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## Using Immigration Law to Protect Human Rights: A Legislative Proposal

William J. Aceves

*California Western School of Law, wja@cwsl.edu*

Paul L. Hoffman

*Bostwick and Hoffman, LLP*

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# USING IMMIGRATION LAW TO PROTECT HUMAN RIGHTS: A LEGISLATIVE PROPOSAL

*William J. Aceves\**

*Paul L. Hoffman\*\**

INTRODUCTION .....	658
I. THE LEGISLATIVE HISTORY OF THE NAZI PERSECUTION AND GENOCIDE PROVISIONS .....	662
II. A REVIEW OF THE NAZI PERSECUTION AND GENOCIDE PROVISIONS .....	669
A. <i>Ineligibility for Admission</i> .....	669
B. <i>Preclusion from Waiver of Inadmissibility</i> .....	670
C. <i>Denaturalization</i> .....	671
D. <i>Deportation</i> .....	672
E. <i>Ineligibility for Withholding of Removal on Grounds of Anticipated Persecution</i> .....	673
F. <i>Ineligibility for Voluntary Departure</i> .....	674
G. <i>Ineligibility for Cancellation of Removal</i> .....	675
H. <i>Conclusion</i> .....	676
III. WHAT CONSTITUTES AN ACT OF PERSECUTION? .....	676
IV. A PROPOSAL TO PRECLUDE IMMIGRATION RELIEF TO ALIENS WHO COMMIT GROSS HUMAN RIGHTS VIOLATIONS.....	682
CONCLUSION .....	691
APPENDIX I PROPOSED LEGISLATION TO AMEND THE IMMIGRATION AND NATIONALITY ACT .....	693
POSTSCRIPT .....	694

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\* William J. Aceves is Associate Professor of Law at California Western School of Law.

\*\* Paul L. Hoffman is partner at Bostwick and Hoffman, LLP and former Chairman of the Board of Directors of Amnesty International-USA. Mr. Hoffman was one of the attorneys representing the plaintiffs in *Abebe-Jiri v. Negewo*. The views expressed in this article do not represent the official views of Amnesty International or Amnesty International-USA.

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Not only is United States citizenship a "high privilege," it is a priceless treasure.<sup>1</sup>

## INTRODUCTION

In September 1990, three Ethiopian refugees filed a lawsuit in federal district court in Atlanta against Kelbessa Negewo, a former high ranking government official from Ethiopia residing in the United States.<sup>2</sup> The lawsuit was filed under the Alien Tort Claims Act, which provides federal district courts with subject matter jurisdiction over tort actions filed by aliens alleging violations of international law.<sup>3</sup> The plaintiffs alleged that Negewo had ordered and participated in numerous acts of torture and other cruel, inhuman or degrading treatment against them in the late 1970s while they lived in Ethiopia.<sup>4</sup>

In *Abebe-Jiri v. Negewo*, the District Court for the Northern District of Georgia found Negewo liable for human rights violations.<sup>5</sup> The district court made several findings of fact, including the following description of acts committed against one of the plaintiffs:

On January 6, 1978, plaintiff Abebe-Jiri was arrested again along with her 16 year old sister Yesharge. She was taken to the same prison. At the prison in Subzone 10, she was interrogated and tortured in the presence of defendant Negewo and several other men for a period of several hours. She was told to take off her clothes. Her arms and legs were then bound and she was whipped with a wire on her legs and her back. She suffered severe pain. She was repeatedly threatened with death if she did not reveal the location of a gun. At all times, the interrogation

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1. Johnson v. Eisentrager, 339 U.S. 763, 791 (1950) (Black, J., dissenting).

2. Complaint, *Abebe-Jiri v. Negewo*, Case No. 1:90-cv-2010-GET (N.D. GA. Sept. 13, 1990).

3. 28 U.S.C. § 1350. The Alien Tort Claims Act provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The term "law of nations" has been interpreted to refer to "international law." See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 Introductory Note (1987).

4. In the mid-1970s, Ethiopia was ruled by a military dictatorship known as the "Dergue." These acts were committed during a brutal campaign of repression referred to as the Red Terror. Under this campaign, local militia groups threatened, punished and executed any groups opposed to the government. See generally AFRICA WATCH, ETHIOPIA: RECKONING UNDER THE LAW (1994); ALEXANDER DE WAAL, EVIL DAYS: THIRTY YEARS OF WAR AND FAMINE IN ETHIOPIA (1991).

5. Findings of Fact, *Abebe-Jiri v. Negewo*, Case No. 1:90-cv-2010-GET (N.D. GA. Aug. 2, 1993).

and torture of plaintiff Abebe-Jiri was conducted in a humiliating and degrading manner.

Defendant Negewo personally supervised at least some part of the interrogation and torture of plaintiff Abebe-Jiri. He also personally interrogated her and participated directly in some of the acts of torture of plaintiff Abebe-Jiri.<sup>6</sup>

Based upon these findings, the district court concluded that Negewo had committed acts of torture and other cruel, inhuman or degrading treatment. Accordingly, the court awarded the plaintiffs compensatory and punitive damages in the amount of \$1.5 million. On appeal, the Eleventh Circuit affirmed the district court's ruling.<sup>7</sup>

While Negewo's case was on appeal to the Eleventh Circuit, the Immigration and Naturalization Service (hereinafter "INS") approved Negewo's pending application for naturalization and granted him U.S. citizenship.<sup>8</sup> Indeed, the INS was informed of the civil action and judgment against Negewo prior to its approval of his naturalization application.<sup>9</sup> The ease with which Negewo entered the United States, the INS decision to approve Negewo's application for naturalization, and the difficulty now facing the INS in seeking to revoke his naturalization decree, reveal glaring and troubling limitations in current immigration law and practice. This case is not unique. Other aliens who have committed gross human rights violations have also gained entry into the United States and been granted immigration relief.<sup>10</sup>

Currently, the Immigration and Nationality Act of 1952, as amended, precludes any form of immigration relief to aliens who participated in Nazi persecution.<sup>11</sup> These provisions were established by Congress in 1978 to prevent the entry of Nazi war criminals into the United States and to facilitate their deportation if they resided in the United States.<sup>12</sup> In 1990, Congress extended these provisions to include

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6. *Id.* at 3.

7. *See Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

8. *See How a Torture Figure Becomes a Citizen*, FULTON COUNTY DAILY REPORT, March 2, 1998.

9. Interview with Paul L. Hoffman, Managing Partner, Bostwick & Hoffman, LLP (Sept. 15, 1999).

10. *See Steve Fainaru, U.S. Is a Haven For Suspected War Criminals*, BOSTON GLOBE, May 2, 1999, at A1; Steve Fainaru, *Suspect in 'Cleansing' By Serbs Living in Vermont*, BOSTON GLOBE, May 3, 1999, at A1; Steve Fainaru, *Rights Violators Exploit U.S. Immigration System*, BOSTON GLOBE, May 4, 1999, at A1.

11. The Immigration and Nationality Act of 1952, as amended, is codified in Title 8 of the United States Code. 8 U.S.C. ch. 12 (1999). Title 8 of the Code of Federal Regulations further elaborates on these provisions. *See generally* 8 C.F.R. (1999).

12. *See generally*, Bruce Einhorn et al., *The Prosecution of War Criminals and Violators of Human Rights in the United States*, 19 WHITTIER L. REV. 281 (1997); Matthew Lippman,

aliens who participated in acts of genocide.<sup>13</sup> All forms of immigration relief are unavailable to aliens who have committed these acts. In addition, the Office of Special Investigations was established to investigate and prosecute aliens who participated in acts of Nazi persecution.

The rationale for these stringent provisions is straightforward.<sup>14</sup> Perpetrators of human rights violations should be held accountable for their actions regardless of when or where such acts took place. At a minimum, they should not be allowed to seek refuge in the United States nor should they benefit from any social, political, or economic opportunities provided in the United States. Accordingly, the Nazi persecution and genocide provisions preclude admission and facilitate the deportation of aliens who committed these acts.<sup>15</sup> To date, these provisions have played an important role in preventing the entry of former Nazis into the United States and facilitating the deportation of former Nazis already present in the United States. Similar immigration restrictions on former Nazi persecutors have been adopted in several other countries.<sup>16</sup>

While the Immigration and Nationality Act precludes any form of immigration relief to aliens who participated in Nazi persecution or who committed acts of genocide, there are no comparable restrictions that apply to aliens who have committed other gross violations of human

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*Fifty Years After Auschwitz: Prosecutions of Nazi Death Camp Defendants*, 11 CONN. J. INT'L L. 199 (1996); Marc J. Hertzberg, *Prosecuting Nazi War Criminals: A Call for the Immediate Prosecution of Living Nazi War Criminals*, 5 MD. J. CONTEMP. LEGAL ISSUES 181 (1993/1994); Jeffrey N. Mausner, *Apprehending and Prosecuting Nazi War Criminals in the United States*, 15 NOVA L. REV. 747 (1991); Elliott M. Abramson, *Reflections on the Unthinkable: Standards Relating to the Denaturalization and Deportation of Nazis and Those Who Collaborated with the Nazis During World War II*, 57 U. CIN. L. REV. 1311 (1989); 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. & POLITICS 101 (1980).

13. See generally, Paul John Chrisopoulos, *Giving Meaning to the Term "Genocide" as It Applies to U.S. Immigration Policy*, 17 LOY. L.A. INT'L & COMP. L.J. 925 (1995).

14. See generally, ALAN ROSENBAUM, *PROSECUTING NAZI WAR CRIMINALS* (1993); ALLAN RYAN, *QUIET NEIGHBORS: PROSECUTING NAZI WAR CRIMINALS IN AMERICA* (1984).

15. See generally, Jeffrey Mausner, *Apprehending and Prosecuting Nazi War Criminals in the United States*, 15 NOVA L. REV. 747 (1991); Stephen Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 MINN. L. REV. 97 (1986); Robert 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).

