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# The International Dimension of U.S. Refugee Law

by  
Joan Fitzpatrick\*

## I.

### INTRODUCTION

The regulation of transboundary migration inherently implicates relations between nation states. Refugee law, in particular, draws heavily upon agreed international standards. The United States chose to join the international refugee regime by ratifying the 1967 Protocol relating to the Status of Refugees (Protocol) in 1968.<sup>1</sup> In enacting the Refugee Act of 1980,<sup>2</sup> Congress pointedly signaled its intention to conform U.S. refugee law to our international legal obligations.<sup>3</sup> A striking similarity in terminology exists between Article 1 of the 1951 Convention relating to the Status of Refugees<sup>4</sup> (Convention) and the U.S. asylum provisions, §§ 101(a)(42)(A) and 208 of the Immigration and Nationality Act<sup>5</sup> (INA). Especially significant is the close resemblance between the do-

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1. Protocol relating to the Status of Refugees, done Jan. 31, 1967, entered into force Oct. 4, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter Protocol]. By ratifying the Protocol, the United States bound itself to respect Articles 2 through 34 of the 1951 Convention relating to the Status of Refugees, done July 28, 1951, entered into force Apr. 22, 1954, 189 U.N.T.S. 137.

2. Refugee Act, Pub. L. No. 96-212, 94 Stat. 102.

3. See, e.g., H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 19, reprinted in 1980 U.S.C.C.A.N. 160, 160; S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979), reprinted in 1980 U.S. Code Cong. & Admin. News 141, 144; H.R. Rep. No. 608, 96th Cong. 1st Sess. 9 (1979).

4. Convention relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Convention]. Article 1A(2) of the Convention defines a refugee as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

5. Immigration and Nationality Act [hereinafter INA]. 8 U.S.C. §§ 101(a)(42)(A) *et. seq.* INA § 101(a)(42)(A) defines a "refugee" as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group,

mestic provision on mandatory withholding of deportation, INA § 241(b)(3)(A) (formerly § 243(h)),<sup>6</sup> and Article 33 of the Convention, which reads:

No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>7</sup>

Thus, in the realm of U.S. refugee law, one expects a high level of consciousness of international obligation and a close congruence between domestic law and international norms. To some extent, reality bears out this expectation. Not only does statutory language closely track international texts, but adjudicators regularly refer to international standards. The *Basic Law Manual*<sup>8</sup> used to train Immigration and Naturalization Service (INS) asylum officers, who make first-instance determinations of asylum status,<sup>9</sup> includes extensive discussion both of international refugee law<sup>10</sup> and international human rights law. Some federal judges and members of the recently reconstituted Board of Immigration Appeals<sup>11</sup> (BIA) are cognizant of the bedrock principles of the international

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or political opinion . . .” It provides for discretionary grants of asylum to persons meeting this definition, who are physically present or at a land border or port of entry to the United States. Amendments in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996, Pub. L. No. 104-208 (1996), do not constrict these basic eligibility criteria, although IIRAIRA imposes onerous procedural obstacles to asylum applicants, including a time limit on application of one year following entry, subject to exceptions for changed conditions or extraordinary circumstances. INA §§ 208(a)(2)(B), (D).

6. INA § 241(b)(3)(A) provides that 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.” This language supersedes prior INA § 243(h), which provided that the “Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.” The 1996 textual amendment has no apparent purpose. Withholding of deportation (or “restriction on removal” as the amended section is captioned) was not a primary focus of the 1996 IIRAIRA. See IIRAIRA, *supra* note 5. In fact, the House of Representatives Committee on the Judiciary inadvertently deleted the withholding provision entirely in an earlier version of the bill. See Immigration in the National Interest Act of 1995, House of Representatives Committee on the Judiciary, H.R. Rep. No. 104-469, pt. 1, 104th Cong., 1st Sess. 25-30 (1996).

7. Article 33(1) of the Convention, *supra* note 4.

8. UNITED STATES DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, BASIC LAW MANUAL: U.S. LAW AND INS REFUGEE ASYLUM ADJUDICATIONS ch. II.B, reprinted in 8 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE, SPECIAL SUPPLEMENT 1995 [hereinafter BASIC LAW MANUAL].

9. In 1990 the Immigration and Naturalization Service (INS) established by regulation a specialized corps of asylum officers to determine affirmative applications for asylum. See 8 C.F.R. §§ 208.2, 208.14 (1995). Aliens placed in exclusion and deportation proceedings may apply for asylum and withholding of deportation as a defense to exclusion or deportation in a hearing before an Immigration Judge. 8 C.F.R. § 208.2(b) (1995). Regulations adopted in 1995 provide that, with certain exceptions, aliens who do not receive a grant of asylum from an asylum officer will be referred to exclusion or deportation proceedings, where they will receive *de novo* review of their asylum claim by the Immigration Judge. 8 C.F.R. §§ 208.14(b), 208.18(b) (1995).

10. The BASIC LAW MANUAL, *supra* note 8, at 11, describes the Convention and Protocol as “fundamental to the efforts of the United States to protect refugees.”

11. In 1995, the size of the BIA was increased from five to twelve members. Subsequently, the BIA has charted new ground in a variety of substantive areas, including asylum and withholding. See Paul Wickham Schmidt *et al.*, *Precedent Decisions of the Board of Immigration Appeals: An*

refugee regime and strive for genuine adherence to international obligations toward asylum-seekers.

Despite these promising signs of receptivity to international norms, U.S. refugee law in key respects is out of sync with the relevant treaties. Ignoring the unusual prominence of international standards in shaping domestic refugee law, some administrators and courts resist international constraints. Adjudicators adhere to no consistent methodology to conform domestic and international law, and they sometimes display appalling disregard for the fundamental premises of refugee protection. The gap between available domestic protection and the imperatives of international obligation results in a serious denial of justice to many asylum-seekers.

This article will address four areas in which U.S. decision-makers have failed to conform domestic law fully to international standards: (1) the gap created by erroneous Supreme Court opinions dealing with Convention Article 33 and the INA provision on withholding of deportation; (2) the inconsistent deference paid to the views of the United Nations High Commissioner for Refugees (UNHCR); (3) the frequent neglect of international norms in assessing persecution under the INA; and (4) reliance upon restrictive concepts of causation that have no basis in international refugee law. Drawing upon the constructive approach of some recent judicial and administrative decisions, this article suggests giving greater prominence to the international law dimension of asylum in order to bridge the divide between international obligation and domestic implementation.

## II.

### FALSE NOTIONS OF NONREFOULEMENT

The Supreme Court rarely speaks to the subject of refugee law, despite the hundreds of thousands of asylum claims that have been filed in recent decades.<sup>12</sup> In three significant decisions since 1984,<sup>13</sup> however, the Supreme Court unmoored U.S. law from the international norms it was adopted to implement. As a result, the United States is seriously out of compliance with the single most important and peremptory norm of refugee law—the prohibition on *refoulement*.<sup>14</sup> The manner in which this divide between domestic and international law developed is symptomatic of the larger problem of a lack of coherent meth-

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*Update*, 73 INTERP. REL. 1101 (1996); Deborah Anker *et al.*, *The BIA's New Asylum Jurisprudence and Its Relevance for Women's Claims*, 73 INTERP. REL. 1173 (1996).

