY 10, 2001] [AS AMENDED APRIL 10, 2002]

A BILL

To amend the Immigration and Nationality Act to provide that aliens who commit acts of torture, extrajudicial killings, or other specified atrocities abroad are inadmissible and removable and to establish within the Criminal Division of the Department of Justice an Office of Special Investigations having responsibilities under that Act with respect to all alien participants in war crimes, genocide, and the commission of acts of torture and extrajudicial killings abroad.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Anti-Atrocity Alien Deportation Act of 2002”.

SECTION 2. INADMISSIBILITY AND REMOVABILITY OF ALIENS WHO HAVE COMMITTED ACTS OF TORTURE OR EXTRAJUDICIAL KILLINGS ABROAD.

(a) **INADMISSIBILITY.**—Section 212(a)(3)(E) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(E)) is amended—

- (1) in clause (ii), by striking ‘has engaged in conduct that is defined as genocide for purposes of the International Convention on the Prevention and Punishment of Genocide is inadmissible’ and inserting ‘ordered, incited, assisted, or otherwise participated in conduct outside the United States that would, if committed in the United States or by a United States national, be genocide, as defined in section 1091(a) of title 18, United States Code, is inadmissible’;

- (2) by adding at the end the following:

“(iii) **COMMISSION OF ACTS OF TORTURE OR EXTRAJUDICIAL KILLINGS.**—Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of—

“(I) any act of torture, as defined in section 2340 of title 18, United States Code; or

“(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of Torture Victim Protection Act of 1991;

is inadmissible.”; and

- (3) in the subparagraph heading, by striking “PARTICIPANTS IN NAZI PERSECUTION OR GENOCIDE” and inserting “PARTICIPANTS IN NAZI PERSECUTION, GENOCIDE, OR THE COMMISSION OF ANY ACT OF TORTURE OR EXTRAJUDICIAL KILLING”.
- (b) **REMOVABILITY.**—Section 237(a)(4)(D) of such Act (8 U.S.C. 1227(a)(4)(D)) is amended—
 - (1) by striking “clause (i) or (ii)” and inserting “clause (i), (ii), or (iii)”;
 - (2) in the subparagraph heading, by striking “ASSISTED IN NAZI PERSECUTION OR ENGAGED IN GENOCIDE” and inserting “ASSISTED IN NAZI PERSECUTION, PARTICIPATED IN GENOCIDE OR COMMITTED ANY ACT OF TORTURE OR EXTRAJUDICIAL KILLING.”
- (c) **EFFECTIVE DATE.**—The amendments made by this section shall apply to offenses committed before, on, or after the date of the enactment of this Act.

SECTION 3. INADMISSIBILITY AND REMOVABILITY OF FOREIGN GOVERNMENT OFFICIALS WHO HAVE COMMITTED PARTICULARLY SEVERE VIOLATIONS OF RELIGIOUS FREEDOM.

- (a) **GROUND OF INADMISSIBILITY.**—Section 212(a)(2)(G) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(2)(G)) is amended to read as follows:

“(G) FOREIGN GOVERNMENT OFFICIALS WHO HAVE COMMITTED PARTICULARLY SEVERE VIOLATIONS OF RELIGIOUS FREEDOM.—Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998, are inadmissible.
- (b) **GROUND OF DEPORTABILITY.**—Section 237(a)(4) of such Act (8 U.S.C. 1227(a)(4)) is amended by adding at the end the following:

“(E) Participated in the commission of severe violations of religious freedom.—Any alien described in section 212(a)(2)(G) is deportable.”

SECTION 4. BAR TO GOOD MORAL CHARACTER FOR ALIENS WHO HAVE COMMITTED ACTS OF TORTURE, EXTRAJUDICIAL KILLINGS, OR SEVERE VIOLATIONS OF RELIGIOUS FREEDOM.