16. For example, Canada has developed an extensive program for pursuing war criminals. Government of Canada, Department of Justice, *Public Report: Canada's War Crimes Program* (1998). Other countries have developed similar restrictions, including Australia and Great Britain. See also, Matthew Lippman, *The Pursuit of Nazi War Criminals in the United States and in Other Anglo-American Legal Systems*, 29 CAL. W. INT'L L.J. 1 (1998); Symposium, *Prosecutor's Symposium: New Jurisdiction*, 12 B.C. THIRD WORLD L.J. 1 (1992); Symposium, *Time and Distance: The Challenge of Prosecuting Holocaust-Related Crimes*, 12 B.C. THIRD WORLD L.J. 37 (1992); Symposium, *Prosecuting World War II Persecutors: Efforts at an Era's End*, 12 B.C. THIRD WORLD L.J. 199 (1992).

rights. For example, aliens who have committed acts of torture or extrajudicial killing may be eligible for some forms of immigration relief. In addition to these substantive limitations, the ability to prevent aliens who have committed gross human rights violations from entering the United States is also hampered by institutional problems and the lack of an organizational commitment to target these individuals. Thus, any presumed immigration restrictions that may apply to aliens who have committed human rights violations are essentially eviscerated by the lack of effective implementation and enforcement mechanisms.

This Article suggests that the rationale underlying the Nazi persecution and genocide provisions of the Immigration and Nationality Act should be extended to all cases where aliens have participated in gross human rights violations. Quite simply, the logic underlying these provisions applies with equal rigor and intensity to all forms of human rights violations regardless of where or when they took place. Immigration relief is truly a priceless treasure.<sup>17</sup> The United States should not become a haven for those aliens who have violated the most fundamental norms of international human rights law. Accordingly, immigration relief must not be provided to any individual who has committed human rights atrocities, including acts of slavery, torture, extrajudicial killing, war crimes, crimes against humanity, or other forms of persecution.

Part I of this Article reviews the legislative history of the Nazi persecution and genocide provisions of the Immigration and Nationality Act. Part II then examines several provisions that preclude immigration relief to aliens who participated in Nazi persecution or who committed acts of genocide. Specifically, it focuses on seven areas where aliens who have committed these acts are ineligible for immigration relief: (a) ineligibility for admission; (b) preclusion from waiver of inadmissibility; (c) denaturalization; (d) deportation; (e) ineligibility for withholding of removal on grounds of anticipated persecution; (f) ineligibility for voluntary departure; and (g) ineligibility for cancellation of removal. Since "persecution" constitutes an integral element in the Nazi persecution and genocide provisions, Part III reviews the standards used by the courts to determine whether an alien has engaged in persecution, thereby precluding immigration relief.

Finally, Part IV of this Article proposes draft legislation to amend the Immigration and Nationality Act in order to preclude all forms of immigration relief to aliens who commit gross violations of human rights such as acts of slavery, torture, extrajudicial killing, war crimes,

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17. See *Miller v. Albright*, 523 U.S. 420 (1998); *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963); *Luria v. United States*, 231 U.S. 9, 22 (1913).

crimes against humanity, or other forms of persecution. This legislative proposal is designed to complement existing provisions concerning aliens who committed acts of Nazi persecution or participated in acts of genocide. In addition to this legislative amendment, Part IV proposes restructuring U.S. government institutions and procedures to better address the problem of modern day atrocities.

Gross violations of human rights, regardless of where or when they occur, always leave physical and emotional scars on their victims. On many occasions, these acts leave an even more troubling legacy—nameless, faceless, and lifeless victims. The legislative proposal outlined in this Article provides a voice for these victims and ensures that egregious violations of fundamental human rights do not go unanswered.

## I. THE LEGISLATIVE HISTORY OF THE NAZI PERSECUTION AND GENOCIDE PROVISIONS

Following World War II, Congress enacted the Displaced Persons Act of 1948 (hereinafter “DPA”) as a mechanism to allow relief to persons displaced by the war, without regard to immigration quota restrictions.<sup>18</sup> The DPA expressly prohibited the issuance of a visa “to any person who is or has been a member of, or participated in, any movement which is or has been hostile to the United States or the form of government of the United States.”<sup>19</sup> The DPA also limited its application to those individuals who were considered “eligible displaced persons” by the International Refugee Organization.<sup>20</sup> Under the terms of the International Refugee Organization’s Constitution, the following persons were not considered “eligible displaced persons” and, therefore, were ineligible for assistance:

2. Any other persons who can be shown:

(a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

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18. Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 1009 (1948). The Displaced Persons Act and the Refugee Relief Act focused primarily on the admission of refugees into the United States because of humanitarian concerns. In contrast, the Immigration and Nationality Acts of 1952 and 1990 contain general immigration provisions. See Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (1953) (codified in scattered sections of 8 U.S.C.); Immigration and Nationality Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.).

19. Displaced Persons Act of 1948, *supra* note 18.

20. *Id.* at § 2(b).

(b) to have voluntarily assisted the enemy forces since the outbreak of the Second World War in their operations against the United Nations.<sup>21</sup>

Under the terms of the DPA, therefore, aliens who assisted in Nazi persecution were ineligible for immigration assistance. In 1950, Congress amended the Displaced Persons Act.<sup>22</sup> Section 13 was amended to expressly bar the issuance of an entrance visa "to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin."

In 1952, the general provisions of the immigration code were substantially revised by the Immigration and Nationality Act.<sup>23</sup> Unlike the Displaced Persons Act, the 1952 Act did not explicitly prohibit immigration relief for aliens who had assisted in Nazi persecution. Rather, it provided for the exclusion of aliens who were members of or affiliated with totalitarian parties such as the Communist Party. This section did not apply to Nazis. In addition, it precluded admission and authorized deportation of aliens who, *inter alia*, had committed acts that constituted the essential elements of a crime involving moral turpitude, or who procured or sought to procure entry by concealment or by willful misrepresentation of a material fact. Accordingly, a Nazi who assisted in persecution, but who entered the United States without concealment or misrepresentation, was not subject to deportation under the Immigration and Nationality Act of 1952.

The Refugee Relief Act (hereinafter "RRA") was adopted in 1953 to replace the Displaced Persons Act.<sup>24</sup> The RRA prohibited entry to any alien "who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin."<sup>25</sup> This language differed slightly from the Displaced Persons Act by adding the word "personally" with regard to advocating or assisting in persecution. The RRA did not specifically exclude aliens who assisted in Nazi persecution from entering the United States. Accordingly, the RRA did not exclude an alien because of mere membership in the Nazi party. The RRA expired in December, 1956. Between 1956 and 1978, therefore, the United States did not specifically preclude immigration relief to aliens who participated in Nazi persecution.

In 1978, Congress began considering legislation to expressly exclude aliens who participated in Nazi persecution and to facilitate their

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21. International Refugee Constitution, Chapter XXIX, annex I, part II, § 2(a) and (b).

22. 1950 Amendment to Displaced Persons Act, ch. 262, 64 Stat. 219, 227 (1950).

23. Immigration and Nationality Act of 1952, *supra* note 18.

24. Refugee Relief Act, ch. 336, 67 Stat. 400 (1953).

25. §14(a), 67 Stat. at 406.



deportation. In testimony before the House, Congresswoman Elizabeth Holtzman (D-NY) indicated that legislation was necessary to fill an unacceptable gap in U.S. immigration law. According to Congresswoman Holtzman:

Since 1952 there has been no provision in our regular immigration law to exclude or deport Nazi war criminals who persecuted people for racial, religious or other reasons. Enactment of this bill would close this loophole and put our Government squarely on record as denying sanctuary in the United States to Nazi war criminals.<sup>26</sup>

Congressman Joshua Eilberg (D-PA), Chairman of the House Subcommittee on Immigration, Citizenship and International Law, stated that “[t]he enactment of this bill would serve as a clear reaffirmation of this country’s commitment to the most basic of human rights—that is, the right to live one’s life and practice one’s belief without the fear of persecution.”<sup>27</sup> According to the House Report, this proposed legislation was consistent with the principles enunciated in a number of international agreements including the United Nations Charter, the Universal Declaration of Human Rights, and the Helsinki Accords.<sup>28</sup> The Report also cited the Nuremberg tribunals, which recognized that persecution because of political, racial or religious grounds was contrary to fundamental principles of humanity.<sup>29</sup>

In 1978, Congress enacted the Holtzman Amendment to expressly exclude aliens who participated in Nazi persecution from entering the United States and to facilitate their deportation.<sup>30</sup> The Holtzman Amendment applies to any alien who, under the direction of or in association with 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, and where such acts

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26. 124 CONG. REC. H31646, H31647 (Sept. 26, 1978).

27. *Id.* at H31647.

28. H.R. REP. NO. 95-1452, at 1 (1978), *reprinted in* 1978 U.S.C.A.N. 4700, 4702-4703.

29. *Id.* at 4704-4705. Several members of Congress appended their dissenting views to the House Report. *Id.* at 4017. They identified four principal concerns. First, they did not believe that the proposed legislation was necessary. Second, the legislation failed to define the term “persecution.” Third, they indicated that the bill was inflexible and provides no opportunity for discretionary relief. Finally, they expressed concern that the legislation was unconstitutional because it was akin to an *ex post facto* law and may constitute a bill of attainder as well.