12. Affirmative asylum applications filed with the Immigration and Naturalization Service (hereinafter INS) totalled 144,577 in FY 1994. REFUGEE REP. Vol. XVI, No. 12 at 8 (Dec. 31, 1995). In FY 1995, 48,163 requests for asylum were filed with the Executive Office for Immigration Review (EOIR) by aliens in deportation and exclusion proceedings. *Id.* at 13. After new asylum regulations took effect in January 1995, affirmative asylum applications fell from a total of 122,589 in calendar year 1994 to 53,255 in calendar year 1995. *One Year Later: Asylum Claims Drop by 57 Percent*, 73 INTERP. REL. 45, 46 (1996).

13. *INS v. Stevic*, 467 U.S. 407 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

14. Convention Article 33(1), *supra* note 4.

odology for approaching international law and a lack of systematic commitment to preserving the international legality of U.S. practice.

The gap can be traced to events associated with the ratification of the Refugee Protocol in 1968. By ratifying the Protocol,<sup>15</sup> the United States became a participant in the international refugee regime, whose prime binding principle is *nonrefoulement*—that refugees may not be forcibly repatriated to a country in which their lives or freedom would be threatened on account of race, religion, nationality, political opinion or membership of a particular social group.

Executive Branch officials assured the Senate in 1968 that the United States could comply with the Protocol without making any formal changes in U.S. law.<sup>16</sup> These assertions were accurate, but based on a misleading premise. While Congress might have assumed that no change in U.S. practice was required, what the Executive Branch witnesses meant was that formal amendment of the statute could be avoided if they, on their own initiative, conformed to the Protocol's demands.<sup>17</sup> Existing INA § 243(h) differed from Convention Article 33 in being discretionary rather than mandatory, by not extending to all Convention refugees,<sup>18</sup> and by being unavailable to aliens who had not technically entered the United States.<sup>19</sup> Moreover, administrative practice imposed a high burden of proof on would-be beneficiaries of INA § 243(h)—a “clear probability of persecution.”<sup>20</sup>

These flaws in the 1968 version of INA § 243(h) did not necessarily impede full U.S. compliance with the mandatory commands of the Protocol, because the Attorney General could also protect refugees through exercise of a discretionary authority to grant “conditional entry” or parole on humanitarian grounds.<sup>21</sup> Moreover, the Attorney General was free to exercise his extensive discretion under INA § 243(h) to prevent the forced repatriation of all persons protected by the Protocol's prohibition on *refoulement*.

15. Protocol, *supra* note 1.

16. See S. Exec. Rep. No. 14, 90th Cong., 2d Sess., 4, 6, 7 (1968); S. Exec. K, 90th Cong., 2d Sess., VIII (1968).

17. The Secretary of State assured the Senate that Article 33 “is comparable” with the existing version of INA § 243(h) and “can be implemented within the administrative discretion provided by existing regulations.” S. Exec. K, 90th Cong., 2d Sess., VIII (1968).

18. INA § 243(h) as of 1968 did not address claims premised on persecution for reasons of nationality or membership of a particular social group.

19. *Leng May Ma v. Barber*, 357 U.S. 185 (1958) (alien in exclusion proceedings, who had been paroled into the United States, had not made an entry and was ineligible to seek a grant of withholding of deportation under INA § 243(h)). Whether Article 33 of the Convention prohibits non-rejection of refugees at the border has been a matter of some controversy since 1951, although state practice supports the notion that claimants at the border are entitled to consideration for refugee protection by states parties to the Convention. See GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 121-24 (2d ed. 1996).

20. In *re Janus and Janek*, 12 I. & N. Dec. 866, 873 (BIA 1968); In *re Kojoory*, 12 I. & N. Dec. 215, 220 (BIA 1967); *INS v. Stevic*, 467 U.S. 407, 415 (1984).

21. INA § 203(a)(7), 8 U.S.C. § 1153(a)(7)(A)(i) (1976 ed.), provided that “conditional entry” could be granted to aliens from a Communist-dominated area or from the Middle East because of persecution on account of race, religion or political opinion. Further, INA § 212(d)(5), 8 U.S.C. § 1182(d)(5), (1976 ed.), conferred discretion on the Attorney General to grant parole on humanitarian grounds.

The provision on “withholding of deportation” entered U.S. immigration law in 1950, instructing the Attorney General to withhold the deportation of any alien who would be subjected to “physical persecution.”<sup>22</sup> The original withholding provision thus pre-existed not only U.S. ratification of the Protocol, but the drafting of the 1951 Refugee Convention.<sup>23</sup> It was the product of Cold War preoccupations and was neither drawn from recognized international norms, nor was it applied with reference to any international benchmark.

In a major reorganization of U.S. immigration law producing the 1952 Immigration and Nationality Act (INA), the withholding provision became INA § 243(h), conferring discretionary authority on the Attorney General to withhold the deportation of any alien who “in his opinion . . . would be subject to physical persecution.”<sup>24</sup> Since the United States had not ratified the Convention, no effort was made in 1952 to conform § 243(h) to the terms of Article 33. When the INA was extensively revised in 1965, the term “physical persecution” was replaced by “persecution on account of race, religion, or political opinion,”<sup>25</sup> a phrase similar to but not identical to the Convention’s terms.<sup>26</sup> By 1965 the United States had still not ratified the Convention.

The Administration’s minimization in 1968 of the obligations immanent in the Protocol is understandable as a cautious strategy to secure the Senate’s consent and bring the United States within a crucial international legal regime. The Administration had good reason to fear that the Senate remained under the sway of “Bricker Amendment” skepticism toward treaties with a human rights dimension.<sup>27</sup> If the Senate could be convinced that the Protocol would effect no alterations in domestic law, Senate consent would be secured much more easily.

The refusal by the Administration and the Senate to acknowledge that Article 33 extended protection beyond the explicit terms of pre-existing statutes led

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22. Section 23 of the Subversive Activities Control Act of 1950, 64 Stat. 1010.

23. Convention, *supra* note 4.

24. 66 Stat. 214.

25. 79 Stat. 918.

26. Convention, *supra* note 4. Article 1A(2) of the Convention defines refugees as persons with a well-founded fear of persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion. Article 33(1) of the Convention protects any “refugee” against *refoulement* if his or her “life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.” The 1965 version of § 243(h) brought the U.S. withholding of deportation provision into closer synchronization with international texts by broadening the concept of “persecution” beyond its previous “physical” focus and by referencing some of the recognized international bases for refugee protection. At the same time, the 1965 revision left out two of those bases, persecution on grounds of nationality and membership of a particular social group.

27. See generally, NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE 94-147 (1990) (explaining that, although Congress rejected a constitutional amendment proposed by Senator John Bricker in 1952 and 1953 to make all treaties non-self-executing and to limit the treaty power to matters constitutionally committed to the federal government, the Senate for several decades shared Sen. Bricker’s opposition to U.S. ratification of human rights treaties). The Senate, while more willing in recent years to ratify human rights treaties, continues to pay homage to the “ghost of Senator Bricker” by insisting on assurances that new human rights treaty obligations will not alter existing domestic law, even if the treaty’s policy objectives are considered desirable. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341 (1995).

to an awkward phase in which compliance with the Protocol was left entirely to administrative discretion.<sup>28</sup> During this period, the Board of Immigration Appeals held in 1973 that "Article 33 has effected no substantial changes in the application of section 243(h)"<sup>29</sup> and that previous regulatory practices requiring proof of a clear probability of persecution could be maintained.

