No. 97-1754

In the Supreme Court of the United States

OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JUAN ANIBAL AGUIRRE-AGUIRRE

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

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

1. Respondent and his amici do not dispute that the statutory phrase at issue in this case—"serious nonpolitical crime"—is ambiguous. Indeed, the court of appeals' ruling and respondent's argument labor to pour their own meaning into the phrase. The question, then, is quite simple: to whom has Congress assigned the responsibility for construing an ambiguous statutory provision governing immigration and international affairs that is couched in terms of what the "Attorney General determines"—the Attorney General or the courts? As we explain in our opening brief (Br. 19-22), the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, itself clearly answers that question by requiring deference to the Attorney General. 8 U.S.C. 1103(a) (the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"). This Court's decisions provide the same answer. See Gov't Br. 19-22, 39.

The fact that this case arises against the backdrop of the United Nations Protocol Relating to the Status of Refugees (Protocol), Jan. 31, 1967, 19 U.S.T. 6224, and the incorporated provisions of the United Nations Convention Relating to the Status of Refugees (Convention), July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259, does not diminish the deference owed the Attorney General. "[T]he meaning attributed to treaty provisions by the Government agencies charged with their * * * enforcement is entitled to great weight." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989); see also *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 119 S. Ct. 662, 671 (1999).

2. Respondent's argument (Br. 23-25) that no deference is due because the Attorney General has been inconsistent in her interpretation of the serious nonpolitical crime exception is devoid of merit. In *In re Rodriguez-Coto*, 19 I. & N. Dec. 208 (BIA 1985), the Board of Immigration Appeals (Board) specifically "reject[ed] any interpretation of the phrases 'particularly serious crime' and 'serious nonpolitical crime' * * * which would vary with the nature of evidence of persecution." *Id.* at 209. That ruling was not "dictum" (Resp. Br. 20), even if we assume, arguendo, that such a characterization has relevance in the administrative context. The Board found it "necessary" to reach the question. 19 I. & N. Dec. at 209 n.2. And the Eleventh Circuit had no trouble recognizing the ruling as a definitive and "sufficiently authoritative" (Resp. Br. 21) expression of the Attorney General's position. See *Garcia-Mir* v. *Smith*, 766 F.2d 1478, 1487 n.10 (1985), cert. denied, 475 U.S. 1022 (1986). The two cases respondent cites (Br. 18-19) as reflecting a contrary position in fact did not resolve the question, and they were decided five years before *Rodriguez-Coto*.[1]

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[1] See *In re Ballester-Garcia*, 17 I. & N. Dec. 592, 596 (BIA 1980) (outcome the same whether balancing test or "traditional view" is applied); *In re Rodriguez-Palma*, 17 I. & N. Dec. 465, 469 (BIA 1980) (outcome the

Equally inapposite is the reliance by respondent (Br. 23-24) and amicus United Nations High Commissioner for Refugees (UNHCR) (Br. 22-23) on the prior practice of the Immigration and Naturalization Service (INS) and the Board of treating an alien's commission of a serious nonpolitical crime as a factor to be taken into account in deciding whether to grant asylum under 8 U.S.C. 1158(a) (1994) as a matter of discretion. See, *e.g.*, 53 Fed. Reg. 11,301-11,302 (1988) (eliminating earlier regulatory provision, 8 C.F.R. 208.8(f)(v) (1981), that mandated denial of asylum on that ground). The post-1988 asylum practice reflected the fact that, before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, the INA contained no prohibition against granting asylum to an alien who the Attorney General had serious reasons for believing had committed a serious nonpolitical crime before coming to the United States. As a result, the Attorney General was free to weigh the alien's risk of persecution in the manner recommended by the UNHCR in deciding whether to grant asylum, even though she could not do so with respect to the statutory bar to withholding of deportation. See 53 Fed. Reg. at 11,302 (explaining distinction).[2]

3. Finally, respondent's claim that the content of the Board's decision disentitles it to deference is baseless. It is true (Resp. Br. 22) that the Board in this case did not

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same "whether we apply a balancing test or make our determination based solely on the nature of the offense involved"). Respondent's citation (Br. 21) of *In re Rodriguez-Majano*, 19 I. & N. Dec. 811 (BIA 1988), and *In re Izatula*, 20 I. & N. Dec. 149 (BIA 1990), is even further afield. Neither case concerned the statutory provision at issue here, addressed the question of whether the risk of persecution should be rebalanced, or involved violence directed solely against innocent civilians.