Section 101(f) of the Immigration and Nationality Act (8 U.S.C. 1101(f)) is amended—

- (1) by striking the period at the end of paragraph (8) and inserting “; and”; and
- (2) by adding at the end the following:

“(9) one who at any time has engaged in conduct described in section 212(a)(3)(E) (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 212(a)(2)(G) (relating to severe violations of religious freedom).”

SECTION 5. ESTABLISHMENT OF THE OFFICE OF SPECIAL INVESTIGATIONS.

(a) AMENDMENT OF THE IMMIGRATION AND NATIONALITY ACT.—

Section 103 of the Immigration and Nationality Act (8 U.S.C. 1103) is amended by adding at the end the following:

- “(g)(1) The Attorney General shall establish within the Criminal Division of the Department of Justice an Office of Special Investigations with the authority to detect and investigate, and, where appropriate, to take legal action to denaturalize any alien described in section 212(a)(3)(E).
- (2) The Attorney General may delegate to any office or other component within the Department of Justice, all or part of the responsibility for determinations of inadmissibility of aliens described in section 212(a)(3)(E), determinations of deportability under section 237(a)(4)(D), or the removal, prosecution, or extradition of such aliens.
- (3) In determining the appropriate legal action to take against an alien described in section 212(a)(3)(E), consideration shall be given to—

“(A) the availability of prosecution under the laws of the United States for any conduct that may form the basis for removal and denaturalization; or

“(B) the removal of the alien to a foreign jurisdiction that is prepared to undertake a prosecution for such conduct.”

(b) **AUTHORIZATION OF APPROPRIATIONS—**

- (1) **IN GENERAL.**—There are authorized to be appropriated to the Department of Justice such sums as may be necessary to carry out the additional duties established under section 103(g) of the Immigration and Nationality Act (as added by this Act) in order to ensure that the Office of Special Investigations fulfills its continuing obligations regarding Nazi war criminals.
- (2) **Availability OF FUNDS.**—Amounts appropriated pursuant to paragraph (1) are authorized to remain available until expended.

SECTION 6. REPORT ON THE IMPLEMENTATION OF THE ACT.

Not later than 180 days after the date of enactment of this Act, the Attorney General, in consultation with the Commissioner of Immigration and Naturalization, shall submit to the Committees on the Judiciary of the Senate and the House of Representatives a report on implementation of this Act that includes a description of—

- (1) the procedures used to refer matters to the Office of Special Investigations and other components within the Department of Justice in a manner consistent with the amendments made by this Act;
- (2) the revisions, if any, made to immigration forms to reflect changes in the Immigration and Nationality Act made by the amendments contained in this Act; and
- (3) the procedures developed, with adequate due process protection, to obtain sufficient evidence to determine whether an alien may be inadmissible under the terms of the amendments made by this Act.

POSTSCRIPT

On June 25, 2002, Representative George W. Gekas (R-Pa.) introduced H.R. 5013 (Securing America's Future Through Enforcement Reform Act) (SAFER Act) in the House.²¹⁹ The SAFER Act is designed to address a variety of immigration issues. It seeks, *inter alia*, to prevent and punish alien smuggling, increase border patrol funding, authorize the use of military forces along U.S. borders, revise the visa process, and facilitate alien terrorist and criminal removal. In addition, the SAFER Act addresses the issue of serious human rights abusers.²²⁰

Title IV, Subtitle C (sections 421 to 434) of the SAFER Act is patterned after the Serious Human Rights Abusers Accountability Act of 2000.²²¹ Section 421 provides an extensive definition of serious human rights violators, which includes any alien who, *inter alia*, participated in persecution, severe violations of religious freedom, war crimes, genocide, or torture.²²² Section 422 states that any serious human rights violator is deportable.²²³ These individuals are also barred from receiving various forms of immigration relief, including refugee status, asylum, and adjustment of status.²²⁴ In addition, they are barred from seeking cancellation of removal, and they are not eligible for a finding of good moral character.²²⁵

The SAFER Act provides for the possibility of criminal prosecution of serious human rights violators. It is unclear, however, whether such prosecution would be for the underlying criminal offense that gave rise to their status as a serious human rights violator or for a violation of U.S. immigration law. Section 423 indicates that the Assistant Attorney General for the Criminal Division of the Department of Justice shall make a determination whether a serious human rights violator should be arrested and prosecuted in the United States for a criminal offense.²²⁶ This section requires the Attorney General to submit periodic reports to Congress describing any action taken against serious human rights violators, including the number of removal proceedings and criminal prosecutions undertaken each year.