When congressional attention finally focused on drafting the Refugee Act in 1980, Congress was preoccupied with the need to construct a power-sharing regime between the Executive and Congress for overseas refugee admissions.<sup>30</sup> As a result, the tasks of crafting a neutral, permanent asylum process and of revising the withholding provision were accomplished with relatively little discussion of their rationales or implications.<sup>31</sup> Nevertheless, the legislative history of the Refugee Act is replete with general expressions of intent to bring U.S. law into conformity with international norms.<sup>32</sup> As the Supreme Court noted in *INS v. Cardoza-Fonseca*, "[i]f one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol . . . ."<sup>33</sup>

Three important textual changes were made to the withholding provision in 1980 to track more closely the international obligations assumed by the United States in 1968: (1) withholding was made mandatory; (2) language from Convention Article 33 ("life or freedom would be threatened") was adopted into the eligibility standard; and (3) the protected classes were expanded to include "nationality" and "membership in a particular social group."<sup>34</sup>

Despite this clear effort by Congress in 1980 to amend the statute to implement the Protocol fully, the Supreme Court, in *INS v. Stevic*, perpetuated pre-1968 standards by limiting eligibility for withholding to persons meeting the pre-1968 "more likely than not" evidentiary burden.<sup>35</sup> *Stevic* had argued that the "well-founded fear" terminology of Convention Article 1A(2)<sup>36</sup> and INA

28. See *Stevic*, 467 U.S. at 416-20. In 1976, the Attorney General issued regulations providing a mechanism by which aliens could seek a grant of asylum from an INS District Director or from an American consul. 8 C.F.R. § 108.1 (1976). Denial of asylum did not preclude the alien, when later placed in deportation, from "applying for the benefits of section 243(h) of the Act and of Articles 32 and 33 of the Convention Relating to the Status of Refugees," 8 C.F.R. § 108.2 (1976) (emphasis added) (suggesting INS awareness that § 243(h) was not entirely congruent with the obligations of the Protocol).

29. In re *Dunar*, 14 I. & N. Dec. 310, 323 (1973).

30. Congress in 1980 added §207 to the INA, 8 U.S.C. 1157, providing for annual consultations between the two political branches on overseas refugee admissions. See Deborah E. Anker and Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

31. See David A. Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. YB OF INT'L LEGAL STUD.: TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 91, 91.

32. See H.R. Conf. Rep. No. 96-781, *supra* note 3, at 19; H.R. Rep. No. 96-608, *supra* note 3, at 9; S. Rep. No. 96-256, *supra* note 3, at 4.

33. 480 U.S. 421, 436 (1987).

34. *Stevic*, 467 U.S. at 421 n.15. In addition, aliens were permitted to apply for withholding in exclusion proceedings, even though they had not technically entered the United States.

35. See 467 U.S. 407 (1984).

36. Convention, *supra* note 4.

§ 101(a)(42)(A)<sup>37</sup> set a lesser burden of proof of eligibility both for asylum and for withholding.

In resolving the *Stevic* case, the Supreme Court relied upon the misleading assurances of executive branch witnesses in 1968 that no formal changes in domestic law were necessary to implement the Protocol.<sup>38</sup> In essence, *Stevic* permits prior non-conforming domestic law to operate as an unstated reservation to the Protocol.<sup>39</sup> Not closely attuned to refugee protection norms,<sup>40</sup> the Court seems to have taken the Administration's suggestion in 1968 that international obligations come virtually cost-free as an invitation to regard them as being without weight in interpreting ambiguous statutory provisions.

When the INS attempted to extend *Stevic*'s "more likely than not" standard to discretionary asylum under INA § 208, the Supreme Court belatedly took a serious look at international refugee standards in *Cardoza-Fonseca*.<sup>41</sup> In some respects, Justice Stevens' opinion in *Cardoza-Fonseca* is a high-water mark among U.S. asylum cases in its attention to international norms. The majority drew not only on the text of the Convention, but also on the UNHCR's explication of the origins of the refugee definition in the Constitution of the International Refugee Organization,<sup>42</sup> and on the works of leading refugee law scholars.<sup>43</sup> As a result, the "well-founded fear" standard applied under INA § 208 closely tracks international standards and provides a flexible framework for asylum adjudication, which is in tune with the realities of the refugee situation.

At the same time, *Cardoza-Fonseca* is deeply flawed. The Court perpetuated its *Stevic* error by insisting that Convention refugees are not *per se* entitled to *nonrefoulement* under Article 33.<sup>44</sup> While all "refugees" may apply for a discretionary grant of asylum under INA § 208, an unlucky sub-set with negative discretionary factors<sup>45</sup> and proof short of the "more likely than not" level may, according to the Supreme Court, be forcibly returned to their persecutors. Nothing in the Convention or Protocol,<sup>46</sup> the interpretive UNHCR Handbook,<sup>47</sup>

37. INS, *supra* note 5.

38. For example, the Court quotes the Secretary of State as "correctly explain[ing] at the time of consideration of the Protocol" that Article 33 could be implemented by administrative discretion under existing regulations. *Stevic*, 467 U.S. at 429-30 n.22 (emphasis in original).

39. *Id.* Under Article 42(1) of the Convention, *supra* note 4, and Article VII(1) of the Protocol, *supra* note 1, ratifying states are explicitly forbidden to make reservations to Article 33.

40. One example of the Court's confusion and lack of familiarity with this body of law is its suggestion that a person could be eligible for withholding of deportation without ever having left his or her country of origin. *Stevic*, 467 U.S. at 428 n.22. This is impossible, because a person must be in U.S. removal proceedings in order to apply for withholding. INA § 241 (b)(3), *supra* note 6.

41. INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987).

42. 480 U.S. at 437-39.

43. 480 U.S. at 431 (citing ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966)), 440 n.24 (citing GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 181 (1966), and GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 22-24 (1983)).

44. 480 U.S. at 440-41.

45. For an explanation of discretionary factors relevant to denials of asylum, see *Matter of Pula*, 19 I & N Dec. 467 (1987).

46. Protocol, Convention, *supra* notes 1, 4.

or other relevant sources of international refugee law<sup>48</sup> suggests that any group of *bona fide* refugees, not subject to the exclusion clauses,<sup>49</sup> is left unprotected by Article 33.

Why did the Court create this unnecessary and potentially harmful gap between U.S. and international refugee law? The Court does not lack the ability to understand the relevant international standards. In *Cardoza-Fonseca* the majority fully embraced the textual, historical and policy arguments proffered by the UNHCR<sup>50</sup>—but only as to eligibility for asylum under INA § 208. These same arguments were presented by the UNHCR in *Stevic*,<sup>51</sup> where they were flatly ignored in construing INA § 243(h).

The Court seems prepared to accept international law as a guide only vis-à-vis those statutes that confer substantial amounts of discretion to administrators. This permits administrators to constrict or to expand the law's benefits as the political climate shifts. Thus, the Court finds international norms to be especially pertinent in construing INA §§ 207 and 208, even though neither refugee admissions nor asylum are mandated by international law.<sup>52</sup> International law does govern *refoulement*, but the Court chose to interpret withholding under INA § 243(h) solely in light of pre-1968 domestic law.<sup>53</sup> This selective approach may not be entirely deliberate, but it suggests unease at the prospect that judicial enforcement of clear international norms might restrict the flexibility of the political branches. Such an attitude is fundamentally at odds with acceptance of international law as a constraint on policy choices and a limit on government freedom to deal as it pleases with individuals possessing rights under international agreements.<sup>54</sup>

However, the practical impact of the gap between Convention Article 33 and the U.S. provision on withholding of deportation is minor. Few asylum adjudicators are prepared to make an explicit finding that a claimant should be

47. HANDBOOK, *infra* note 80.

48. See Jennifer Moore, in Moore Part III, B, 2 *Restoring the Humanitarian Character of U.S. Refugee Law: Lessons from the International Community*, 15 BERKELEY J. INT'L L. 54-58 (1997) (noting significance of numerous Conclusions of the Executive Committee of the High Commissioner's Programme stating that all Convention refugees are entitled to the protection of Article 33).