[2] Section 604 of IIRIRA, 110 Stat. 3009-690, created a parallel statutory bar to eligibility for asylum as well, which applies to applications filed on or after April 1, 1997. See Gov't Br. 5 n.2.

reiterate its previous refusal to rebalance the persecution risk; but it was unnecessary to do so because *Rodriguez-Coto*, *supra*, had already answered that question. In any event, respondent is ill-positioned to offer up both that complaint and his criticism of the Board (Br. 22, 25-28) for failing to set forth its reasoning at greater length, because respondent never filed a brief with the Board or in any other way presented his current factual or legal theories for relief to the Board, although he was represented by counsel and his request for an extension of time to file a brief was granted. AR 13-21. The deference due the Board does not turn upon the Board's ability to divine and address arguments that were never presented to it, but that might be made for the first time in the court of appeals or this Court.

Respondent's further argument (Br. 24-25) that the Board's disagreement with the immigration judge (IJ) diminishes the deference owed is wrong. There is only one final determination by the Attorney General under review in this case, which is the Board's ruling.[3] It is true that the Board generally accords deference to the IJ's credibility findings; but the IJ's credibility findings had no bearing on the Board's ruling here because the Board simply applied the law to respondent's own admitted and uncontested statements. See Gov't Br. 42.[4]

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[3] See *Charlesworth* v. *INS*, 966 F.2d 1323, 1325 (9th Cir. 1992); *Martinez-Benitez* v. *INS*, 956 F.2d 1053, 1055 (11th Cir. 1992); cf. *INS* v. *Doherty*, 502 U.S. 314, 327 (1992) (Attorney General's disagreement with Board does not limit his discretion).

[4] Amicus Lawyers Committee for Human Rights (LCHR) mistakenly asserts (Br. 2-3, 8) that the government concedes that respondent has a well-founded fear of persecution. In fact, the Board expressly reserved that issue. See Pet. App. 18a.

B. The Board Reasonably Concluded That The Risk Of Persecution Upon Return Is Not Relevant In Determining Whether An Alien Committed A "Serious Nonpolitical Crime"

1. The court of appeals erred in requiring (Pet. App. 6a-7a) the Board, in deciding whether to withhold deportation, to balance the seriousness of the alien's crime against the risk of persecution he would face upon return. That consideration finds no support in the text or structure of Section 1253(h)(2)(C). See Gov't Br. 22-26. A future risk of persecution has no logical bearing on whether a previously committed crime was either serious or nonpolitical. It is simply an asserted justification for overlooking the offense. Further, Section 1253(h)(1) already weighs the risk of persecution an alien faces in determining his eligibility for withholding of deportation in the first place. Nothing indicates that Congress intended to count the persecution factor twice.[5]

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[5] Respondent notes (Br. 40) that the Board in this case applied the withholding exception without first determining whether respondent faced the requisite risk of persecution. See Pet. App. 18a. That is beside the point. The issue is one of statutory construction, not Board procedure. There is no gainsaying that, to adopt respondent's reading of Section 1253(h)(2)(C), the Court would have to conclude that Congress intended the risk of persecution to be weighed both in determining eligibility for withholding under Section 1253(h)(1), and again in evaluating the applicability of the exceptions under Section 1253(h)(2). Likewise, respondent's observation (Resp. Br. 39-40) that the Board "balances" by inquiring into whether the political aspect of an offense outweighs its common-law character proves nothing. That inquiry is necessary to give meaning to the ambiguous statutory term "serious nonpolitical crime." It does not, as respondent and amici advocate here, simply interject additional, extra-statutory considerations that (as respondent concedes, Br. 38) have no bearing on the meaning of Congress's chosen factors. The other instances of "balancing" cited by respondent (Br. 40 n.31) and LCHR (Br. 20) involved the weighing of factors in deciding whether to grant discretionary relief, and thus are even further afield from the application of the mandatory exception at issue here.

Respondent now agrees. He makes no effort to justify the risk-of-persecution factor as an interpretation of Section 1253(h)(2)(C). To the contrary, he concedes (Br. 38) that "[i]t is not that the seriousness of the crime varies with the likelihood or the degree of persecution. Nor does a past act become more or less political when future risk is considered." Instead, respondent and his amici argue (Resp. Br. 29-39; UNHCR Br. 16-24; LCHR Br. 3-22) that the risk of persecution must be balanced as an extra-statutory factor in order to conform United States law to the Protocol and its incorporated Convention provisions. But again, respondent and his amici do not contend that the risk-of-persecution factor has any "anchor[] in the text" (*Shannon* v. *United States*, 512 U.S. 573, 583 (1994)) of the Protocol or Convention.[6] Nor could they, because the Convention flatly denies refugee status to "any person with respect to whom there are serious reasons for considering that * * * he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee." Protocol art. 1(2), 19 U.S.T. at 6225; Convention art. 1(F)(b), 19 U.S.T. at 6261.[7]

Nor does the negotiating history of the Convention document a consensus that the Convention bound signatories to apply such a balancing test. Respondent and his amici rely (Resp. Br. 36 & n.26; UNHCR Br. 19; LCHR Br. 18 & n.15) on the statement of Conference President Larsen that, "[w]hen a person with a criminal record sought asylum as a refugee, it was for the country of refuge to strike a balance between the offences committed by that person and the

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[6] See also *Itel Containers Int'l Corp.* v. *Huddleston*, 507 U.S. 60, 65 (1993) (interpretation of treaty language "must begin, as always, with the text of the Convention[ ]"); see also *El Al Israel Airlines*, 119 S. Ct. at 671.