30. Holtzman Amendment of 1978, Pub. L. No. 95-549, 92 Stat. 2065 (1978).

were committed between March 23, 1933 and May 8, 1945.<sup>31</sup> The primary goal of the Holtzman Amendment was to preclude admission and facilitate the deportation of aliens who participated in Nazi persecution. Under both the Displaced Persons Act and the Refugee Relief Act, former Nazis were ineligible for admission into the United States as well as other forms of immigration relief. In cases where aliens entered the United States under these provisions, prosecution was arguably straightforward since these individuals were statutorily barred from gaining immigration relief. In practice, however, prosecution was troublesome due to procedural and administrative limitations.<sup>32</sup> In cases where entry took place under the normal procedures of the Immigration and Nationality Act of 1952, prosecution was even more difficult because the Act did not bar Nazis until the Holtzman Amendment was adopted in 1978.<sup>33</sup> Accordingly, the Holtzman Amendment resolved an important limitation in U.S. immigration law.

In addition, the Holtzman Amendment precludes immigration relief in several other areas. It prevents aliens who participated in Nazi persecution from being eligible to receive visas and excludes them from admission into the United States. It also prevents these aliens from seeking waiver of exclusion. Finally, it precludes the Attorney General from authorizing withholding of deportation or granting voluntary departure to aliens who have committed such acts.

In 1990, Congress enacted the Immigration and Nationality Act of 1990 that retained the provisions of the Holtzman Amendment and added provisions that precluded immigration relief to aliens who participated in genocide.<sup>34</sup> Specifically, these new provisions prohibit immigration relief to aliens who engaged in conduct that is defined as

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31. An earlier version of the bill would have applied "to exclude from admission to the United States aliens who have persecuted any person on the basis of race, religion, national origin, or political opinion and to facilitate the deportation of such aliens who have been admitted into the United States." H.R. Rep. No. 95-1452, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4700. The bill was revised and limited to aliens who participated in Nazi persecutions because of concern that the earlier version was too broad. 124 Cong. Rec. H31648. For criticism of this earlier bill, see *Hunting Witches at the Border Again*, N.Y. TIMES, July 30, 1978, § IV at 22, col. 1; *A New Congressional Witch Hunt*, WALL ST. J., July 21, 1978, at 8, col. 1.

32. See Kreig, *Hunting Nazis: Trying for Immigration Service*, NAT'L L.J., Nov. 6, 1978, at 5; *Alleged Nazi War Criminals: Hearings Before the Subcomm. on Immigration, Citizenship, & Int'l Law of the House Comm. on the Judiciary*, 95th Cong. 1 (1977).

33. According to a former Director of the Office of Special Investigations, "[i]n those cases, we produced the State Department officials who had issued the visas; they testified that they had the discretion to deny a visa to anyone who, in their opinion, would not have been a desirable immigrant, and that this certainly included Nazi war criminals." Ryan, *supra* note 14, at 248.

34. Immigration and Nationality Act of 1990, *supra* note 18, at § 212(A)(3)(E).

genocide for purposes of the International Convention on the Prevention and Punishment of Genocide.<sup>35</sup> According to the State Department, “[a]lthough no specific legislative background could be found, Congress apparently intended to exclude any alien whose behavior, though similar to that found excludable under the Nazi provisions, violated more universal standards.”<sup>36</sup>

Implementation of these provisions is conducted by the Immigration and Naturalization Service, the Department of Justice, and the Department of State. Under the current system, an alien seeking an immigrant or nonimmigrant visa to enter the United States is required to prepare and submit a visa application to U.S. officials. Both applications ask the alien to disclose whether they have participated in Nazi persecution or participated in genocide.<sup>37</sup> In addition, an interagency watch list identifies individuals suspected of having participated in Nazi persecution or acts of genocide. The names of aliens seeking visas are checked against this list, known as the Automated Visa Lookout System. Furthermore, all cases of possible ineligibility under the Nazi persecution or genocide provisions require a security advisory opinion from the State Depart-

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35. The Genocide Convention defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280.

36. U.S. Dep’t of State, Foreign Affairs Manual, § 40.35 (b), at n. 1.

37. The Application for Immigrant Visa and Alien Registration asks aliens whether they “participated in Nazi persecutions or genocide,” whether they “engaged in genocide,” whether they “are a member or representative of a terrorist organization as currently designated by the U.S. Secretary of State,” or whether they have committed a crime involving moral turpitude. In contrast, the Nonimmigrant Visa Application asks aliens whether they have “ever ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion under the control, direct or indirect, of the Nazi Government of Germany, or of the government of any area occupied by, or allied with, the Nazi Government of Germany, or have you ever participated in genocide,” or whether they are “a member or representative of a terrorist organization.” Under the Nonimmigrant Visa Application, therefore, an individual who has committed human rights violations is not obligated to disclose such information on the application. Finally, the Application for Asylum asks aliens to disclose whether “you, your spouse or child(ren) ever caused harm or suffering to any person because of his or her race, religion, nationality, membership in particular social group or political opinion, or ever ordered or assisted in such acts.”

ment.<sup>38</sup> No visa may be issued until the State Department submits its advisory opinion. If the State Department determines that an alien has participated in acts of Nazi persecution or genocide, a visa may not be issued. Moreover, there is no waiver relief available to either nonimmigrants or immigrants who have participated in Nazi persecution or committed acts of genocide once a determination has been rendered by the State Department.<sup>39</sup>

If an alien arrives at a U.S. port-of-entry, the INS also conducts an eligibility determination by checking the names of such aliens against a separate watch list, known as the National Automated Immigration Lookout System.<sup>40</sup> Aliens who do not require a visa because of their nationality must fill out a Nonimmigrant Visa Waiver Form.<sup>41</sup> The form requires the alien to disclose whether they were ever involved in acts of Nazi persecution or genocide.<sup>42</sup>

To facilitate enforcement of U.S. immigration laws against alleged participants in Nazi persecution, the Attorney General established the Office of Special Investigations (hereinafter "OSI") in 1979.<sup>43</sup> OSI was granted "the primary responsibility for detecting, investigating, and, where appropriate, 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 because of race, religion, national origin, or political opinion."<sup>44</sup> Specifically, the OSI shall:

1. Review pending and new allegations that individuals, who prior to and during World War II, under the supervision or

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38. Foreign Affairs Manual, *supra* note 36, at § 40.35(a) and (b).

39. *Id.*

40. Immigration Law and Procedure at § 2.05[2][a]. See also, Senate Judiciary Comm., Subcomm. on Tech., Terrorism & Gov't Info. (1998) (Statement of Walter D. Cadman).

41. In 1986, a visa waiver program was established for visitors from certain countries. 8 C.F.R. § 217.1-2 (1999). The program is limited to countries that provide reciprocal rights to U.S. nationals. Under this program, a visa is not required from certain countries including: Andorra, Argentina, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, San Marino, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. Aliens from these countries must submit a nonimmigrant visa waiver form upon arrival at a U.S. port-of-entry.

42. Form I-94W.

43. 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). See also, GAO Report on Nazi War Criminals in the United States: Oversight Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. on the Judiciary, 99th Cong. 1 (1985).

44. Transfer of Functions of the Special Litigation Unit, *supra* note 43, at 1.

- in association with the Nazi government in 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.<sup>45</sup>

The OSI staff consists of attorneys, investigators and historians. To date, the Office of Special Investigations has investigated over 1,600 people and filed approximately 100 cases seeking denaturalization or deportation of former Nazis.<sup>46</sup> Perhaps the most noticeable foreign national denied entry because of his Nazi past is former U.N. Secretary General and Austrian President Kurt Waldheim.<sup>47</sup> Recently, the OSI has begun to use the Nazi persecution statutes to prevent Japanese war criminals from entering the United States.<sup>48</sup>

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45. *Id.* at 3.

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

47. On April 27, 1987, the Attorney General announced that Waldheim's name had been placed on both the National Immigration and Automated Visa Lookout Systems. *See* ELI ROSENBAUM, *BETRAYAL: THE UNTOLD STORY OF THE KURT WALDHEIM INVESTIGATION AND COVER-UP* (1993); Philip Shenon, *U.S. Disputes Waldheim Assertions*, N.Y. TIMES, Feb. 17, 1998, at A3; *U.S. Bars Kurt Waldheim, Cites Service with Nazis*, CHICAGO TRIBUNE, Apr. 28, 1987, at C1; *U.S. Bars Waldheim Entry Over Charges of Nazi Past; First Head of State to be Banned*, L.A. TIMES, Apr. 27, 1987, at A1.

48. *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 Japanese GIs*, L.A. TIMES, June 25, 1998, at A9.

## II. A REVIEW OF THE NAZI PERSECUTION AND GENOCIDE PROVISIONS

The Immigration and Nationality Act precludes immigration relief to aliens who participated in Nazi persecution or who committed acts of genocide. Specifically, the Act contains the following restrictions: (a) ineligibility for admission; (b) preclusion from waiver of inadmissibility; (c) denaturalization; (d) ineligibility for withholding of removal on grounds of anticipated persecution; (e) deportation; (f) ineligibility for voluntary departure; and (g) ineligibility for cancellation of removal. This list is by no means exhaustive. There are several other provisions in the Immigration and Nationality Act that also preclude immigration relief to aliens who participated in Nazi persecution or who committed acts of genocide.<sup>49</sup>

### A. *Ineligibility for Admission*

Aliens who participated in Nazi persecutions or who committed acts of genocide are ineligible for admission into the United States. As currently codified, 8 U.S.C. § 1182(a)(3)(E) provides in pertinent part:

(a) Classes of aliens ineligible for visas or admission.

Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

...

(3) Security and Related Grounds

...

(E) Participants in Nazi persecutions or genocide.

(i) Participation 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,

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49. See also, 8 U.S.C. § 1101(a)(42) (definition of refugee); 8 U.S.C. § 1158(b)(2)(A)(i) (eligibility for political asylum); 8 U.S.C. § 1182(d)(1) (eligibility for waiver of any ground of exclusion for S nonimmigrants); 8 U.S.C. § 1225(c)(1) (eligibility for removal without further hearings); 8 U.S.C. § 1231(a)(6) (detention and removal of aliens ordered removed); 8 U.S.C. § 1254(c)(2)(A) (temporary protected status); 8 U.S.C. § 1255a(d)(2)(B)(ii)(III); 8 U.S.C. § 1255(j)(1)(B) (eligibility for adjustment of status to permanent resident status); 8 U.S.C. § 1259 (record of lawful admission).