219. Securing America's Future Through Enforcement Reform Act (SAFER Act), H.R. 5013, 107th Cong. (2002). The SAFER Act received forty-one cosponsors in the House.

220. See generally Michael D. Patrick, *Immigration Law: Special Registration and Monitoring of Certain Non-Immigrants*, NEW YORK L.J., July 22, 2002, at 3; Press Release, Representative George W. Gekas, Gekas Introduces Sweeping Immigration Reform Bill (June 26, 2002) (on file with author).

221. Serious Human Rights Abusers Accountability Act of 2000, H.R. 5285, 106th Cong. (2000).

222. SAFER Act, *supra* note 219, § 421.

223. *Id.* § 422.

224. *Id.* §§ 426-427, 430.

225. *Id.* §§ 428-429.

226. *Id.* § 423.

The SAFER Act also establishes a unique mechanism for initiating removal proceedings against serious human rights violators.²²⁷ Section 425 provides that any individual may file a complaint with the Attorney General alleging that an alien present in the United States is a serious human rights violator. Upon receipt of such complaint, the Attorney General must serve notice on the alien. In turn, the alien must answer the complaint within fourteen days. The Attorney General must then conduct an investigation to determine whether the alien identified is a serious human rights violator. Within 180 days from the filing of the initial complaint, the Attorney General must either initiate removal proceedings against the alien or issue a written determination that the alien is not a serious human rights violator.

Finally, Section 433 requires the Attorney General to revise the regulations adopted to implement the obligations set forth in the Convention Against Torture with respect to the principle of *non-refoulement*.²²⁸ Specifically, the regulations shall be revised to exclude serious human rights violators from *non-refoulement* protection, including withholding of removal and deferral of removal. In addition, the regulations require that the applicant seeking withholding of removal or deferral of removal to establish by clear and convincing evidence that he or she would be tortured if removed. No court shall have jurisdiction to review the regulations adopted to implement this section.²²⁹

It remains unclear whether Congress will be able to address the SAFER Act before it adjourns in 2002. The legislation was referred to the House Subcommittee on Immigration, Border Security and Claims; however, no vote has occurred. In addition, the Justice Department continues to develop its own proposal.

While Title IV, Subtitle C addresses the issue of serious human rights abusers, it also raises significant concerns about respect for human rights. For example, its restrictions on *non-refoulement* protection and removal of judicial review are inconsistent with the recommendations set forth in this Article. Its creation of a private complaint procedure may prove unwieldy and dangerous to civil liberties. Accordingly, a copy of this manuscript was sent to members of Congress, urging them to consider the profound implications of the SAFER Act in their final deliberations.

227. *Id.* § 425.

228. *Id.* § 433.

229. Section 604 of the SAFER Act adds that a determination as to whether *non-refoulement* protection shall be given is to be made by the Service District Director of the district where the alien resides or is being detained. There is no administrative or judicial review of such determinations. *Id.* § 604.

APPENDIX II: SELECTED SECTIONS OF THE SAFER ACT**H.R. 5013: SECURING AMERICA'S FUTURE THROUGH ENFORCEMENT REFORM ACT OF 2002 [JUNE 25, 2002]****TITLE IV: REMOVING ALIEN TERRORISTS, CRIMINALS, AND HUMAN RIGHTS VIOLATORS****SUBTITLE C—REMOVING ALIEN HUMAN RIGHTS VIOLATORS****SECTION 421. SERIOUS HUMAN RIGHTS VIOLATOR DEFINED.**