[7] As respondent conceded below (C.A. Br. 17-18), the Protocol is not a self-executing treaty. It thus does not confer any rights beyond those granted by the implementing domestic legislation. See Gov't Br. 27.

extent to which his fear of persecution was well founded." *Summary Record of the Twenty-ninth Meeting*, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, at 23, U.N. Doc. A/Conf.2/SR.29 (July 19, 1951). That comment offers scant support for respondent's position. First, it was made in the course of describing the practice of some nations under previous international instruments, which is why it was worded in the past tense. See *ibid.* The statement thus did not purport to be an interpretation of any mandate to be included in the text of the Convention itself. Indeed, the president's next sentence "simply ask[ed]" representatives to "keep in mind" the hypothetical case of a minor official of an outlawed political party who had a criminal record, noting his belief that countries had always dealt with such cases "fairly" under earlier agreements. *Ibid.*

Second, the comment quoted above does not specifically mandate ad hoc, individualized balancing; it suggests only that the "country of refuge" strike a balance. See also *Summary Record of the Twenty-fourth Meeting*, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, at 13, U.N. Doc. A/Conf.2/SR.24 (July 17, 1951) (statement of Mr. Larsen as delegate of Denmark) ("A proper balance must be struck between all the considerations involved.") (cited in LCHR Br. 18-19 n.15). As explained in our opening brief (at 29-30), Congress, after weighing the relevant considerations, struck what it deemed to be the appropriate balance in the text of Section 1253(h), which adopts a categorical approach with respect to all aliens who are believed to have committed "serious nonpolitical crime[s]." In so doing, Congress, in effect, chose to give uniorm weight to persecution risk in the implementation of Section 1253(h), rather than a weight that varies and must be measured against the seriousness of particular past criminal conduct. In any event, the two remarks by a single delegate, upon which respondent and his amici rely, hardly constitute a "shared expectation[] of the contracting parties"

that could bind signatory nations. *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 223 (1996); see also G. S. Goodwin-Gill, *The Refugee in International Law* 102 n.126 (2d ed. 1996) ("The summary records [of the Convention] reveal shared concerns, but little consensus" on the serious nonpolitical crime provision.). That is especially so since respondent and his amici cite nothing—and there is nothing—in the text of the Convention itself that could reasonably be thought to impose such a requirement.

2. Respondent and his amici resort to the "overall object" and "purposes" of the Convention (Resp. Br. 29; LCHR Br. 19; UNHCR Br. 7-10). But again, they do so not to assist in the interpretation of ambiguous Convention terms, but rather to read into the Convention (and, derivatively, United States law) a mandatory, non-textual limitation on the expressly reserved sovereign power to exclude persons who are believed to have committed serious nonpolitical crimes. Even if we assume, for the moment, that such an approach is a valid means of treaty interpretation (cf. *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 535 (1991) (aids to treaty construction other than plain language "may be brought to bear *on difficult or ambiguous passages*") (emphasis added; citation omitted)), the argument is without merit.

Respondent claims (Br. 32) that the Convention's serious nonpolitical crime exception has two purposes: to protect the internal security of the country in which refuge is sought and to decline protection for persons who are fugitives from justice. The exception's purposes are not so limited, as we explain below. See pp. 9-12, *infra*. But even if they were, respondent fails to explain how rebalancing the risk of persecution advances either of those purposes. The persecution risk an alien would face upon return has no logical bearing on the threat to public order or safety that person might pose to the country of refuge. Nor does it contribute measurably to an effort to distinguish between fugitives from justice and refugees. The essential attributes of re-

fugees are identified both under the Convention and United States law by the initial requirement that the alien demonstrate a well-founded fear of persecution (see Convention art. 1(A)(2), 19 U.S.T. at 6261; 8 U.S.C. 1253(h)(1)).[8]

Further, respondent's identification of the serious nonpolitical crime exception's purposes is incomplete. Internal security and public order were not the animating purposes of that exception. Both the Convention and United States law specifically address those concerns elsewhere. See Convention art. 33(2), 19 U.S.T. at 6276 (*non-refoulement* "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 * * * constitutes a danger to the community of that country"); 8 U.S.C. 1253(h)(2)(B) (exception for alien who "constitutes a danger to the community of the United States").[9]