- (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.
- (ii) Participation in genocide.  
Any alien who has engaged in conduct that is defined as genocide for purposes of the International Convention on the Prevention and Punishment of Genocide is inadmissible.

....<sup>50</sup>

### B. *Preclusion from Waiver of Inadmissibility*

The consequences for aliens who participated in Nazi persecutions or who committed acts of genocide extend far beyond entry restrictions. For example, the Attorney General has discretion to waive an alien's ineligibility for admission. However, 8 U.S.C. § 1182(d)(3) provides that aliens who participated in Nazi persecution or who committed acts of genocide are precluded from receiving a discretionary waiver of inadmissibility. This section provides in pertinent part:

#### Excludable aliens

...

#### (d) Temporary admission of nonimmigrants

- (1) The Attorney General shall determine whether a ground for inadmissibility exists with respect to a nonimmigrant described in section 101(a)(15)(S) of this title. The Attorney General, in the Attorney General's discretion, may waive the application of

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50. Immigration and Nationality Act §212(a)(3)(E), 8 U.S.C. § 1182(a)(3)(E) (1998).

subsection (a) of this section (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 101(a)(15)(S) of this title, if the Attorney General considers it to be in the national interest to do so. Nothing in this section shall be regarded as prohibiting the Immigration and Naturalization Service from instituting removal proceedings against an alien admitted as a nonimmigrant under section 101(a)(15)(S) of this title for conduct committed after the alien's admission into the United States, or for conduct or a condition that was not disclosed to the Attorney General prior to the alien's admission as a nonimmigrant under section 101(a)(15)(S) of this title.

...

- (3) Except as provided in this subsection, an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and (3)(E) of such subsection), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, or (B) who is inadmissible under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and (3)(E) of such subsection), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General.

.....<sup>51</sup>

### *C. Denaturalization*

The provisions on revocation of naturalization are codified at 8 U.S.C. § 1451.<sup>52</sup> Specifically, 8 U.S.C. § 1451(a) provides that it shall

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51. Immigration and Nationality Act §212(d), 8 U.S.C. § 1182(d)(3) (1998).

52. The requirements for naturalization are codified at 8 U.S.C. § 1427. Immigration and Nationality Act, 8 U.S.C. § 1427 (1998).



be the duty of U.S. attorneys for the respective districts to institute denaturalization proceedings where an order admitting a person to citizenship and the certificate of naturalization "were illegally procured or were procured by concealment of a material fact or by willful misrepresentation."<sup>53</sup>

While this section does not specifically address Nazis or Nazi persecution, it has been used to seek denaturalization of aliens who concealed or misrepresented their past association with the Nazis during World War II.<sup>54</sup> It would also apply to aliens who concealed or misrepresented acts of genocide.

In *Fedorenko v. United States*, the U.S. government brought a denaturalization action against a former Nazi death camp guard who misrepresented his wartime activities and concealed his Nazi past in his visa petition and subsequent naturalization application.<sup>55</sup> The Supreme Court indicated that under the provisions of the immigration code, a visa obtained through a material misrepresentation is invalid. The Court found that Fedorenko had failed to satisfy a statutory requirement by misrepresenting his wartime activities. Accordingly, his citizenship must be revoked because it was illegally procured. "Our cases have established that a naturalized citizen's failure to comply with the statutory prerequisites for naturalization renders his certificate of citizenship revocable as 'illegally procured' under 8 U.S.C. § 1451(a)."<sup>56</sup>

#### D. Deportation

Once an alien is found to be ineligible for immigration benefits, it is still necessary to deport him if he is present in the United States. Aliens who were inadmissible at time of entry, who assisted in Nazi persecution, or who engaged in acts of genocide, are deportable. As currently codified, 8 U.S.C. § 1227(a)(4)(D) provides in pertinent part:

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53. Immigration and Nationality Act, 8 U.S.C. § 1451(a) (1998). The Application for Naturalization requires an alien to disclose whether he has "at any time, anywhere, ever ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion."

54. Gordon, Mailman and Yale-Loehr, 7 *Immigration Law and Procedure* § 100.02[3][b][iv][B] (1997). See also Lisa J. Del Pizzo, *Not Guilty-But Not Innocent: An Analysis of the Acquittal of John Demjanjuk*, 18 B.C. INT'L & COMP. L. REV. 137 (1995); Shari B. Gersten, *United States v. Kungys: Clarifying the Materiality Standard in Denaturalization Proceedings?*, 38 AM. U. L. REV. 429 (1989); Comment, *The Denaturalization of Nazi War Criminals in the United States: Is Justice Being Served?*, 7 HOUS. J. INT'L L. 169 (1985).

55. *Fedorenko v. United States*, 449 U.S. 490 (1981).

56. *Id.* at 514. See also, *Kungys v. United States*, 485 U.S. 759 (1988).

## (a) Classes of deportable aliens.

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

## (1) Inadmissible at time of entry or of adjustment of status or violates status.

## (A) Inadmissible aliens.

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

...

## (4) Security and related grounds.

...

## (D) Assisted in Nazi persecution or engaged in genocide.

Any alien described in clause (i) or (ii) or section 212(a)(3)(E) [8 U.S.C. § 1182(a)(3)(E)(i) or (ii)] is deportable.

...<sup>57</sup>

*E. Ineligibility for Withholding of Removal on Grounds of Anticipated Persecution*

Under 8 U.S.C. § 1231(b)(3)(A), the Attorney General is precluded from removing an alien to a country where that alien's life or freedom would be threatened because of his race, religion, nationality, membership in a particular social group, or political opinion. However, aliens who participated in Nazi persecution or who committed acts of genocide are ineligible for withholding of removal on the grounds of anticipated persecution. This section, codified at 8 U.S.C. § 1231(b)(3)(B)(i), provides in pertinent part:

Detention and removal of aliens ordered removed

...

## (B) Countries to which aliens may be removed.

...

## (3) Restriction on removal to a country where alien's life or freedom would be threatened.

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57. Immigration and Nationality Act §237(a)(4)(D), 8 U.S.C. § 1227(a)(4)(D) (1998).

## (A) In general.

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

## (B) Exception.

Subparagraph (A) does not apply to an alien deportable under section 237(a)(4)(D) [8 U.S.C. § 1227(a)(4)(D)] or if the Attorney General decides that—

- (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

...<sup>58</sup>

### F. *Ineligibility for Voluntary Departure*

The Attorney General is authorized to grant an alien who is subject to removal proceedings the right of voluntary departure. Generally, voluntary departure allows an alien the opportunity to leave without the stigma and five-year bar to entry that attaches to a deportation order.<sup>59</sup> Voluntary departure can be requested before removal proceedings or at the conclusion of removal proceedings. However, aliens who participated in Nazi persecution or who committed acts of genocide are ineligible for voluntary departure at either stage.<sup>60</sup> This section, codified at 8 U.S.C. § 1229c(a), provides in pertinent part:

## (a) Certain conditions.

## (1) In general.

58. Immigration and Nationality Act § 241(b)(3), 8 U.S.C. § 1231(b)(3)(A) (1998). *But see* 8 C.F.R. Parts 3, 103, 208, 235, 238, 240, 241, and 253; 22 C.F.R. Part 95.

59. Immigration Law and Procedure, *supra* note 40, at § 1.04[4][a].

60. 8 U.S.C. § 1229c(a) (1998).

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 240 or prior to the completion of such proceedings, if the alien is not deportable under section 237(a)(2)(A)(iii) or section 237 (a)(4)(B).

...

(b) At conclusion of proceedings.

(1) In general.

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 240, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that—

...

(c) the alien is not deportable under section 237(a)(2)(A)(iii) or section 237(a)(4);

...<sup>61</sup>

Under these provisions, former Nazi war criminals are ineligible for voluntary departure at the conclusion of removal proceedings. While they appear eligible for voluntary departure prior to the conclusion of removal proceedings, the Attorney General has promulgated administrative regulations under the authority vested by Section 240B(e) that precludes voluntary removal at this stage.<sup>62</sup>

### *G. Ineligibility for Cancellation of Removal*

Finally, aliens who participated in Nazi persecution or otherwise committed acts of genocide are ineligible for cancellation of removal. According to 8 U.S.C. § 1229b(a), the Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien: (a) has been an alien lawfully admitted for permanent residence for not less than 5 years; (b) has resided in the United States continuously for 7 years after having been admitted in any status; and (3) has not been convicted of any aggravated felony. However, 8 U.S.C. § 1229b(c)(4) provides that the Attorney General may not cancel removal of "[a]n alien who is inadmissible under section 212(a)(3) or deportable under section 237(a)(4)."<sup>63</sup>

61. Immigration and Nationality Act § 240B, 8 U.S.C. § 1229c(a) (1998).

62. See 8 C.F.R. § 240.26(b)(1)(E) (1999).

63. Immigration and Nationality Act § 240A(c)(4), 8 U.S.C. § 1229b(a) (1998).

## H. Conclusion

In sum, the Immigration and Nationality Act precludes all forms of immigration relief to aliens who participated in Nazi persecution or who committed acts of genocide. It is important to recognize the broad scope of this legislation. In the strongest terms, Congress has sought to ensure that perpetrators of Nazi persecution or genocide find no safe haven in the United States. With few exceptions, no category of aliens is subject to more restrictions.