Section 101(a) (8 U.S.C. 1101(a)) is amended by adding at the end the following:

“(51)(A) The term ‘serious human rights violator’ means any alien who—

- “(i) 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;
- “(ii) while serving as a foreign government official, was responsible for, or directly carried out, particularly severe violations of religious freedom (as defined in section 3 of the International Religious Freedom Act of 1998 (22 U.S.C. 6402));
- “(iii) during an armed conflict, ordered, incited, assisted, or otherwise participated in a war crime (as defined in section 2441(c) of title 18, United States Code);
- “(iv) ordered, incited, assisted, otherwise participated in, attempted to commit, or conspired to commit conduct that would constitute genocide (as defined in section 1091(a) of title 18, United States Code), if the conduct were committed in the United States or by a United States national;
- “(v) ordered, incited, assisted, or otherwise participated in any act of torture (as defined in the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention); or

“(vi) committed, ordered, incited, assisted, otherwise participated in, or was responsible for any of the following acts, when undertaken in whole or in significant part for a political, religious, or discriminatory purpose:

“(I) Murder or other homicide.

“(II) Kidnapping.

“(III) Disappearance.

“(IV) Rape.

“(V) Torture or mutilation.

“(VI) Prolonged, arbitrary detention.

“(VII) Enslavement.

“(VIII) Forced prostitution, impregnation, sterilization, or abortion.

“(IX) Genocide.

“(X) Extermination.

“(XI) Recruitment of persons under the age of 15 for use in armed conflict.

“(B) Subparagraph (A) shall not apply to an alien who demonstrates by clear and convincing evidence that the conduct was committed under extreme duress. For purposes of the preceding sentence, ‘extreme duress’ means duress created by a threat of imminent death or rape of the alien, or a spouse, child, or parent of the alien.”

SECTION 422. DEPORTABILITY OF SERIOUS HUMAN RIGHTS VIOLATORS.

(a) **IN GENERAL.**—Section 237(a) (8 U.S.C. 1227(a)) is amended by adding at the end the following:

“(8) **SERIOUS HUMAN RIGHTS VIOLATORS.**—Any serious human rights violator is deportable.”

(b) **CONFORMING AMENDMENT.**—Section 237(a)(4)(D) (8 U.S.C. 1227(a)(4)(D)) is amended to read as follows:

“(D) ASSISTED IN NAZI PERSECUTION.—Any alien described in section 212(a)(3)(E) is deportable.”

SECTION 423. ARREST AND DETENTION OF SERIOUS HUMAN RIGHTS VIOLATORS PENDING REMOVAL AND CRIMINAL PROSECUTION DECISIONS.

(a) CUSTODY.—Section 236(c)(1)(D) (8 U.S.C. 1226(c)(1)(D)) is amended by striking ‘section 237(a)(4)(B),’ and inserting ‘paragraph (4)(B) or (8) of section 237(a)’.

(b) NOTICE TO CRIMINAL DIVISION.—Section 236(c) (8 U.S.C. 1226(c)) is amended by adding at the end the following:

“(3) NOTICE TO CRIMINAL DIVISION.—The Commissioner shall ensure that the Assistant Attorney General for the Criminal Division of the Department of Justice—

“(A) is notified when an alien is arrested and detained under paragraph (1) by reason of inadmissibility under section 212(a)(2)(G) or deportability under section 237(a)(8);

“(B) is provided the information that was the basis for the application of such paragraph; and

“(C) makes a determination whether the alien should be arrested and prosecuted in the United States for a criminal offense.

“(4) REPORTS.—Beginning 6 months after the date of the enactment of the Securing America’s Future through Enforcement Reform Act of 2002, and every 12 months thereafter, the Attorney General shall submit to the Committees on the Judiciary of the United States House of Representatives and of the Senate a report containing the following:

“(A) The number of removal proceedings initiated against aliens under sections 212(a)(2)(G) and 237(a)(8) during the reporting period.

“(B) The number of removal proceedings under sections 212(a)(2)(G) and 237(a)(8) pending at the conclusion of the reporting period.