49. Article 33(2) of the Convention, *supra* note 4, explicitly excludes from the prohibition on *refoulement* aliens who are reasonably regarded as a danger to security or who have committed a particularly serious crime and constitute a danger to the community of the state in which they are present. Further, a person does not qualify as a "refugee" under international law if he or she falls within the exclusion clauses of Article 1F of the Convention, which apply to persons for whom there are serious reasons to believe that they have committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime or acts contrary to the purposes and principles of the United Nations.

50. See Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondent, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (No. 85-782).

51. See Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondent, *INS v. Stevic*, 467 U.S. 407 (1984) (No. 82-973).

52. *Cardoza-Fonseca*, 480 U.S. at 436-41.

53. In *Cardoza-Fonseca*, 480 U.S. at 430, for example, the Court notes that "the terms 'refugee' and 'well-founded fear' were made an integral part of the § 208(a) procedure, [but] they continued to play *no part* in § 243(h)" (emphasis added).

54. See *infra* text accompanying notes 68-69.

deported to a country in which he or she faces a well-founded fear of persecution, simply because of negative discretionary factors combined with a failure to satisfy withholding's higher evidentiary threshold. This is not to say that many refugees are not ordered deported to their persecutors in violation of the Protocol. But these unsuccessful claimants are typically denied asylum on the basis of unduly strict notions of causation,<sup>55</sup> excessively broad ineligibility grounds<sup>56</sup> or factually incorrect assessments of "well-founded fear."<sup>57</sup>

Nevertheless, *Stevic* and *Cardoza-Fonseca*, by suggesting that Congress was insincere or ineffectual in bringing the nation fully into compliance with international refugee law, have had a corrosive effect. The gap between U.S. law and international refugee law widened perceptibly in 1993 with the Supreme Court's willfully erroneous interpretation of Article 33 and then-INA § 243(h) in *Sale v. Haitian Centers Council*.<sup>58</sup> The Court, relying upon dubious interpretations of the text and *travaux préparatoires* of the Convention, held that asylum-seekers intercepted by U.S. officials on the high seas could be forcibly repatriated without screening of their claims of persecution, consistently with the norm of *nonrefoulement*.<sup>59</sup> Under the Court's view of the Convention, only expulsion, which presupposes entry into national territory, is forbidden, while other forced return of refugees is left unregulated.<sup>60</sup> By placing a strict geographic limit on both Article 33 and INA § 243(h), the Court avoided a formal widening of the cleavage between its readings of the two. But the Court's geographically constricted reading of Article 33 shocked many in the international community, and it was rejected by the UNHCR.<sup>61</sup>

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55. See Section V *infra*.

56. Article 33(2) of the Convention excludes from the prohibition on *refoulement* aliens who "having been convicted by a final judgment of a particularly serious crime, constitute[ ] a danger to the community of that country." INA § 208(b)(3)(i) provides that any alien who has been convicted of an aggravated felony as defined in INA § 101(a)(43) is ineligible for asylum. INA § 241(b)(3)(B) provides that an alien who has been convicted of an aggravated felony (or felonies) for which a sentence of imprisonment of at least five years has been imposed is ineligible for withholding of deportation; however, the Attorney General may determine that an alien not meeting this standard is also ineligible for withholding on grounds of conviction for a "particularly serious crime." While the term "aggravated felony" suggests seriousness, Congress has absurdly expanded this definition to encompass many nonviolent and relatively nonsevere offenses, such as tax evasion exceeding \$10,000 (§ 101(a)(43)(M)(ii)) and any theft offense (including receipt of stolen property) resulting in a sentence of at least one year (§ 101(a)(43)(G)), regardless of whether the sentence has been suspended. INA § 101(a)(48)(B). As a result, a person convicted of a non-violent crime, who did not serve a single day in prison may be an "aggravated felon" ineligible for asylum. These provisions require no separate inquiry into the alien's "danger to the community."

57. See Section IV *infra*.

58. 509 U.S. 155 (1993).

59. *Id.* at 177-187.

60. *Id.*

61. UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*, 32 I.L.M. 1215 (1993) (The UNHCR stated that "the obligation not to return refugees to persecution arises irrespective of whether governments are acting within or outside their borders. UNHCR bases its position on the language and structure of the treaties and on the treaties' overriding humanitarian purpose, which is to protect especially vulnerable individuals from persecution. UNHCR's position is also based on the broader human rights of refugees to seek asylum from persecution as set out in the Universal Declaration of Human Rights"). See *supra* note 19 for discussion of controversy over the geographic scope of the *nonrefoulement* obligation.

The damage done by *Sale* is more severe than that inflicted by *Stevic* and *Cardoza-Fonseca*. *Sale* had an immediate negative impact on the lives and safety of many Haitian asylum-seekers subjected to *refoulement* without screening. Further, *Sale* is an open invitation to other asylum-weary states to avoid their international obligations through extraterritorial interception or push-backs of seaborne refugees. That invitation tragically has already been acted on.<sup>62</sup> *Sale* also diminishes the pressure on developed states to moderate deterrent measures aimed at asylum-seekers and contributes to a downward spiral in access to fair refugee determination processes.<sup>63</sup> Finally, *Sale* communicates an attitude of calculated cynicism toward international obligation, which in the long run may prove its most destructive legacy.

The gap between domestic asylum law and the Protocol poses the question whether the international obligation of *nonrefoulement* should operate of its own force, even if the Court is correct in holding that Congress failed to implement it fully in the Refugee Act. The issue whether Article 33 is "self-executing" was carefully avoided by the Supreme Court in *Sale*,<sup>64</sup> consistent with the Court's general tendency to leave this area of foreign relations law in a state of incoherence.<sup>65</sup> Lower courts have nevertheless produced a spate of poorly-reasoned decisions finding Article 33 to be non-self-executing.<sup>66</sup> The tendency to find Article 33's clear, mandatory command to be domestically unenforceable in the absence of identically worded implementing legislation is yet another symptom of the courts' general disregard of international law, especially where individuals seek its protection against law-breaking conduct by U.S. officials.<sup>67</sup>

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62. Mexico, under diplomatic pressure from the United States, agreed to take custody of over 600 Chinese asylum-seekers intercepted on the high seas by the U.S. Coast Guard and repatriated them summarily in July 1993, shortly after the *Sale* decision. Sebastian Rotella, *Mexico Begins Repatriating Chinese Emigres*, L.A. TIMES, July 18, 1993, available in 1993 WL 2293239, News Library, Majpap File. During 1996 two boatloads of Liberian refugees were denied entry by several West African states. While 1,800 asylum seekers on the *Bulk Challenge* eventually were permitted to land in Ghana in May 1996, the *Zolotitsa* was forced to return its 450 passengers to Liberia in June 1996 after three weeks at sea and denial of entry by Ghana, Benin, Togo and the Ivory Coast. Thalia Griffiths, *Africa Tires of Its Refugees*, REUTERS NEWS SERVICE, June 20, 1996, available in LEXIS, News Library, Curnws file; *Spurned Refugee Ship Returns to Liberia*, N.Y. TIMES, June 19, 1996, available in 1996 WL 7511336, News Library, Curnws file.