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[8] Amicus LCHR invokes what it characterizes as the Convention's overall purpose of protecting "persons facing persecution in their countries." Br. 8, 19. But the Convention does not protect all "persons" facing persecution; it protects only those who meet its definition of "refugee," which in turn excludes persons who have committed serious nonpolitical crimes. Thus, LCHR's argument simply begs the question presented in this case. Furthermore, in appropriate cases, amici LCHR's and UNHCR's concern (LCHR Br. 20-21; UNHCR Br. 18) that aliens not be returned to face severe persecution, such as certain death or torture, could be addressed through a grant of asylum (for cases such as this one that arose prior to IIRIRA) or an exercise of the Attorney General's prosecutorial discretion to defer action or stay removal. In addition, the United States is a party to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, modified Mar. 1985, 24 I.L.M. 535 (see 136 Cong. Rec. S17,486-S17,492 (daily ed. Oct. 27, 1990); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822), and thus will not return any peson covered by that agreement to a country where he would likely be tortured.

[9] Amicus UNHCR's claim (Br. 18 & n.20, 19) that "delegate after delegate" expressed the view that an "intractable refugee" should not be returned to "certain death" overlooks that those comments were made

The language and negotiating history of the Convention also demonstrate that the serious nonpolitical crime exception reaches beyond pure fugitives from justice. First, the language does not require a finding that the individual in fact committed a crime; it requires only that there be "serious reasons for considering" that a crime was committed.[10] Second, draft proposals suggesting that the exception to *refoulement* exclude "case[s] of prosecutions genuinely arising from non-political crimes" or "persons liable to extradition" for crimes were not adopted.[11] Third, limiting the exception

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during the debates over Article 33's provision for expulsion of a "refugee" by the host country for crimes committed within that country. They did not address the serious nonpolitical crime exception to attaining refugee status in the first instance. See *Summary Record of the Fortieth Meeting*, Ad Hoc Comm. on Refugees and Stateless Persons, 2d Sess., at 33, U.N. Doc. E/AC.32/SR.40 (Aug. 22, 1950) (the predecessor to Article 33's prohibition on return or expulsion of refugees applied only to a "genuine refugee * * * coming under the well-pondered definitions contained in article 1"); *Summary Record of the Twentieth Meeting*, Ad Hoc Comm. on Statelessness and Related Problems, 1st Sess., at 15-21, U.N. Doc. E/AC.32/SR.20, (Feb. 1, 1950). Moreover, the statements upon which amicus UNHCR relies are by no means unequivocal. Thus, the Chairman stated (*id.* at 15) that it was for the government concerned "to find some means of making reservations to meet special cases" of "intractable refugees," while accepting the "general principle" of not expelling refugees to territories where they would meet certain death. And the representative of the United Kingdom stated only that the "power" to expel any alien "would of course not be employed if it would endanger his life" (U.N. Doc. E/AC.32/SR.40, *supra*, at 31); he did not say that the Convention would divest the signatories of the power itself.

[10] See Convention art. 1(F), 19 U.S.T. at 6261; see also 8 U.S.C. 1253(h)(2)(C); N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents, and Interpretation* 67 n.60 (1953) (serious nonpolitical crime exception "refer[s] to persons who, in the *opinion* of the competent authorities of the state concerned, committed the crime or act").

[11] U.N. Doc. A/Conf.2/SR.24, *supra*, at 10-16; *Summary Record of the Thirty-third Meeting*, Ad Hoc Comm. on Refugees and Stateless Persons, 2d Sess., at 8, U.N. Doc. E/AC.32/SR.33 (Aug. 14, 1950); see also Goodwin-Gill, *supra*, at 105.

to fugitives from justice would make the operation of the serious nonpolitical crime exception vary depending, not upon the conduct of the alien, but rather upon the prosecutorial resources and wherewithal of the country in which the crime occurred.