### III. WHAT CONSTITUTES AN ACT OF PERSECUTION?

The concept of persecution is an integral component of the Nazi persecution and genocide provisions. Accordingly, it is useful to consider what constitutes an act of persecution.<sup>64</sup>

The meaning of the term "persecution" was considered by Congress during its deliberations of the Holtzman Amendment.<sup>65</sup> The House Report on the Holtzman Amendment discussed the persecution standard and determined that it could be properly and efficiently administered:<sup>66</sup>

In the making of a "persecution" determination, emphasis should be placed on the governmental nature of the conduct involved. Isolated instances of mistreatment on the part of one individual against another, without Government support or complicity, would clearly not meet that criterion. Further, it is important to stress that the conduct envisioned must be of a deliberate and severe nature and such that is condemned by civilized governments, precluding invocation of the

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64. A related question involves the treatment of acts of persecution in extradition and asylum proceedings. See generally, William J.A. Hobson, *A Canadian Perspective on the Political Offense Exception in Relation to War Crimes*, 62 INT'L REV. PENAL L. 339 (1991); Michelle N. Lewis, *The Political-Offense Exception: Reconciling the Tension between Human Rights and International Public Order*, 63 GEO. WASH L. REV. 585 (1995).

65. The United Nations Protocol Relating to the Status of Refugees provides in Article 1(F) that the provisions of the Convention do not apply to any person with respect to whom there are serious reasons for considering that "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." Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. In turn, the Charter of the International Military Tribunal defined crimes against humanity as including, *inter alia*, persecutions on political, racial or religious grounds. Charter of the International Military Tribunal, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280. For alternative approaches to the persecution standard, see Daniel Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733 (1998).

66. H.R. REP. NO. 95-1452, 95th Cong. 2, at 1 (1978), reprinted in 1978 U.S.C.C.A.N. 4700, 4706.

“persecution” language in situations, for example, where governmental action is taken pursuant to a statute or rule which has been properly enacted or established but which later is invalidated as being inconsistent with a national constitution or charter. Such Government action would not constitute “persecution” for purposes of this bill unless it could be established that the objective of such statute or rule was to deliberately inflict severe harm or suffering on a particular person or group of persons based on race, religion, national origin, or political opinion.<sup>67</sup>

The House Report indicated that applying the “persecution” provisions of the Amendment should be made on a case-by-case basis in accordance with U.S. case law as well as international material such as the opinions of the Nuremberg tribunals. The Report added that the Amendment would further well-recognized principles of international law and that its application should not be precluded simply because it may necessitate difficult determinations.<sup>68</sup>

Perhaps the most significant case to examine the persecution standard is *Fedorenko v. United States*.<sup>69</sup> In *Fedorenko*, the Supreme Court examined whether involuntary service as a Nazi concentration camp guard constituted persecution for purposes of the Displaced Persons Act. The Court indicated that determinations of persecution should not focus on the voluntariness of the action since the Displaced Persons Act contained no such requirement. Rather, the Court focused on whether particular conduct can be considered assisting in the persecution of civilians:

Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.<sup>70</sup>

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67. *Id.*

68. *Id.* at 4707.

69. *Fedorenko v. United States*, 449 U.S. 490 (1981).

70. *Id.* at 514.

Several lower courts have applied the *Fedorenko* analysis in interpreting the persecution standard of the Holtzman Amendment.<sup>71</sup> However, they have produced conflicting results. Some courts have determined that an individual need not actively or personally participate in persecution to be deportable under the Holtzman Amendment.<sup>72</sup> Other courts have determined that an individual must personally participate or provide active assistance in persecutorial acts in order to be deportable under the Holtzman Amendment.<sup>73</sup>

As to specific acts that constitute persecution, most courts define persecution as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive."<sup>74</sup> Such acts as support of terrorism or participating in the detention of individuals who will be tortured have been found to constitute persecution. However, the harm or suffering caused by persecution need not be physical. Congress has indicated that persecution may take other forms, "such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."<sup>75</sup>

Numerous cases have addressed the persecution standard in the context of the Nazi persecution statutes. In contrast, only a handful of cases have examined an alien's participation in persecution in non-Nazi cases.<sup>76</sup> These cases have generally examined whether an alien's participation in persecution precludes his eligibility for asylum.

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71. See generally, K. Lesli Ligorner, *Nazi Concentration Camp Guard Service Equals "Good Moral Character?"*: *United States v. Lindert*, 12 AM. U. J. INT'L L. & POL'Y 145 (1997); Kirsten Swisher, *Justice Delayed: The Role of Equitable Considerations in the Denaturalization and Deportation of Nazi War Collaborators*, 7 GEO. IMMIGR. L.J. 415 (1993); Elliott Abramson, *Reflections on the Unthinkable: Standards Relating to the Denaturalization and Deportation of Nazis and Those Who Collaborated with the Nazis During World War II*, 57 U. CIN. L. REV. 1311 (1989).

72. See *Kalejs v. INS*, 10 F.3d 441 (7th Cir. 1993); *United States v. Schmidt*, 923 F.2d 1253 (7th Cir. 1991); *Kulle v. INS*, 825 F.2d 1188 (7th Cir. 1987); *United States v. Kairys*, 782 F.2d 1374 (7th Cir. 1986); *Schellong v. INS*, 805 F.2d 655 (7th Cir. 1986); *Maikovskis v. INS*, 773 F.2d 435 (2d Cir. 1985).

73. See *Petkiewytch v. INS*, 945 F.2d 871 (6th Cir. 1991); *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985); *United States v. Sprogis*, 763 F.2d 115 (2d Cir. 1985).

74. *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

75. H.R. REP. NO. 95-1452, 95th Cong. 2, at 3 (1978), reprinted in 1978 U.S.C.C.A.N. 4700, 4704.

76. See *Riad v. INS*, 161 F.3d 14 (9th Cir. 1998) (former general in the Egyptian military found ineligible for asylum, withholding of deportation, suspension of deportation and voluntary departure); *Han v. INS*, 1997 U.S. App. LEXIS 3854 (9th Cir. 1997) (former member of South Korean security forces ineligible for asylum or withholding of deportation); *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986) (member of the Provisional Irish Republican Army found ineligible for withholding of deportation).

One of the few decisions that addressed persecution in a non-Nazi case is *In the Matter of Ofosu*. Kwadwo Ofosu was a citizen of Ghana seeking political asylum and withholding of return. At an exclusion hearing, Ofosu disclosed that he had worked for the Ghanaian government as a member of the Committee for Defense of the Revolution (hereinafter "CDR"), a quasi-police force. Although he participated in arresting political opponents, Ofosu denied having killed or tortured any detainee. Indeed, he claimed to oppose the repressive efforts of the CDR. Ofosu admitted, however, that most people arrested by the CDR were often tortured or killed due to their political beliefs. The Board of Immigration Appeals, a U.S. Magistrate and a federal district court judge each found that Ofosu had committed acts of persecution, thereby precluding immigration relief. According to the district court:

The Report finds, and I agree, that the statute barring persecutors does not merely bar the trigger-pullers and torturers. The machinery of persecution requires as its foot soldier the arresting officer, and so long as that officer knows the likely consequences of his actions, he cannot find sanctuary in the United States under color of its protections for the persecuted. Arrest of persons the petitioner believed would be killed or tortured (or merely imprisoned indefinitely without trial) on account of their political actions constitutes persecution of the kind Congress considered sufficiently abhorrent to disqualify an applicant for refugee status.<sup>77</sup>

On appeal, the Second Circuit found that Ofosu's case did not fit "neatly" into the statutory provisions set forth in the immigration code.<sup>78</sup> The Court noted it had never addressed the meaning of the phrase "ordered, incited, assisted, or otherwise participated in . . . persecution" as employed in the exception to the definition of a refugee, or as employed in the exception to the statutory eligibility of an alien for the withholding of return. Indeed, the Court referred to a letter issued by the Special Assistant United States Attorney in charge of the case which indicated that published authority addressing the issue would be extremely useful.<sup>79</sup> The Court also noted that an interpretation of the pertinent language on persecution would be beneficial. Accordingly, the Court granted a stay of exclusion and deportation subject to the condition that Ofosu surrender to the custody of the INS. It would then consider Ofosu's petition with respect to the persecution standard.

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77. *In the Matter of Kwadwo Ofosu*, 933 F.Supp. 237, 239 (S.D.N.Y. 1996).

78. *Ofosu v. McElroy*, 98 F.3d 694 (2d Cir. 1996).

79. *Id.* at 701.



Subsequent hearings were never held in the case because Ofofu fled prior to his surrender to the INS.

Given the limited exposure U.S. courts have had to persecution in non-Nazi cases, it may be worthwhile to review Canada's experiences in pursuing modern day perpetrators of human rights violations. In 1987, Canada adopted legislation that precludes admission to persons who have committed war crimes or crimes against humanity.<sup>80</sup> In 1993, the legislation was expanded to prohibit the admission of senior members of regimes known for widespread human rights abuses.<sup>81</sup> In 1996, a Modern War Crimes Unit was established within the Canadian Department of Citizenship and Immigration to track modern day perpetrators of human rights violations.<sup>82</sup>

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80. R.S.C. 1985, c. I-2, s. 19(1)(j). This provision precludes admission to persons who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or a crime against humanity. In 1989, legislation was enacted to exclude a person from refugee status if the person had committed a war crime or crimes against humanity. R.S.C. 1985, c. I-2, s. 46.01(1)(e)(ii).

81. R.S.C. 1985, c. I-2, s. 19(1)(l). This provision precludes persons who are or were senior members of or senior officials in the service of a government that is or was, in the opinion of the Minister, engaged in terrorism, systematic or gross human rights violations or war crimes or crimes against humanity. The term "senior members" is defined as persons who, by virtue of the position they hold or have held, are or were able to exert a significant influence on the exercise of government power and, without limiting its generality, includes: (a) heads of state or government; (b) members of the cabinet or governing council; (c) senior advisors to persons described in paragraph (a) or (b); (d) senior members of the public service; (e) senior members of the military and of the intelligence and internal security apparatus; (f) ambassadors and senior diplomatic officials; and members of the judiciary. R.S.C. 1985, c. I-2, s. 19(1.1).