63. The most analogous deterrent strategy being deployed in Europe is the series of readmission agreements negotiated between European Union states and Central European buffer states for the return of asylum-seekers who transit the buffer states. Such agreements may create a situation of chain *refoulement*. See Alberto Acherman and Mario Gattiker, *Safe Third Countries: European Developments*, 7 INT'L J. REFUGEE L. 19 (1995); Rosemary Byrne and Andrew Shacknove, *The Safe Country Notion in European Asylum Law*, 9 HARV. HUM. RTS. J. 185 (1996).

64. 509 U.S. at 167, 179-183.

65. See Carlos Manuel Vásquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 716 (1995) (observing that the Supreme Court has "unambiguously denied relief on self-execution grounds in only one case [in 1829]"). Vásquez notes that the Supreme Court avoided the Executive's explicit invitation to rule the Protocol non-self-executing. *Id.* at 717.

66. See, e.g., *Haitian Refugee Center, Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991); *Bertrand v. Sava*, 684 F.2d 204, 218-19 (2d Cir. 1982); *Cuban ABA v. Christopher*, 43 F.3d 1412, 1417 (11th Cir. 1995). See also, Carlos Manuel Vásquez, the "Self-Executing" Character of the Refugee Protocol's Nonrefoulement Obligation, 7 GEORGETOWN IMMIG. L. REV. 39 (1993).

67. See, e.g., *Barrera-Echavarría v. Rison*, 44 F.3d 1441 (9th Cir. 1995), cert. denied, \_\_\_ U.S. \_\_\_, 116 S. Ct. 479 (1995) (one of many cases finding that Marielito Cubans subject to indefinite

While it is speculative to assess motivations for this reluctance to recognize the independent operative force of international law, certain factors figure in the pattern. The first factor is unfamiliarity with international law, and its authoritative sources and doctrines of treaty interpretation and implementation. A second influence appears to be a concept of majoritarian democracy privileging legal norms that have received the explicit assent of elected members of the legislative branch. While treaties are ratified by the Senate, the more popular chamber, the House of Representatives, participates only in passage of implementing legislation. Where the courts do not find legislation to govern the case explicitly, they may hesitate to grant the full potential scope of the treaty's protection to individual claimants. Third, despite the caveat in *Baker v. Carr*<sup>68</sup> that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance" under the political question doctrine, courts often defer to Executive Branch interpretations of treaties, especially where the legality of the Executive's own conduct is in issue and the claimant is an alien.<sup>69</sup> Where a case challenges an important policy objective of the Executive or has significant partisan political ramifications, the courts often take shelter behind doctrines that find the treaty inapplicable (*e.g.*, by narrow interpretation of its substantive terms, as in *Sale*) or unenforceable (*e.g.*, by finding the treaty to be non-self-executing).

The Supreme Court does not alone bear responsibility for the divide between domestic and international refugee law. Congress, despite its fine intentions in 1980, has widened the gap through misdirection of the overseas refugee admissions program under INA § 207. In one sense, INA § 207 bears no relation to international norms because refugee law imposes no obligation of distant resettlement.<sup>70</sup> Though offers of distant resettlement help realize the protective goals of the international refugee regime,<sup>71</sup> they are not directly governed by international standards. Overseas refugee admissions typically reflect national policy choices shaped by influences such as past association between the refugees and the resettlement state or the promotion of foreign policy objectives.

Confusion arises because Congress chose to adopt the same textual definition of "refugee" under INA § 207 that it incorporated into INA § 208. Those entering under INA § 207 are given the legal status of "refugee." Yet, while every "asylee" under INA § 208 must prove that he or she meets the Convention

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detention in maximum security prisons have no enforceable rights under customary international law).

68. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

69. *See, e.g.*, *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (refusing to enforce U.S.-Mexico Extradition Treaty on behalf of Mexican citizen kidnapped by federal agents, finding treaty silent on issue of abduction).

70. Distant resettlement refers to grants of admission to refugees who have not yet managed to reach the granting state's shores, for example, offers by developed states to resettle a certain number of inhabitants of refugee camps located in a lesser developed region. Grants of asylum, in contrast, are generally made to refugees who on their own reach the territory or border of the asylum state.

71. *See, e.g.*, *Future of Refugee Resettlement on the Line*, REFUGEE REP. [first paged piece] Vol. XVI, No. 10 at 1-8 (Oct. 30, 1995).

definition of "refugee,"<sup>72</sup> fewer than 20% of the recent beneficiaries of INA § 207 meet that definition.<sup>73</sup> Designated "refugees" under domestic law may lack that status under international law either because they are admitted directly from their country of origin<sup>74</sup> or because they do not have a well-founded fear of persecution.<sup>75</sup> INA § 207 is a highly politicized humanitarian admissions program. Without denigrating humanitarianism, one may regret the misappropriation of the refugee concept. The obvious political nature of INA § 207 increases the danger that asylum will also fall outside the rule of law and lose its close congruence with international norms. The discongruity between INA § 207 and international law operates to the benefit of § 207 beneficiaries, who receive offers of admission despite falling short of an entitlement to international protection as refugees. In contrast, divorcing international and domestic law tends to operate to the grave detriment of asylum-seekers. They come uninvited. If left unprotected by domestically enforceable international norms, asylum-seekers are at risk of arbitrary *refoulement*, especially during periods of heightened concern about foreign policy, border control or absorptive capacity.

### III. THE ROLE OF THE UNHCR

The United States, like all parties to the Convention and Protocol, has a general obligation to cooperate with the UNHCR.<sup>76</sup> But the formal role of the UNHCR in the application of refugee law in the United States is rather marginal.<sup>77</sup> Individual asylum claims are not ordinarily referred to the UNHCR for evaluation<sup>78</sup> and the organization does not play a dominant role in legislative and administrative policy-making. While the UNHCR has some influence in the

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72. To be eligible for a grant of asylum under INA § 208, an applicant must prove that he or she meets the definition of "refugee" set out in INA § 101(a)(42)(A), which is drawn from the Protocol. See INA, *supra* note 5.

73. Susan Rauffer, *In-Country Processing of Refugees*, 9 GEORGETOWN IMMIGR. L.J. 233, 234 (1995).

74. Under the Convention Art. 1A, *supra* note 4, a refugee must be outside his or her country of origin or habitual residence. INA § 101(a)(42)(B) expands that definition to include persons who have not yet left their country of origin or habitual residence.

75. Pursuant to the Lautenberg Amendment, Pub. L. No. 101-167, § 599D, 103 Stat. 1195, 1261 (1989), certain nationals or residents of the former Soviet Union or Estonia, Latvia and Lithuania, who are Jews, evangelical Christians or Ukrainian Catholics, along with certain nationals or residents of Vietnam, Laos or Cambodia, are eligible for admission under INA § 207 if they assert a "credible basis for concern about the possibility of . . . persecution," which is intended to be an easier standard of eligibility than the Convention's "well-founded fear" criterion. In a rare acknowledgment of international norms, a restrictionist House Judiciary Committee noted with apparent disapproval in 1996 that the Lautenberg Amendment's standard is "more generous than that contained in the INA or in international law." H.R. Rep. No. 104-469, pt. 1, *supra* note 6, at 138.