In addition, respondent ignores the fact that perhaps the most important purpose of the serious nonpolitical crime exception was to provide signatory nations a measure of flexibility and to equip them with a tool for sifting out those persons deemed undeserving of refugee status.[12] Recognizing both the sensitive nature of governmental decisions to afford safe haven to persons who have committed serious nonpolitical crimes in other countries and the wide variations in nations' criminal laws, moreover, the Convention drafters entrusted the delicate task of drawing lines and applying the Convention's terms to the individual States Parties.[13] Thus,

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[12] See UNHCR Br. 7-10; U.N. Doc. E/AC.32/SR.33, *supra*, at 8 (exception "brought the Convention into accordance with the requirements of international morality and provided a safeguard for genuine refugees and for the receiving countries"); U.N. Doc. A/Conf.2/SR.24, *supra*, at 5 ("There were so many *bona fide* refugees that it was important not to allow any confusion between them and ordinary common-law criminals."); *id.* at 6 ("The real purpose of paragraph E [now F] of article 1 was to exclude from the scope of the Convention persons regarded as criminals, on the grounds that they should not be placed on an equal footing with *bona fide* refugees."); Goodwin-Gill, *supra*, at 95 & n.105 (Article 1(F)'s exclusions from refugee status describe persons "not deserving the benefit of refugee status," and each signatory State will determine the applicability of the serious nonpolitical crime exclusion "according to its own standards"); J. C. Hathaway, *The Law of Refugee Status* 214-215 (1991) (Article 1(F) exclusions allow signatory States to withhold protection from "undesirable refugees"); S. Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 149 Recueil Des Cours (Collected Courses of the Hague Academy of Int'l Law) 287, 298 (1977).

[13] See Gov't Br. 21-22, 29; P. Weis, *Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees*, 1953 Brit. Y.B. Int'l L. 478, 480 (1954) ("The determination whether an individual is a refugee in the sense of Article I of the Convention and whether, therefore, the Convention is to be applied to him is clearly within the competence of the

contrary to the assertion of the UNHCR (Br. 16- 17), the fact that the United States does not balance the risk of future persecution against the seriousness of the past crime does not prevent other countries from doing so if they wish.[14]

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

Neither respondent nor his amici make any effort to defend the court of appeals' ruling that the Attorney General must consider whether an alien's crimes involved "acts of an atrocious nature" (Pet. App. 6a). Nor could they. See Gov't

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Contracting States."); Goodwin-Gill, *supra*, at 105; Hathaway, *supra*, at 214-215 ("[I]t falls to each contracting state to decide for itself when a refugee claimant is within the scope of an exclusion clause."). For this reason, the United States has long considered the guidelines from the UNHCR Handbook to be "just that—guidelines," which "may be accepted or rejected with respect to a signatory state's interpretation of the Convention." *U.S. Refugee Program: Oversight Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 26 n.5 (1981) (Office of Legal Counsel Memorandum).

[14] This flexibility is also manifest in the differing approaches of signatory nations to balancing the risk of persecution. The British House of Lords has specifically rejected the balancing test proposed here. *T* v. *Secretary of State for the Home Dep't*, 2 All England L. Rep. 865, 882 (House of Lords 1996) (Lord Mustill) ("[T]he crime either is or is not political when committed, and its character cannot depend on the consequences which the offender may afterwards suffer if he is returned."); but see UNHCR Br. 21 n. 23 (citing French case applying the balancing test); *Malouf* v. *Canada*, 1995 1 Can. Fed. Ct. Rep. 537, 556-557 (Can. Fed. Ct. 1994) (adopting balancing test). Amicus UNHCR also cites (Br. 20) the Council of the European Union's *Joint Position on the Harmonized Application of the Term "Refugee,"* E.U. Doc. No. 96/196/JHA ¶ 13 (1996). That document, however, expressly provides that it "shall not bind the legislative authorities or affect the judicial authorities of the Member State[s]." *Id.* (preamble). Moreover, while the document proposes a "harmonized" approach by member States that would be consistent with the UNHCR's guidance, it does not suggest that the Convention mandates that approach.

Br. 33-38. Instead, they now argue that the serious nonpolitical crime exception must be confined to "very grave" offenses. Resp. Br. 38; LCHR Br. 9. This argument, however, suffers from the same fatal defects as the requirement that the crimes be "atrocious." "Serious" and "very grave" are not synonyms; had Congress intended to limit the exception to "very grave" crimes, it would have said so. See 5 U.S.C. 1212(g)(2)(B) (referring to "exceptionally grave" damage). Further, as explained in our opening brief (at 34-35), Section 1253(h)(2)(B) separately precludes any alien who has been convicted of a "particularly serious crime" from obtaining mandatory withholding relief, and further defines "particularly serious crime" to include an "aggravated felony," 8 U.S.C. 1253(h)(2). The cramped reading of "serious crimes" that respondent and amicus LCHR advance entails an upside-down construction of Section 1253(h), under which "serious" crimes would register as more depraved and violent than "particularly serious crimes."[15] In any event, the evidence is quite clear that respondent's crimes of arson and assault with weapons satisfy both the INA's and the Convention's terms.[16]

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[15] The Convention similarly distinguishes between "serious" and "particularly serious" crimes (Convention art. 33(2), 19 U.S.T. at 6276), and thus "serious nonpolitical crime" must be afforded a construction that does not render superfluous the reference to "particularly serious crimes" elsewhere in the Convention's text. Clearly, a crime that excludes an alien under Article 1(F)(b) does not have to be tantamount to a war crime or a crime against humanity, which are addressed by Article 1(F)(a) and (c). See 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 294-295 (1966) (rejecting such a construction as "too restrictive" and inconsistent with practice); Robinson, *supra*, at 69 n.67.