“(C) The number of aliens removed under sections 212(a)(2)(G) and 237(a)(8) during the reporting period.

“(D) The number of notifications under paragraph (3)(A) made during the reporting period.

“(E) The number of criminal prosecutions initiated during the reporting period based on information provided under paragraph (3).

“(F) The number of criminal prosecutions pending at the conclusion of the reporting period that were initiated based on information provided under paragraph (3).

“(G) The number of criminal prosecutions initiated based on information provided under paragraph (3) that resulted in a conviction during the reporting period.”

SECTION 424. EXCEPTION TO RESTRICTION ON REMOVAL FOR SERIOUS HUMAN RIGHTS VIOLATORS AND TERRORISTS.

Section 241(b)(3)(B) (8 U.S.C. 1231(b)(3)(B)) is amended—

- (1) in the matter preceding clause (i), by striking “section 237(a)(4)(D)” and inserting “subparagraph (B) or (D) of section 237(a)(4)”; and
- (2) by amending clause (i) to read as follows:

“(i) the alien is a serious human rights violator;”

SECTION 425. INITIATION OF REMOVAL PROCEEDINGS AGAINST SERIOUS HUMAN RIGHTS VIOLATORS BY COMPLAINT.

Section 239 (8 U.S.C. 1229) is amended by adding at the end the following:

“(e) COMPLAINTS RESPECTING SERIOUS HUMAN RIGHTS VIOLATORS.—

“(1) ESTABLISHMENT OF PROCESS.—The Attorney General shall establish a process for the receipt, investigation, and disposition of complaints alleging that an alien present in the United States is a serious human rights violator and identifying that alien.

“(2) PERSONS ENTITLED TO FILE COMPLAINTS.—Any individual may file a complaint under paragraph (1).

“(3) FORM AND CONTENT OF COMPLAINT.—A complaint under paragraph (1) shall be in the form of a written statement, executed under oath or as permitted under penalty of

perjury under section 1746 of title 28, United States Code, and shall contain such information as the Attorney General may require. Complaints shall be filed with an office designated for that purpose by the Attorney General.

“(4) NOTICE SERVED ON SUBJECT OF COMPLAINT.—The Attorney General shall serve notice, by certified mail and within 14 days of the filing of a complaint under paragraph (1), on each alien identified in the complaint as a serious human rights violator. The alien shall answer the complaint within 10 days of receiving it.

“(5) INVESTIGATION AND ACTION.—The Attorney General shall conduct an investigation of each complaint that satisfies the requirements of this subsection. Not later than 180 days after the date of filing of such a complaint, the Attorney General, with respect to each alien identified in the complaint as a serious human rights violator—

“(A) shall initiate removal proceedings against the alien; or

“(B) shall issue to the complainant a written determination that, in the opinion of the Attorney General, the alien is not a serious human rights violator.

“(6) CONSTRUCTION.—Nothing in this subsection shall be construed to limit the discretion of consular officers under section 291 to determine eligibility for a visa or document required for entry or to limit the discretion of any immigration officer otherwise to initiate removal proceedings under this Act.”

SECTION 426. BARS TO REFUGEE STATUS AND ASYLUM FOR SERIOUS HUMAN RIGHTS VIOLATORS.

- (a) **REFUGEE DEFINED.**—Section 101(a)(42) (8 U.S.C. 1101(a)(42)) is amended by striking the second sentence and inserting “The term ‘refugee’ does not include any person who is a serious human rights violator as defined in section 101(a)(51)(A).”
- (b) **NO WAIVER OF GROUND OF INADMISSIBILITY FOR REFUGEE SEEKERS.**—Section 207(c)(3) (8 U.S.C. 1157(c)(3)) is amended by inserting “or (2)(G)” after “(2)(C).”
- (c) **EXCEPTIONS TO GRANTING ASYLUM.**—Section 208(b)(2)(A)(i) (8 U.S.C. 1158(b)(2)(A)(i)) is amended to read as follows:

“(i) the alien is a serious human rights violator;”.