76. Convention Article 35(1), *supra* note 4; Protocol Article II.1, *supra* note 1.

77. Jennifer Moore notes that the UNHCR plays an important interpretive role, especially through Conclusions of the Executive Committee of the High Commissioner's Programme, which should have a strong shaping influence on U.S. practice, for example through the explication of customary norms of international refugee law. *Supra* note 48.

78. See GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 21, 166-203 (1983) (describing various degrees of involvement by UNHCR in refugee status determinations by national authorities).

litigation of individual cases, its views are not uniformly considered, nor are they given a particular weight.

The Convention and Protocol neither create a centralized status determination body nor prescribe detailed guidelines for implementation of refugee law by national states. To promote greater uniformity in national practice and to ensure that fundamental refugee protections are respected,<sup>79</sup> the UNHCR issued the *Handbook on Procedures and Criteria for Determining Refugee Status* (Handbook) in 1979.<sup>80</sup>

While some states regard the Handbook as authoritative,<sup>81</sup> the attitude of U.S. decision-makers has been erratic. The Supreme Court placed a somewhat equivocal imprimatur on the Handbook in *Cardoza-Fonseca*:

We do not suggest, of course, that the explanation in the U.N. Handbook has the force of law or in any way binds the INS with reference to the asylum provisions of § 208(a). Indeed, the Handbook itself disclaims such force . . . .

Nonetheless, the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.<sup>82</sup>

The INS *Basic Law Manual* advises asylum officers that while the Handbook is “not legally binding,” it may be cited where it “does not conflict with United States law or regulations.”<sup>83</sup>

Both before and after *Cardoza-Fonseca*,<sup>84</sup> courts and administrators have found useful guidance in the Handbook’s explication of some troublesome nuances of the refugee definition.<sup>85</sup> The Handbook provides a reasonable approach to certain problematic and recurrent issues, such as claims by

79. The UNHCR drafted the HANDBOOK, *infra* note 80, at the request of the Executive Committee of the High Commissioner’s Programme, which was responding in part to the collapse of the UN’s efforts to draft a convention on territorial asylum. The United States was among the states requesting the UNHCR to draft the HANDBOOK. See Executive Committee of the High Commissioner’s Programme, *Report of the 28th Session, Conclusions on International Protection*, Conclusion No. 8 (XXVIII) of 1977 on Determination of Refugee Status, 32 U.N. GAOR Supp. (No. 12A), U.N. Doc. A/31/12/Add/1 at 12-16 (1977).

80. Office of the United Nations High Commissioner for Refugees, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. Doc. HCR/PRO/4 (1979) [hereinafter the HANDBOOK].

81. See Abigail D. King, *Note: Interdiction: The United States’ Continuing Violation of International Law*, 68 B.U. L. REV. 773, 798-800 (1988).

82. 480 U.S. at 439 n.22.

83. BASIC LAW MANUAL, *supra* note 8, at 18.

84. Deborah Anker notes, for example, that *Matter of Acosta*, 19 I & N Dec. 211 (BIA 1985), is “significant for its extensive reliance on the *UN Handbook* . . . .” DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES: ADMINISTRATIVE DECISIONS AND ANALYSIS*, Volume III at I-5 (3d ed. 1994).

85. For example, in *Matter of Chen*, Interim Decision 3104, 1989 BIA LEXIS 10 at 7-8 (BIA 1989), the BIA drew upon para. 136 of the HANDBOOK to hold that past persecution may be a basis for asylum, even where there is little likelihood of future persecution. The BIA has also cited the HANDBOOK on procedural points, such as the importance of full testimony by the applicant under oath, *Matter of Fefe*, Interim Decision 3121, 1989 BIA LEXIS 21 at 6 (BIA 1989) (citing paras. 199-200 of the HANDBOOK); and the need for background evidence concerning country conditions, *Matter of Dass*, Interim Decision 3122, 1989 BIA LEXIS 27 at 12-13 (BIA 1989) (citing para. 42 of the HANDBOOK).

conscientious objectors,<sup>86</sup> the significance of an internal flight alternative<sup>87</sup> or persecution on imputed grounds.<sup>88</sup> The Handbook is silent or oblique, however, on issues such as interdiction on the high seas<sup>89</sup> or proof of the persecutor's motive.<sup>90</sup>

While the UNHCR occasionally seeks to offer an authoritative interpretation of the Protocol as *amicus curiae* in major asylum cases, the courts have adopted no consistent response to the UNHCR's participation. In five instances of UNHCR *amicus* participation in the Supreme Court, the pattern is mixed. While the UNHCR's convincing interpretations of Article 33 and the Refugee Act of 1980 were essentially ignored in *Stevic*,<sup>91</sup> virtually the same arguments were given a high profile and determinative weight in *Cardoza-Fonseca*.<sup>92</sup> In *INS v. Doherty*,<sup>93</sup> the Court avoided reaching the issue of concern to the UNHCR, whether the Attorney General could deny asylum in an exercise of discretion in order to promote a foreign policy objective.<sup>94</sup> A Court bent upon granting undue deference to administrators adopted illogically stringent definitions of refugee eligibility in *Elias-Zacarias*.<sup>95</sup> The majority in *Elias-Zacarias* ignored the UNHCR's warning that international standards place almost no

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86. Paras. 167-174 of the HANDBOOK, *supra* note 80, discuss the situation of deserters and persons avoiding military service.

87. Para. 91 of the HANDBOOK, *supra* note 80, provides:

The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.

In a series of cases involving Sikh applicants from India who had been persecuted by the national police, the Ninth Circuit has regularly reversed asylum denials based on the applicant's failure to prove countrywide persecution. Yet the Court's reliance on the HANDBOOK to support its conclusion is inconsistent. Compare *Hardev Singh v. Moschorak*, 53 F.3d 1031 (9th Cir. 1995), and *Surinder Singh v. Ilchert*, 69 F.3d 375 (9th Cir. 1995) (relying on the text of the statute and 1990 asylum regulations to presume countrywide risk where past persecution had been inflicted by national police), with *Harpinder Singh v. Ilchert*, 63 F.3d 1501, 1511 (9th Cir. 1995) (relying also on para. 91 of the HANDBOOK).

88. Persecution on grounds of imputed political opinion may satisfy the refugee definition, according to the BIA. "Notably, the United Nations Handbook on Refugees recognizes that persecution on political opinion may include situations in which 'such opinions have come to the notice of the authorities or are attributed by them to the applicant'" (citing para. 80 of the HANDBOOK). *Matter of S— P—*, Interim Decision 3287, 1996 BIA LEXIS 25 at 8 (BIA 1996).

89. The HANDBOOK's discussion of "geographical scope" relates to the Convention's original limitation to refugees from events in Europe. HANDBOOK, *supra* note 80, at paras. 108-110.

90. The UNHCR stresses the absence of discussion of the persecutor's motive in the HANDBOOK to support its conclusion that "[e]mphasis on the motive of the persecutor is . . . incompatible with the accepted analytic framework for determining refugee status." Brief *Amicus Curiae* of the Office of the United Nations High Commissioner for Refugees in Support of Respondent at 12, *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (No. 90-1342).

91. *INS v. Stevic*, 467 U.S. 407 (1984). See *supra* text accompanying notes 35-40.

92. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). See *supra* text accompanying notes 41-43.

93. 502 U.S. 314 (1992).