[16] See Gov't Br. 43 (citing authorities); Hathaway, *supra*, at 224 ("violence against persons" and arson); Goodwin-Gill, *supra*, at 107 (describing criteria proposed by UNHCR for screening Mariel Cuban asylum seekers in 1980) (arson, and assault accompanied by aggravating factors; use of weapons and injury to person suggest crime is "serious"); UNHCR Br. 14 n.16 (same). Respondent's argument (Br. 48) that his conduct did

Respondent, moreover, fails to come to grips with the Attorney General's position that the serious nonpolitical character of criminal conduct is influenced, not simply by its abstract gravity or Model Penal Code classification, but also by the identity of its victims. As explained in our opening brief (at 35-41), the Attorney General has determined that criminal violence targeted solely or primarily at innocent civilians will often be disproportionate to any reasonable political objective and thus will likely constitute a serious nonpolitical crime. See also *In re Atta*, 706 F. Supp. 1032, 1039 (E.D.N.Y. 1989) ("[T]he United States does not regard the indiscriminate use of violence against civilians as a political offense."). That principle is consonant with longstanding judicial definitions of political activity, see Gov't Br. 35-36 (citing cases), with well-established principles of international law, *id.* at 36-37 (citing international instruments), and with the position of the UNHCR (Br. 26-29).[17] Respondent, for his part, cites absolutely no authority for the proposition that either United States law or the Convention and Protocol should be or were intended to be construed to protect persons who deliberately and repeatedly target innocent civilians for physical violence and property destruction.

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

Respondent's defense (Br. 44-45) of the court of appeals' requirement that the Board factor in the necessity and

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not constitute arson is mistaken. See *United States* v. *Bedonie*, 913 F.2d 782, 789-790 (10th Cir. 1990) (federal arson statute, 18 U.S.C. 81, applies to the burning of a motor vehicle), cert. denied, 501 U.S. 1253 (1991); *State* v. *Hage*, 532 N.W.2d 406, 412 (S.D. 1995) (burning of school bus is arson).

[17] Other than balancing the risk of persecution, the Attorney General's practice under the INA is largely consonant with the approach recommended by the UNHCR, as the UNHCR recognizes (Br. 24).

success of criminal conduct is notable for its brevity. Respondent makes no argument that the text of the INA, Convention, or Protocol, or their respective histories, compels consideration of those factors. Respondent argues (Br. 45) only that violence may sometimes be necessary. But it is difficult to imagine the circumstances under which deliberate and repeated violence against innocent civilian victims would be necessary or justifiable. In any event, alleged necessity does not make criminal conduct any more or less "serious." Nor does it by itself make the violence political. Rather, the Board has determined that it is the nexus between the criminal conduct and the protestor's objectives vis-a-vis the governing authority that endows the crime with a political character. And, as amicus UNHCR acknowledges (Br. 26-29), it has long been recognized that crimes targeting civilians and promoting general social disorder lack a sufficiently close nexus to qualify as political.[18]

Respondent is correct (Br. 46-47) that the cases we cite generally deal with violence against civilians in the context of what might be characterized as terrorist offenses. But nothing in the text of the INA or the relevant international agreements requires the Attorney General to disregard civilian violence unless it reaches the extreme level of terrorism. Indeed, it is eminently reasonable and consistent with principles of international law to conclude that unprovoked,

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[18] See Gov't Br. 40 (citing cases); UNHCR Br. 26 ("[T]he link [to political conduct] is weakest when politically motivated acts are principally directed against private interests and is non-existent when those acts are intended to do nothing more than promote social chaos.") (internal quotation marks omitted); see also *Ahmad* v. *Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990) ("We agree that an attack on a commercial bus carrying civilian passengers on a regular route is not a political offense. Political motivation does not convert every crime into a political offense.").

deliberate, repeated crimes against civilians will bear a heavy presumption that they are "nonpolitical."[19]

Requiring the Board to consider the success of criminal activity is even more counterintuitive. Under respondent's theory (Br. 44), repeated failures in accomplishing a political objective suggest that the underlying conduct was nonpolitical. But whether a protest action succeeds the first, fifth, or fiftieth time does not determine its essential political character. The lack of success may more readily be attributable to the level of oppression or the entrenchment of governmental officials.[20]