82. The Canadian government recently issued the following statistics with respect to its own investigations of modern day war criminals in Canada:

#### IMMIGRATION CASES (OVERSEAS)

Cases under investigation	96
Immigrant cases refused pursuant to 19(1)(j) or (l)	23
Visitor cases refused pursuant to 19(1)(j) or (l)	16
Cases refused on other grounds	302
<i>Total Cases Overseas</i>	<i>437</i>

#### REFUGEE CLAIMANTS CASES (IN CANADA)

Cases under investigation	12
Cases with insufficient evidence to proceed	1,048
Cases in which Minister intervened	82
Cases excluded	190
Cases found not to be refugees for other reasons	63
Cases not excluded and found to be refugees	25
Cases withdrawn or abandoned	29
<i>Total refugee claimant cases in Canada</i>	<i>1,449</i>

In reviewing cases involving modern day human rights violations, Canadian courts have held that persons who personally committed war crimes or crimes against humanity are ineligible for immigration relief.<sup>83</sup> In these cases, "personal involvement in persecutorial acts must be established" and "complicity rests in such cases . . . on the existence of a shared common purpose and the knowledge that all of the parties in question may have of it."<sup>84</sup> In contrast, the courts have distinguished between two types of cases where persons did not personally commit war crimes or crimes against humanity but were members in an organization that did. Specifically, courts conduct:

(a) an assessment of the nature of the organization and whether it can be said that it is "directed to a limited brutal purpose;" and

(b) an assessment of the individual's involvement with the organization and whether he was a member or had the kind of involvement with it from which it can be inferred that he shared the group's common purpose.<sup>85</sup>

Thus, Canadian courts have distinguished between persons who are members of organizations that are specifically devoted to committing atrocities in a widespread manner, such as death squads, and persons who are members of organizations that commit atrocities incidentally to their primary function, such as the military or police.

In addition, Canadian courts have held that the standard of proof in determining whether a person has committed a war crime or a crime against humanity is lower than the usual civil standard.<sup>86</sup> Indeed, the courts have indicated that the standard of proof is well below that

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IMMIGRANT CASES (IN CANADA)

Cases under investigation	153
Cases with insufficient evidence	17
Cases described by an adjudicator (immigration judge)	16
Cases not described by an adjudicator (immigration judge)	7
Cases pending before an adjudicator (immigration judge)	18
<i>Total Immigrant Cases in Canada</i>	<i>211</i>

*See* Government of Canada, Department of Justice, *Canada's War Crimes Program: Annual Report 1998-1999* (1999).

83. *Ramirez v. Canada* (Minister of Employment and Immigration), 89 D.L.R. 4th 173, 175-177 (1992).

84. *Moreno v. Canada* (Minister of Employment and Immigration), 107 D.L.R. 4th 424, 441 (1993).

85. *Minister of Citizenship and Immigration v. Hajjalikhani*, 83 A.C.W.S. 3d 462 (1998).

86. *Moreno v. Canada* (Minister of Employment and Immigration), 107 D.L.R. 4th at 430.

required under either the criminal law (beyond a reasonable doubt) or the civil law (on balance of probabilities or preponderance of evidence.)

#### IV. A PROPOSAL TO PRECLUDE IMMIGRATION RELIEF TO ALIENS WHO COMMIT GROSS HUMAN RIGHTS VIOLATIONS

While the Immigration and Nationality Act precludes any form of immigration relief to aliens who participated in Nazi persecution or who committed acts of genocide, there are no comparable restrictions on aliens who have committed other gross violations of human rights such as acts of slavery, torture, extrajudicial killing, war crimes, or crimes against humanity.

Perpetrators of gross human rights violations appear to be eligible for limited forms of immigration relief. At present, these aliens can be excluded or deported only if they fall within the general class of excludable or deportable aliens. Theoretically, a perpetrator of human rights abuses could be found excludable under one of the following classes: crimes involving moral turpitude; terrorist activities; foreign policy consequences; membership in a totalitarian party; or misrepresentation.<sup>87</sup> In practice, however, no reported cases have determined conclusively that an alien who commits human rights abuses is ineligible for admission under any of these classes.<sup>88</sup> In addition, aliens who have ordered, incited, assisted or otherwise participated in the persecution of any person because of race, religion, national origin, membership in a particular social group, or political opinion are only ineligible for some forms of immigration relief.<sup>89</sup> Moreover, the Attorney General retains discretion-

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87. Section 212(a)(2)(A) of the Immigration and Nationality Act (acts of moral turpitude); Section 212(a)(3)(B) of the Immigration and Nationality Act (terrorist activity); Section 212(a)(3)(C) of the Immigration and Nationality Act (foreign policy consequences); Section 212(a)(2)(D) of the Immigration and Nationality Act (membership in totalitarian party); Section 212(a)(6)(C) of the Immigration and Nationality Act (misrepresentation).

For the apparent preclusion of a Chilean national for alleged human rights violations, see 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.

88. In *Riad v. INS*, the Ninth Circuit seemed to indicate that an alien lacks good moral character when they have participated in persecution. See *supra* note 76, at 5. The only other reported cases that have made this determination involved former Nazis. See *United States v. Dercacz*, 530 F.Supp. 1348, 1353 (E.D.N.Y. 1982); *United States v. Linnas*, 527 F.Supp. 426, 440 (E.D.N.Y. 1981), *aff'd* 685 F.2d 427 (2d Cir. 1982); *United States v. Demjanjuk*, 518 F.Supp. 1362, 1383 (N.D. Ohio 1981), *aff'd* 680 F.2d 32 (6th Cir. 1982).

89. At present, aliens who have 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 are ineligible for the following forms of immigration relief: political asylum (8 U.S.C. § 1158(b)(2)(A)(i)); withholding of removal on grounds of anticipated persecution (8 U.S.C. § 1231(b)(3)(B)); eligibility for temporary resident status

ary authority to waive limitations that would otherwise bar such individuals from gaining immigration relief.<sup>90</sup> Interestingly, the United States faced a similar situation prior to 1978, when the Immigration and Nationality Act did not specifically preclude all forms of immigration relief to aliens who had participated in Nazi persecution.

Indeed, Congress continues to deal with human rights violations in a haphazard manner. For example, Congress recently adopted the International Religious Freedom Act. The Act added a new category of inadmissibility to the Immigration and Nationality Act. Specifically, Section 212(a)(2)(G) provides “[a]ny alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time during the preceding 24-month period, particularly severe violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998, and the spouse and children, if any are inadmissible.”<sup>91</sup> The term “particularly severe violations of religious freedom” is defined as:

systematic, ongoing egregious violations of religious freedom, including violations such as—

- (A) torture or cruel, inhuman or degrading treatment or punishment;
- (B) prolonged detention without charges;
- (C) causing the disappearance of persons by the abduction or clandestine detention of those persons; or

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(8 U.S.C. § 1255a(a)(4)(C)). In addition, the spouse or children of an alien who has been granted asylum may not accompany the principal alien if it is determined that they participated in acts of persecution (8 C.F.R. § 208.19(a)(1)).

90. Aliens who committed acts of persecution appear to be eligible for several forms of immigration relief. Section 212(d)(1) authorizes the Attorney General to waive inadmissibility in the case of a nonimmigrant described in Section 101(a)(15)(S). Section 212(d)(3) authorizes the Attorney General to waive inadmissibility of any alien except those aliens who are ineligible under Section 212(a)(3)(A),(C), or (E). Section 237(a)(1)(H) authorizes the Attorney General to waive deportation for aliens who misrepresented a material fact in seeking immigration documentation. Section 240B authorizes the Attorney General to grant an alien, who is subject to removal proceedings, the right of voluntary departure in lieu of being subject to proceedings under Section 240, prior to the completion of such proceedings, or at the conclusion of such proceedings. While aliens who participated in Nazi persecution or committed acts of genocide are ineligible for these forms of relief, aliens who committed other acts of persecution appear to be eligible.

In addition, the Attorney General is authorized to waive an alien's ineligibility for admission insofar as it relates to a single offense of possession of marijuana. 8 U.S.C. § 1182(h). However, no waiver shall be provided in the case of an alien who has been convicted or who has admitted committing acts that constitute torture.

91. 8 U.S.C. § 1182(a)(2)(G) (1998).

- (D) other flagrant denial of the right to life, liberty, or the security of persons.<sup>92</sup>

This provision is unduly restrictive. It should not be limited to foreign government officials but should apply to all individuals who commit violations of human rights law. There is no reason to limit these restrictions to acts committed in the context of religious persecution. Other forms of persecution are equally pernicious. The 24-month time limitation for this prohibition is also unnecessary. A perpetrator of human rights atrocities should not be able to seek absolution by merely waiting two years after the commission of these acts.

There is little justification for prohibiting all forms of immigration relief only to aliens who participated in Nazi persecution or who engaged in acts of genocide. As noted by the findings of a group of immigration experts established by the 1980 Select Commission on Immigration and Refugee Policy, "an exclusion based simply on Nazi persecution is too narrow and should be expanded to include a general bar for all persecution."<sup>93</sup> Such action would be consistent with the 1990 Immigration and Nationality Act, which precludes aliens who committed acts of genocide from seeking immigration relief. It would also be consistent with congressional efforts to restrict immigration relief to aliens who commit human rights violations in the context of religious persecution.<sup>94</sup> And, it would be consistent with international law.<sup>95</sup>

There are several reasons for preventing perpetrators of human rights violations from receiving immigration relief in the United States.<sup>96</sup>

92. 22 U.S.C. § 6402(11) (1998).

93. U.S. Select Commission on Immigration and Refugee Policy, Final Report: U.S. Immigration Policy and the National Interest 757 (1981).