94. Brief of the Office of the United Nations High Commissioner for Refugees as *Amicus Curiae* in Support of Respondent, *INS v. Doherty*, 502 U.S. 314 at 4 (1992) (No. 90-925).

95. 502 U.S. 478 (1992).

weight upon the persecutor's specific intent and that ungenerous criteria for refugee status can result in a breach of international law.<sup>96</sup> In *Sale*,<sup>97</sup> the Court pointedly ignored the UNHCR's explication of the plain text of Article 33, along with its emphasis on the deleterious impact a restrictive territorial reading of Article 33 could have on the international refugee regime.<sup>98</sup>

#### IV. THE NATURE OF PERSECUTION

"Persecution" is not defined in the Convention or Protocol. As Atle Grahl-Madsen noted, the laconic nature of the international refugee texts reflects their drafters' awareness that the ingenuity of evil knows no predictable limits.<sup>99</sup> Which harmful conduct merits characterization as persecution depends not only on a subjective evaluation of relative degrees of harm, but also on generally accepted human rights norms. Where U.S. adjudicators err in assessing claims of persecution, it is often because they fail to advert to basic human rights principles. This failure is especially acute where the distinction between legitimate prosecution for unlawful acts and retaliatory persecution on political or other grounds is at issue.

Persecution describes a range of oppressive or unfair behavior. As the *INS Basic Law Manual* notes:

One must determine whether the conduct alleged to be persecution violates a basic human right, *protected under international law*.<sup>100</sup>

Merely proving that an alien has suffered or will suffer a violation of international human rights will not *per se* establish refugee status.<sup>101</sup> The harm inflicted or threatened may not constitute persecution if it falls short of the required degree of severity, though "[t]he more persistent the aggression, the less severity [is] required to establish persecution."<sup>102</sup> And some link must exist

96. HANDBOOK, *supra* note 90.

97. 509 U.S. 155 (1993).

98. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (No. 92-344 *sub nom.* *McNary v. Haitian Centers Council, Inc.*).

99. ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 193 (1966) ("[The drafters of the Convention] capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men.").

100. BASIC LAW MANUAL, *supra* note 8, at 28 (emphasis in original). The BASIC LAW MANUAL further observes that customary international law forbids genocide; killing other than as lawful punishment upon conviction in accordance with due process; torture and other cruel, inhuman or degrading treatment or punishment; and prolonged detention without notice of and an opportunity to contest the grounds for detention. *Id.*

101. The BASIC LAW MANUAL notes that "the abuses must be connected with an enumerated ground, i.e., race, religion, nationality, membership in a particular social group or political opinion." *Id.* at 27.

102. *Id.* at 29. Persistent violations of the rights of privacy, family, home and correspondence; deprivation of all means of livelihood; relegation to substandard dwelling; exclusion from higher education; enforced social and civil inactivity; passport denial; constant surveillance or pressure to become an informer can all be grounds for asylum if aggravated and inflicted for reasons recognized in the refugee definition. *Id.* at 28.

between the harmful acts and the victim's status or opinion.<sup>103</sup> The Ninth Circuit suggests:

'Persecution' occurs only when there is a difference between the persecutor's views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate.<sup>104</sup>

In some cases, adjudicators go astray by ignoring clear benchmarks provided by human rights law. For example, torture and summary execution are egregious violations of international human rights under both customary law<sup>105</sup> and treaties ratified by the United States.<sup>106</sup> They are forbidden under all circumstances, including armed conflict<sup>107</sup> and public emergencies threatening the life of the nation.<sup>108</sup> A primary purpose of refugee law is to spare individuals from the infliction of such universally condemned harm. Yet the BIA and reviewing courts have sometimes blithely ordered the forced repatriation of persons facing near-certain torture or summary execution at the hands of forces who perceive them as political enemies.<sup>109</sup>

The dangerous implication of these decisions is that besieged foreign governments may have a "license to kill."<sup>110</sup> The cases erroneously suggest that the authorities' use of torture or summary execution to maintain political control is legitimate in the context of civil strife.<sup>111</sup> Such misapprehension in fact runs grossly afoul of international human rights and humanitarian law standards.

Recent decisions by the BIA, however, show increasing sensitivity to the illegal nature of the harm inflicted upon asylum applicants. In *Matter of H*—<sup>112</sup> the BIA found that severe beatings of the applicant and the summary executions

103. Problems posed in interpreting the "on account of" element of the refugee definition in INA § 101(a)(42)(A) are addressed in Section V *infra*.

104. *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985).

105. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

106. International Covenant on Civil and Political Rights, Articles 6 and 7, adopted Dec. 19, 1966, entered into force Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1, adopted Dec. 10, 1984, entered into force June 26, 1987, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

107. See Convention Relative to the Protection of Civilian Persons in Time of War, Articles 3, 27, 31, 32, done at Geneva Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

108. ICCPR, *supra* note 106, Article 4.

109. See, e.g., *Matter of K—S—*, Interim Decision 3209 (BIA 1993); *Nakeswaran v. INS*, 1994 U.S. App. LEXIS 10101 (1st Cir. 1994). In *Nakeswaran*, an unpublished decision, the First Circuit recited a litany of abuse suffered by the Tamil applicant and his brothers in Sri Lanka (mob violence, detention without charge or trial, torture, death threats, house destruction, surveillance) and concluded, *id.* at 20:

Whether petitioner will suffer violence on his return to Sri Lanka, we do not know. We do know, however, that there is no principled basis for overturning the Board's decision.

110. For an insightful analysis of opinions characterized by this approach as of 1992, see Carolyn Patty Blum, *License to Kill: Asylum Law and the Principle of Legitimate Governmental Authority to "Investigate Its Enemies,"* 28 WILLAMETTE L. REV. 719 (1992).

111. Board member Heilman has been a major proponent of the view that lawless violence inflicted by governmental authorities upon suspected "extremists" cannot be regarded as persecution. *Matter of R—*, Interim Decision 3195 at 10 (BIA 1992) (Heilman, concurring).

112. In re H—, Interim Decision 3276 (BIA 1996).

of his father and brother, inflicted because of their specific clan identity, could constitute persecution on account of membership of a particular social group. The BIA explicitly held that the civil war context of the abuses did not exclude the applicant from the protection of refugee law:

The situation in Somalia since 1991 presents the question of whether the widespread chaos and violence caused by civil strife and the type of individualized harm which constitutes persecution on one of the five grounds protected under our asylum laws are necessarily mutually exclusive. The Board has acknowledged that persecution can and often does take place in the context of civil war. . . . [W]hile interclan violence may fall within the general category of civil strife, that does not preclude *certain acts* from being persecutory and does not change the fact that *certain types of harm* may constitute persecution.<sup>113</sup>

In another context, the BIA found that a well-founded fear of female genital mutilation (FGM) could form the basis for an asylum claim in *Matter of Kasinga*.<sup>114</sup> The BIA relied primarily upon a physical description of the threatened harm.<sup>115</sup> The fact that the practice had been condemned by the United Nations was noted, however, in the majority's holding that "there is no legitimate reason for FGM."<sup>116</sup>

Asylum adjudicators sometimes err in failing to perceive the interrelationship between violations of different human rights norms. For example, the freedoms of opinion and expression are fundamental human rights.<sup>117</sup> While freedom of expression is subject to limitations, these limits are strictly circumscribed in international law.<sup>118</sup> Moreover, international human rights law prescribes detailed norms of fair process for punishment of criminal conduct.<sup>119</sup>

Asylum adjudicators frequently encounter claims by persons threatened with torture, summary execution or imprisonment for the peaceful expression of their political beliefs. Under international law, such individuals should properly be recognized as refugees. Yet their claims are denied with surprising frequency, on the ground that the applicant faces prosecution, rather than persecu-

113. *Id.* at 11 (emphasis added). Board Member Heilman dissented, accusing the majority of joining "the Ninth Circuit in its quixotic attempt to right the wrongs of the world through the asylum process." *Id.* at 20.