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[19] In any event, respondent (Br. 45) and amicus Massachusetts Law Reform Institute (MLRI) (Br. 6-25) exaggerate the "necessity" of violence against civilians to effect political change in Guatemala. Guatemala has enjoyed seven peaceful transfers of power between governments since 1985. AR 116; Dep't of State, *Country Reports on Human Rights Practices for 1997* 526-527, 533 (Joint Comm. Print 1998). Furthermore, shortly after respondent left Guatemala, an attempt by the then-President to suspend constitutional rule was quelled, and the President ousted, by purely peaceful protests. See Gov't Br. 40 n.17. MLRI's brief also cites instances of peaceful resistance by students and others. Br. 12 (referring to protest marches and strikes), *id.* at App. 9, 23, 55, 122. MLRI's other "evidence" of the need for respondent to resort to violence against civilians is lacking in completeness. For example, MLRI identifies (Br. 13) as "[t]he Price of Student Protest" a 1980 incident in which the Guatemalan government supposedly attacked student protestors solely "*for reading* a list of grievances at a foreign embassy." While not to excuse the Guatemalan government's response, what MLRI neglects to inform the Court is that, in addition to "reading a list of grievances," the students, who were armed with revolvers, Molotov cocktails, and machetes, seized the embassy and took a number of hostages, including the Spanish ambassador. D. Stoll, *Rigoberta Menchu and the Story of All Poor Guatemalans* 79-86 (1999). MLRI also fails to cite any authority for many of its assertions, such as claims that passengers joined in the destruction of buses (Br. 5 n.5, 16), and that the military killed the head of respondent's party, the UCN (*id.* at 9; cf. *Country Report*s, *supra*, at 529 (noting charges filed against and conviction of gang members involved in UCN leader's death)).

[20] We have already disposed of respondent's alternative claim (Resp. Br. 17 n.7) that he is entitled to relief under the Antiterrorism and Effec-

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

As our opening brief details (at 41-46), substantial evidence supports the Board's determination that respondent's admitted, repeated acts of assault, arson, and vandalism targeted solely at innocent civilians constitute serious nonpolitical crimes.[21] Perhaps recognizing this, respondent seeks to amend rather than defend the record below. But his efforts to do so are too little too late.

First, respondent's attempted re-translation of his testimony is wrong. Respondent argues (Br. 11-12) that he never admitted to throwing stones at passengers, and that he said only that he "thr[e]w rocks at the buses" (Br. 12). As we explain in our reply brief at the petition stage (at 2)—an explanation that respondent still has not answered—the tape recording reveals that respondent referred to the object of his stoning by using the feminine direct object pronoun "la" (translated as "the," A. Gooch et al., *Cassell's Spanish-English, English-Spanish Dictionary* 385 (1978)). That "la" refers back to his use of the feminine noun "la gente" ("the people," *id.* at 332), and not to the masculine noun "el bus" ("the bus," *id.* at 80 (autobus)). Had respondent intended to refer to "el bus," he would have used the masculine direct object pronoun "lo" (*id.* at 396).[22]

Second, respondent's claim cannot be raised for the first time in this Court. This is "a court of review, not one of first

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tive Death Penalty Act of 1996, Pub. L. No. 104-132, Div. C, Tit. IV-B, § 413(f), 110 Stat. 1269, amendments to the INA. See Gov't Br. 31-32 n.13.

[21] Indeed, MLRI's lengthy discussion (Br. 16-20) of bus burnings in Guatemala provides powerful evidence that respondent's conduct was predominantly economically motivated violence targeted at the actions of private bus owners.

[22] We lodged a copy of the tape recording of the administrative hearing with the Court at the petition stage.

view." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 457 (1995). Section 1105a(a)(4) of Title 8 directs, moreover, that an alien's petition for judicial review of a final order of deportation "shall be determined solely upon the administrative record upon which the deportation order is based." See also *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam).[23]

Respondent, who was represented by the same attorney before the court of appeals, offers no sound excuse for his tardiness. Respondent's insistence (Br. 13-15) that the tape could not have been acquired earlier is pure surmise: he never asked. As soon as he did, the tape was promptly provided (*id.* at 15).[24] Nor was access to the tape necessary. In the brief it filed with the Board, the INS specifically relied upon the transcription of respondent's testimony stating that he stoned persons. AR 25. With or without a tape of the hearing, respondent himself surely knew whether that was an accurate account of his activities and his testimony, and at that time could have called any discrepancy to the Board's attention. But respondent declined to file either a brief before the Board or a motion to remand to the IJ. 8 C.F.R. 3.2(b) and (c)(4) (1998); *In re Coelho*, 20 I. & N. Dec. 464, 471 (BIA 1992). Furthermore, after the Board rendered its decision, which relied in significant part on the transcript showing that respondent had stoned and hit bus passengers

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[23] Although Congress repealed Section 1105a in 1996, Congress reenacted that same provision as part of IIRIRA. See 8 U.S.C. 1252(b)(4)(A) (Supp. III 1997). Because respondent's deportation order was final before IIRIRA's enactment, 8 U.S.C. 1105a(a)(4) governs his case. See 8 U.S.C. 1252 note (Supp. III 1997).