94. See, e.g., 8 U.S.C. § 1182(a)(2)(G) (1998).

95. The Convention Relating to the Status of Refugees provides that its provisions shall not apply to any person with respect to whom there are serious reasons for considering that:

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

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (1951), at Art. 1(F). See also, GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* (1983). 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 60-61.

96. On the importance of prosecuting human rights violations, see generally, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW (Steven R. Ratner and

First, this action affirms U.S. commitment to human rights and ensures that human rights violations are not condoned in any way. Indeed, preclusion of immigration benefits sends a powerful message of condemnation. Second, preclusion of immigration relief punishes perpetrators of human rights violations. While immigration proceedings are civil rather than criminal in nature, the denial of immigration relief can serve as a punitive sanction because it prevents perpetrators from taking advantage of social, political and economic opportunities in the United States.<sup>97</sup> Third, this action may deter other human rights abuses. Perpetrators must consider the civil, criminal and immigration implications of their actions. If other countries adopt similar immigration restrictions, it will significantly isolate perpetrators of human rights violations.

The attached bill (See Appendix 1) would amend portions of the Immigration and Nationality Act. It would make no changes to existing provisions that preclude immigration relief to aliens who have participated in Nazi persecution or who have committed acts of genocide. Rather, it would extend such proscriptions to aliens who have committed acts of slavery, torture, extrajudicial killing, war crimes, crimes against humanity, or other forms of persecution. Such acts are clearly recognized violations of international law.<sup>98</sup> They have been defined by Congress.<sup>99</sup>

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Jason S. Abrams, eds., 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).

97. Despite this assertion, the denial of immigration benefits is not viewed as punishment by the courts. See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913).

98. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Annex G.A. Res. 46 (XXXIX 1984) (*entered into force* June 26, 1987); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (*entered into force* March 23, 1976). Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (*entered into force* Feb. 2, 1956); Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (*entered into force* Oct. 21, 1950).

99. The Torture Victim Protection Act provides the following definitions:

- (a) **EXTRAJUDICIAL KILLING.**—For the purposes of this Act, the term “extrajudicial killing” means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.
- (b) **TORTURE.**—For the purposes of this Act—
  - (1) the term “torture” means any act, directed against an individual in the offender’s custody or physical control, by which severe pain or

They have also been recognized by several federal courts.<sup>100</sup>

Indeed, this legislative proposal complements the existing network of federal statutes that impose civil and criminal penalties on perpetrators of human rights violations.<sup>101</sup> Until such crimes are effectively prosecuted by international authorities, it is necessary and appropriate for national legal systems to take action in defense of human rights.<sup>102</sup> Moreover, such action is consistent with the notion of universal juris-

- suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
- (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—
- (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
  - (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the sense or the personality.
  - (C) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

See also H.R. REP. NO. 367, 102d Cong. 1, pt. 1 (1991). In addition, acts of torture, regardless of where they occur, may result in criminal liability. 18 U.S.C. § 2340A (1998). Criminal liability has also been established for acts of slavery (18 U.S.C. § 1584 (1998)), war crimes (18 U.S.C. § 2441 (1998)), and genocide (18 U.S.C. § 1091 (1998)).

100. See generally, *Doe v. Unocal*, 963 F.Supp. 880 (C.D. Cal. 1997); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). See also, THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (Ralph Steinhardt and Anthony D'Amato eds., 1999); Ryan Goodman and Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 *FORDHAM L. REV.* 463 (1997); Ralph Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 *YALE J. INT'L L.* 65 (1995).

101. Other human rights violations that may be addressed in this proposed legislation include arbitrary detention, disappearance, and cruel, inhuman or degrading treatment. In determining which human rights violations should be included in this legislative proposal, it is important to identify violations that are clearly defined and that have been recognized by Congress and the courts. Otherwise, it will be difficult to garner congressional support for such legislation. See *Hunting Witches at the Border Again*, *N.Y. TIMES*, July 30, 1978, § IV at 22, col. 1; *A New Congressional Witch Hunt*, *WALL ST. J.*, July 21, 1978, at 8, col. 1.

102. See William J. Aceves, *Liberalism and International Legal Scholarship: Towards a Universal System of Transnational Law Litigation*, 41 *HARV. INT'L L.J.* (forthcoming 2000).

diction—some violations of international law are so egregious that all states have an obligation to respond.<sup>103</sup> While universal jurisdiction has generally been applied in the context of criminal prosecution for certain violations of international law, the principles underlying this doctrine are equally applicable in the civil context including the preclusion of immigration relief.<sup>104</sup>

The proposed legislation would amend two sections of the Immigration and Nationality Act. First, Section 212(a)(3)(E) of the Immigration and Nationality Act would be amended to preclude admission to aliens who commit gross human rights violations. Second, Section 237(a)(4)(D) of the Immigration and Nationality Act would be amended to order deportation of aliens who commit such acts. The remaining sections of the Act would incorporate these changes by reference. Therefore, no additional amendments are necessary. In order to be effective, these restrictions must apply to offenses committed before, on, or after, the enactment of this legislation.

While the Nazi persecution and genocide provisions do not provide any possibility of waiver, it may be beneficial, in very limited cases, to provide some form of discretionary relief.<sup>105</sup> For example, discretionary relief may be necessary to allow aliens to provide information or testimony to law enforcement authorities or in judicial proceedings. Discretionary relief may also be necessary in cases where aliens will provide testimony in prominent cases abroad but require protection against reprisals as a condition for their testimony. Indeed, the Immigration and Nationality Act already provides the Attorney General with discretion to waive inadmissibility in cases involving the national interest.<sup>106</sup> The Canadian government recognizes a similar

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103. See generally, Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEXAS L. REV. 785 (1988); Rena Hozore Reiss, *The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine*, 20 CORNELL INT'L L.J. 281, 296-307 (1987).

104. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. b (1987).

105. *But see* 8 U.S.C. § 1182(d)(5)(A). The Attorney General may authorize parole into the United States, on a case-by-case basis for urgent humanitarian reasons or significant public benefit, to any alien applying for admission to the United States. Such parole is not regarded as an admission of the alien. When the purposes of such parole have been served, the Attorney General may order the parole terminated and the alien returned. *See id.* It is conceivable that the Attorney General could use this provision to authorize parole into the United States of an alien who participated in acts of Nazi persecution or genocide.

106. Section 212(d) of the Immigration and Nationality Act allows the Attorney General to waive inadmissibility with respect to a nonimmigrant as set forth in Section 101(a)(15)(S) if the Attorney General considers it to be in the national interest to do so. Section 101(a)(15)(S) provides in pertinent part:



exception.<sup>107</sup> A separate concern involves cases where an alien may be subject to torture if they are deported or extradited to another country. In these cases, the United States should not deport or extradite the affected alien.<sup>108</sup> Rather, it should prosecute these individuals. This is consistent with the longstanding doctrine *aut dedere aut judicare*—extradite or prosecute.<sup>109</sup> If a discretionary waiver of inadmissibility is to be recog-

an alien—

- (i) who the Attorney General determines—
  - (I) is in possession of critical reliable information concerning a criminal organization or enterprise;
  - (II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and
  - (III) whose presence in the United States the Attorney General determines is essential to the success of an organized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or
- (ii) who the Secretary of State and the Attorney General jointly determine—
  - (I) is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;
  - (II) is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;
  - (III) will be or has been placed in danger as a result of providing such information; and
  - (IV) is eligible to receive a reward under Section 36(a) of the State Department Basic Authorities Act of 1956,

and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) consider it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in clause (i) or (ii) if accompanying, or following to join, the alien.

107. In Canada, the Minister of Immigration has the authority to issue a written permit authorizing any person to come into or remain in Canada. R.S.C. 1985, c. 1-2, s.37. The Minister may cancel this permit at any time. In addition, R.S.C. 1985, c. 1-2, s.19(1)(l) provides that no person shall be granted admission who is a member of any of the following classes: "persons who are or were senior members of or senior officials in the service of a government that is or was, in the opinion of the Minister, engaged in terrorism, systematic or gross human rights violations or war crimes or crimes against humanity within the meaning of subsection 7(3.76) of the Criminal Code, *except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.*" (*emphasis added*)

108. Article 3 of the Torture Convention provides "[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. *See generally*, Terry Coonan, *Refoulement on the High Seas*, 63 U. CIN. L. REV. 1241 (1995); Harold Koh, *The Haitian Centers Council Case: Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 1, (1994); Robert L. Newmark, *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, 71 WASH. U. L. Q. 833 (1993).

109. *See* Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations*, 39 VA. J. INT'L L. 425 (1999); William M. Cohen, *Implementing the Torture Convention in U.S. Extradition Cases*, 26 DENV. J. INT'L L. & POL'Y 517 (1998); M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 5-11 (3rd ed. 1997).

nized, Sections 212(d) and 101(a)(15)(S) of the Immigration and Nationality Act would have to be amended.

In addition to this proposed legislation, immigration forms and procedures must also be revised. Currently, an alien who has committed serious violations of human rights is not required to disclose this information on the Nonimmigrant Visa Application or on the Nonimmigrant Visa Waiver Form.<sup>110</sup> While the Application for Immigrant Visa and Alien Registration requires aliens to disclose whether they have committed crimes involving moral turpitude, the courts have not ruled definitively that human rights violations constitute crimes involving moral turpitude. Accordingly, visa application forms must be amended to require aliens to indicate whether they have committed any violations of human rights.<sup>111</sup>

Strong institutional mechanisms must be established to implement this proposed legislation. At present, there does not appear to be any agency within the Department of Justice with the specific mandate of identifying, investigating and prosecuting modern day perpetrators of human rights atrocities. The importance of establishing a separate agency for this function can be seen in the experiences of the Office of

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On October 21, 1998, President Clinton signed into law a bill that requires U.S. government agencies to prescribe regulations that would implement Article 3 of the Torture Convention. *See* Foreign Affairs Reform and Restructuring Act of 1998, Public Law 105-277. As a result, both the Immigration and Naturalization Service and the Department of State promulgated regulations to implement Article 3 of the Torture Convention. These regulations prohibit deportation to any country where an alien may face torture. *See* 8 C.F.R. Parts 3, 103, 208, 235, 238, 240, 241, and 253; 22 C.F.R. Part 95.