- (d) **EXTENSION TO SPOUSES AND CHILDREN OF EXCEPTIONS TO GRANTING ASYLUM.**—Section 208(b)(3) of the Immigration and Nationality Act (8 U.S.C. 1158(b)(3)) is amended by striking “such alien.” And inserting “such alien, unless the Attorney General determines that one of the exceptions in clauses (i) through (v) of paragraph (2)(A) applies to the spouse or child.”

SECTION 427. BAR TO ADJUSTMENT OF STATUS FOR SERIOUS HUMAN RIGHTS VIOLATORS.

Section 209(c) (8 U.S.C. 1159(c)) is amended by inserting “or (2)(G)” after “(2)(c).”

SECTION 428. BAR TO FINDING OF GOOD MORAL CHARACTER FOR SERIOUS HUMAN RIGHTS VIOLATORS.

Section 101(f) (8 U.S.C. 1101(f)) is amended by inserting after paragraph (1) the following:

“(2) a serious human rights violator;”

SECTION 429. BAR TO CANCELLATION OF REMOVAL FOR SERIOUS HUMAN RIGHTS VIOLATORS.

Section 240A(c)(4) (8 U.S.C. 2339b(c)(4)) is amended—

- (1) by striking “section 212(a)(3)” and inserting “paragraph (2)(G) or (3) of section 212(a);” and
- (2) by striking “section 237(a)(4).” And inserting “paragraph (4) or (8) of section 237(a).”

SECTION 430. BAR TO ADJUSTMENT OF STATUS WITH RESPECT TO CERTAIN SPECIAL IMMIGRANTS.

Section 245(h)(2)(B) (8 U.S.C. 1255(h)(2)(B)) is amended by inserting “(2)(G),” before “(3)(A).”

SECTION 431. CRIMINAL PENALTIES FOR REENTRY OF REMOVED SERIOUS HUMAN RIGHTS VIOLATORS.

Section 276(b) (8 U.S.C. 1326(b)) is amended—

- (1) in paragraph (3), by striking “sentence. Or” and inserting “sentence;”;
- (2) in paragraph (4), by striking the period at the end and inserting “; or”; and

- (3) by inserting after paragraph (4) the following:

“(5) who was removed from the United States pursuant to section 212(a)(2)(G) or 237(a)(8), and who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States shall be fined under title 18, United States Code, imprisoned not more than 10 years, or both.”

SECTION 432. AIDING OR ASSISTING SERIOUS HUMAN RIGHTS VIOLATORS TO ENTER THE UNITED STATES.

Section 277 (8 U.S.C. 1327) is amended by striking “felony” and inserting “felony or is a serious human rights violator”.

SECTION 433. REVISION OF REGULATIONS WITH RESPECT TO THE INVOLUNTARY RETURN OF PERSONS IN DANGER OF SUBJECTION TO TORTURE.

(a) REGULATIONS.—

- (1) REVISION DEADLINE.—Not later than 120 days after the date of the enactment of this Act, the Attorney General shall revise the regulations prescribed by the Attorney General to implement the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984.
 - (2) EXCLUSION OF CERTAIN ALIENS.—The revision shall exclude from the protection of such regulations aliens described in section 241(b)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)(B)) (as amended by section 424 of this Act), including rendering such aliens ineligible for withholding or deferral of removal under the Convention.
 - (3) BURDEN OF PROOF.—The revision shall also ensure that the burden of proof is on the applicant for withholding or deferral of removal under the Convention to establish by clear and convincing evidence that he or she would be tortured if removed to the proposed country of removal.
- (b) JUDICIAL REVIEW.—Notwithstanding any other provision of law, no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to

consider or review claims raised under the Convention or this section, except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

SECTION 434. EFFECTIVE DATE.

This subtitle, and the amendments made by this subtitle, shall take effect on the date of the enactment of this Act and shall apply to violations occurring before, on, or after such date.