[24] We are informed by the Executive Office for Immigration Review that, during proceedings before the IJ, the tapes are available for review from the clerk of the immigration court. Once an appeal to the Board is filed, the tape is sent to the Board for transcription and is available under the Freedom of Information Act, 5 U.S.C. 552. It may also be possible to obtain the tape through more informal methods, as occurred in this case.

(see Pet. App. 13a), respondent could have filed a motion to reopen or reconsider before the Board. 8 C.F.R. 3.2 (1996).[25] But he failed to do so. And before the court of appeals, respondent relied upon his testimony, Resp. C.A. Br. 24, 26, rather than challenge it. Respondent's failure to bring to the court of appeals' attention a claim of which he reasonably was (or should have been) aware far earlier counsels strongly against this Court granting a remand on that same basis. See, *e.g.*, *Heller* v. *Doe*, 509 U.S. 312, 319 (1993); cf. 28 U.S.C. 2347(c) (providing for interlocutory remand by a court of appeals in which a petition for review is pending only if the party adduces additional "material" evidence and "there were reasonable grounds for failure to adduce the evidence before the agency") (rendered inapplicable to immigration petitions for review filed after October 31, 1996, see IIRIRA § 309(c)(4)(B), 110 Stat. 3009-626; 8 U.S.C. 1252(a)(1) (Supp. III 1997)) (discussed in Gov't Br. (at 46-47 & n.21) and Reply Br. (at 4) in *Reno* v. *American-Arab Anti-Discrimination Comm.*, No. 97-1252 (argued Nov. 4, 1997)).[26]

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[25] Since July 1, 1996, a ninety-day time limit has been imposed on motions to reopen, unless the INS joins the motion. 8 C.F.R. 3.2(c)(2) and (c)(3)(iii) (1998); see also 61 Fed. Reg. 18,905 (1996); *id.* at 32,924.

[26] Respondent has also failed to exhaust his administrative remedies on this point. 8 U.S.C. 1105a(c) (1994) ("An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations."); 8 U.S.C. 1252(d)(1) (Supp. III 1997); *Ravindran* v. *INS*, 976 F.2d 754, 762-763 (1st Cir. 1992) (claim of inadequate translation barred by failure to exhaust); see also *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). Respondent cites (Br. 15) as authority for a remand *Communist Party of the United States* v. *Subversive Activities Control Bd.*, 351 U.S. 115 (1956). But there the new evidence that served as the basis for the remand "was not in existence when the proceedings were concluded before the" administrative agency. *Id.* at 125. Both *Willing* v. *Binenstock*, 302 U.S. 272 (1937), and *Panama Mail S.S. Co.* v. *Vargas*, 281 U.S. 670 (1930) (see Resp. Br. 16), were cases in which the record was devoid of facts pertaining to the relevant legal issue. Nor are any of the exceptional circumstances that occurred in *Wood*

Third, the translation errors respondent identifies, even if accurate and properly preserved, are immaterial. Even if we assume, *arguendo*, that hurtling rocks at a bus with glass windows that is loaded with innocent passengers is not itself serious criminal conduct, under respondent's own interpretation he still admits to tying up innocent civilians and beating them with sticks to force them to abandon the buses and stores he intended to burn and vandalize. See Resp. Br. App. 11-13. The alleged translation errors thus hardly obviate the serious nonpolitical character of his crimes.[27]

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For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

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v. *Georgia*, 450 U.S. 261 (1981), present here. Lastly, the power to grant, vacate, and remand under 28 U.S.C. 2106 should not be used simply to excuse a party's default or lack of due diligence. Respondent's invocation of "due process" (Br. 12-13) does not aid his claim, because the Board and the IJ were available to provide him fair process. See *Vargas* v. *United States Dep't of Immigration & Naturalization*, 831 F.2d 906, 908 (9th Cir. 1987).

[27] Only a month before filing his answering brief in this Court, and nearly half a year after he first raised the translation issue in his brief in opposition, respondent filed a motion to remand with the Board. Resp. Br. App. 1-21. The INS has asked the Board to hold the motion in abeyance pending the Court's decision in this case. Also, for the Court's information, the Attorney General has exercised her discretion to stay temporarily the removal of most Guatemalan nationals (which would include respondent) in the wake of Hurricane Mitch's devastation. Unless extended, however, that stay will expire on March 8, 1999.