110. Over 50% of nonimmigrant visitors who enter the United States at air or sea ports-of-entry apply for admission under the Visa Waiver Program. In 1996 alone, approximately 12 million aliens entered the United States under this program. The United States is also increasing the number of countries eligible for the Visa Waiver Program. Accordingly, the Immigration and Naturalization Service has expressed some concern about the use of the Visa Waiver Program. *See* Statement of Walter D. Cadman, *supra* note 40.

111. Recent efforts to improve data acquisition concerning the entry and departure of aliens have met with some difficulty. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act required the Attorney General to develop an automated entry and exit control system within two years. *See* Illegal Immigration Reform and Immigrant Responsibility Act § 110, 8 U.S.C. § 1221 note (1998). Specifically, the system must be capable of: (1) recording the departure of every alien from the United States and matching the record of departure with the record of the alien's arrival in the United States; and (2) enabling the Attorney General to identify nonimmigrant aliens who remain in the United States beyond the period authorized by the Attorney General. Several members of Congress expressed concern that the proposed system would cause burdensome and unnecessary delays at border crossings throughout the United States. *See Impact of Entry-Exit System on U.S. Border: Hearings on S.1360 Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary, 105th Cong., 4 (1997)*. In 1998, Congress extended the deadline for implementing the INS system to March 30, 2001. *See* Section 116 of the Department of Justice Appropriations Act of 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

Special Investigations. Indeed, the OSI provides an excellent model. Its methodology for pursuing Nazi war criminals can be applied with equal rigor to other perpetrators of human rights violations. To be effective, however, this agency must be closely aligned with the Immigration and Naturalization Service. The importance of strong interagency coordination and prompt action can be seen in the experiences of the Canadian government. As noted by the Canadian Department of Justice, "[e]arly action by the government, particularly through screening abroad and exclusion proceedings . . . [has] proven to be the most effective means of dealing with these cases."<sup>112</sup>

Throughout implementation, efforts must be taken to ensure that aliens are provided with adequate due process protection. For example, sufficient evidence must exist before an alien is placed on a watch list. At present, no person may be placed on a watch list unless they are inadmissible under the Immigration and Nationality Act.<sup>113</sup> Even more exacting standards must be met before an individual can be denied a visa or otherwise denied admission into the United States. At each stage, individuals must be given an opportunity to challenge any alleged charges.<sup>114</sup> The purpose of this legislative proposal is not to make it more difficult for legitimate immigrants and refugees to enter the United States. The United States has benefited greatly from maintaining open borders and welcoming immigrants from around the world. It also has a responsibility to protect legitimate refugees fleeing war and persecution. Rather, this legislative proposal seeks to limit the ability of perpetrators of human right atrocities from entering our society.

Finally, courts should look to national and international case law for guidance in interpreting and applying this proposed legislation. Existing national case law can provide appropriate guidance on such issues as the definition of persecution. In addition to Nazi persecution jurisprudence, numerous cases have been filed under the Alien Tort Statute and the more recent Torture Victim Protection Act.<sup>115</sup> Existing international case law can also provide appropriate guidance to U.S. courts. Recent decisions by the International Criminal Tribunals for the Former Yugoslavia

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112. Government of Canada, Department of Justice, *Canada's War Crimes Program: Annual Report 1998-1999* (1999).

113. See Visa Lookout Systems in notes accompanying 8 U.S.C. § 1182 (1998).

114. In dissenting opinions, several federal judges have expressed concern about ensuring that due process protections apply in these sensitive cases. See *United States v. Stelmokas*, 100 F.3d 302, 328 (3rd Cir. 1996) (Aldisert, J., dissenting); *Kalejs v. Immigration and Naturalization Service*, 10 F.3d 441, 452 (7th Cir. 1993) (Eisele, J., dissenting). See also, John W. Heath, Jr., *Journey Over "Strange Ground:" From Demjanjuk to the International Criminal Court Regime*, 13 GEO. IMMIGR. L.J. 383 (1999).

115. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

and Rwanda have clarified the definitions of war crimes and crimes against humanity.<sup>116</sup> These existing standards would reduce uncertainty in the implementation and application of this new legislation.

### CONCLUSION

This article proposes amending the Immigration and Nationality Act to prohibit all forms of immigration relief to aliens who have committed acts of slavery, torture, extrajudicial killing, war crimes, crimes against humanity, or other forms of persecution. This legislation is patterned after, and meant to complement, existing provisions concerning aliens who participated in Nazi persecution or who engaged in acts of genocide. In addition to the proposed legislation, this Article suggests that immigration procedures must be revised to facilitate the prompt identification of aliens who have committed human rights atrocities. A separate agency should also be established with broad authority to investigate and prosecute these cases.

The goals of this proposed legislation are twofold: to ensure that aliens seeking the benefits of U.S. immigration relief are worthy recipients and to affirm U.S. commitment to the protection of human rights. As noted by a former Director of the Office of Special Investigations:

[b]y revoking citizenship, the polity—the American people joined together in a society and a government—takes the most solemn and drastic step available to it: the civil equivalent of excommunication. Citizenship is the most fundamental right accorded to any member of the polity; its revocation is a highly unusual and difficult procedure, and it represents the judgment of the polity that the individual does not share its commitment to the basic values on which the society is founded.<sup>117</sup>

Indeed, if other countries provide comparable immigration restrictions, it will send a powerful message of condemnation that violations of human rights are unacceptable and will not be tolerated by any civilized nation.

As we celebrate the 20th anniversary of the Holtzman Amendment, it is appropriate to recall the underlying goals of this important legislation: “to serve as a clear reaffirmation of this country’s commitment to the most basic of human rights—that is, the right to live one’s life and

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116. See Case No. IT-94-1-AR72 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia 1995), *reprinted in* 35 I.L.M. 32 (1996).

117. Ryan, *supra* note 14, at 340.

practice one's beliefs without the fear of persecution."<sup>118</sup> The attached legislative proposal would further these noble goals.

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118. 124 CONG. REC. H31646, H31647 (Sept. 26, 1978).

APPENDIX 1  
PROPOSED LEGISLATION TO AMEND THE IMMIGRATION AND  
NATIONALITY ACT

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 and Immigration Act  
of 1999.”

SECTION 2. AMENDMENTS TO THE IMMIGRATION AND  
NATIONALITY ACT

(A) Inadmissibility.

Section 212(a)(3)(E) is amended to read as follows:

(E) Participants in Nazi persecution, genocide, or other  
forms of persecution.

. . .

(iii) Any alien who has committed any of the follow-  
ing acts is inadmissible: slavery, torture,  
extrajudicial killing, war crimes, or crimes  
against humanity.

(B) Removability.

Section 237(a)(4)(D) is amended to read as follows:

(D) Participants in Nazi persecution, genocide, or other  
forms of persecution.

Any alien described in clause (i), (ii), or (iii) of section  
212(a)(3)(E) is deportable.

SECTION 3. EFFECTIVE DATE

The amendments made by this Act shall apply to offenses  
committed before, on, or after the enactment of this Act.

## POSTSCRIPT

Following completion of this article, Senator Patrick Leahy (D-VT) and Senator Herb Kohl (D-WI) introduced legislation in the United States Senate that would preclude immigration relief to aliens who commit acts of torture.<sup>119</sup> The Anti-Atrocity Deportation Act (S.1375) amends 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.”<sup>120</sup>

Upon submitting the bill to the U.S. Senate, Senator Leahy indicated that “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.”<sup>121</sup> Interestingly, the Immigration and Naturalization Service has also proposed the development of new rules and institutions to respond to human rights abusers.<sup>122</sup>

The Leahy proposal reads as follows:

## 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:

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119. See Robert L. Jackson, *Setting Up a System to Pursue Alleged War Criminals in U.S.*, L.A. TIMES, Aug. 17, 1999, at A5; Sam Skolnik, *Leahy Proposes Expanding OSI'S Jurisdiction To Include Acts of Torture*, LEGAL TIMES, July 26, 1999, at 1; Steve Fainaru, *Leahy Wants U.S. Anti-Nazi Unit To Eye Other Alleged War Crimes*, BOSTON GLOBE, July 17, 1999, at A6.

120. S.1375, 106th Cong. (1999). On July 29, 1999, Representative Robert Franks (R-NJ) introduced the Anti-Atrocity Alien Deportation Act in the House of Representatives as H.R. 2642. H.R. 2642, 106th Cong. (1999).

121. 145 CONG. REC. 8631, 8636.

122. See Steve Fainaru, *INS Moves to Track Down Rights Abusers*, BOSTON GLOBE, Sept. 20, 1999, at A1.

“(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.

While the Leahy proposal addresses the principal concerns raised in this Article, its provisions should not be limited to aliens who have committed acts of torture. At a minimum, the Leahy proposal should be



extended to include aliens who committed acts of slavery, extrajudicial killing, war crimes, and crimes against humanity. Indeed, if the United States is determined to prevent perpetrators of human rights violations from entering its territory, the Leahy proposal should be extended to include aliens who commit other forms of persecution including arbitrary detention, forced disappearance, or cruel, inhuman or degrading treatment.<sup>123</sup> Finally, the Leahy proposal should recognize an extremely narrow exception for those cases where entry of an otherwise inadmissible alien is in the greater interests of justice.

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123. These practices are clearly recognized as violations of *jus cogens* norms. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at § 703. A *jus cogens* norm is a peremptory norm accepted and recognized by the international community from which no derogation is permitted. MALCOLM N. SHAW, INTERNATIONAL LAW 97 (4th ed. 1997); J. SZTUCKI, JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES (1974).