114. *Matter of Kasinga*, Interim Decision 3278 (BIA 1996).

115. *Id.* at 9-10 (declining the INS suggestion to adopt a "shocks the conscience" test).

116. *Id.* at 11 (noting also condemnation of FGM by groups such as the International Federation of Gynecology and Obstetrics, the Council of Scientific Affairs, the World Health Organization, the International Medical Association and the American Medical Association). Concurring Board Member Rosenberg stressed that the BIA "should draw on traditional principles of asylum jurisprudence to adopt a framework that is consistent and appropriate with the Refugee Act and international law," but relied on international sources primarily for guidance on "social group" definition rather than the question of FGM as persecution. *Matter of Kasinga*, Interim Decision 3278 (BIA 1996), Concurring Opinion by Board Member Lory D. Rosenberg, at 1, 3.

117. See Article 19 of the Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 (1948); and Article 19 of the ICCPR, *supra* note 106.

118. The ICCPR, *supra* note 106, permits no limitations to the "right to hold opinions without interference." Article 19(1). Freedom of expression may be subject to restrictions only if "provided by law" and "necessary" to protect the rights and reputations of others or to protect national security, public order or public health and morals. Article 19(3).

119. See ICCPR, *supra* note 106, Articles 9 and 14.

tion, for his or her political beliefs.<sup>120</sup> Adjudicators have sometimes mistakenly construed foreign laws to permit the punishment of peaceful expression of opinion<sup>121</sup> and have assumed that the application of these laws does not constitute persecution. This conclusion is doubly wrong. Punishment of the peaceful expression of political opinion generally violates international law. Moreover, even where a state has a basis for restricting expression to serve a compelling social objective, such restrictions must be "provided by law" and "necessary,"<sup>122</sup> and applied in accord with demanding international standards of procedural regularity and fairness.<sup>123</sup>

Sensitivity to these international norms, as well as the text of the Refugee Convention, guided the Sixth Circuit in *Perkovic v. INS*,<sup>124</sup> a decision that offers a promising model for conforming U.S. asylum law to international obligations. The Perkovic siblings had been activists on behalf of ethnic Albanians in Yugoslavia prior to their departure in 1986 and had continued their peaceful political activity while in exile in the United States.<sup>125</sup> Their asylum claims were denied by the BIA on the theory that punishment for crime or for insurrection does not constitute persecution.<sup>126</sup> The Sixth Circuit reversed, noting that "it is appropriate to refer to international law on the treatment of refugees in considering the meaning of the asylum provision."<sup>127</sup> Denial of asylum to persons who had engaged in criminal behavior or violent insurrection, the court observed, should be guided by the exclusion grounds of Article 1F of the Refugee Convention,<sup>128</sup> which do not encompass peaceful political activity.

The Court found that the Perkovics "committed acts both here and in Yugoslavia that, although protected under international human rights law, are considered political crimes in their homeland."<sup>129</sup> In the Court's view, the BIA erred in not being guided by international human rights law in assessing the Perkovics' claims:

Yugoslavia outlaws and punishes peaceful expression of dissenting political opinion, the mere possession of Albanian cultural artifacts, the exercise of citizens' rights to petition their government, and the association of individuals in political groups with objectives of which the government does not approve. Although international law allows sovereign countries to protect themselves from criminals and revolutionaries, it does not permit the prohibition and punishment

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120. See, e.g., *Sadeghi v. INS*, 40 F.3d 1139 (10th Cir. 1994) (opposition to conscription of children in Iran).

121. For a critique of improper presumptions concerning the content of foreign law, see Cynthia A. Isaacs, Comment, *The Torch Dims: The Ambiguity of Asylum and the "Well-Founded Fear of Persecution" Standard in Sadeghi v. INS*, 20 N.C. J. INT'L L. & COM. REG. 721, 734-36 (1995).

122. ICCPR, *supra* note 106, Article 19(3).

123. ICCPR, *supra* note 106, Articles 9 and 14.

124. 33 F.3d 615 (6th Cir. 1994).

125. 33 F.3d at 616-18.

126. 33 F.3d at 621.

127. 33 F.3d at 621.

128. See note 49 *supra*. While the Sixth Circuit is correct that denial of asylum because of prior criminal conduct ought to be based on the exclusion clauses of Articles 1F and 33(2), in fact the BIA derived the non-persecution theory applied to the Perkovics from a strict reading of the phrase "on account of" in INA § 101(a)(42)(A).

129. 33 F.3d at 622.

of peaceful political expression and activity, the very sort of conduct in which the petitioners engaged here. . . . Since international law and the U.S. asylum statute explicitly seek to shelter activities such as those in which the petitioners engaged, the Board's construction of the statute to render such conduct outside its scope conflicts with the statute and must be reversed.<sup>130</sup>

As *Perkovic* proclaims, the fact that the alleged persecutor's conduct violates human rights norms or humanitarian law should be a major factor in assessing whether threatened harm amounts to persecution.<sup>131</sup> To assume that the rest of the world is a lawless jungle, unconstrained by human rights or humanitarian norms and in which asylum-seekers must simply take their chances, is a fundamental betrayal of the promise of both human rights law and the international refugee regime.

The Ninth Circuit has firmly rebuffed the notion that torture and threats of summary execution by police constitute nonpersecutory "investigation of and reaction against those thought—rightly or wrongly—to be militants seeking the violent overthrow of the government."<sup>132</sup> In *Blanco-Lopez v. INS*,<sup>133</sup> the Ninth Circuit found the government's violent conduct to be persecutory, since it had not initiated "an actual, legitimate, criminal prosecution" but had instead inflicted extrajudicial harm. The Ninth Circuit frequently stresses the illegal nature of government response in finding persecution.<sup>134</sup> While the *Blanco-Lopez* principle is not linked as explicitly to international human rights norms as the *Perkovic* analysis, it does much to keep Ninth Circuit asylum law in line with international standards.

Assessing a government's actions in light of international norms may nevertheless result in the denial of asylum, where those actions are genuinely prosecutorial. In *Chanco v. INS*,<sup>135</sup> the Ninth Circuit upheld an asylum denial to a Philippine Navy officer implicated in a *coup* plot against President Corazon Aquino. Drawing upon the UNHCR Handbook for "significant guidance,"<sup>136</sup>

130. 33 F.3d at 622 (citing the Universal Declaration of Human Rights, *supra* note 117, and the Helsinki Final Act, Conference on Security and Cooperation in Europe, 14 I.L.M. 1292 (1975)).

A similar, though less thoroughly reasoned, result was reached in an unpublished opinion by the Ninth Circuit in *Savov v. INS*, 1995 U.S. App. LEXIS 28176 (9th Cir. 1995). In *Savov*, Bulgarian authorities had arrested, detained, beaten and threatened the applicant because he attended political rallies and protested police brutality toward other protesters. The Court observed, *id.* at 4-5:

The Board's reasoning [in denying asylum] is troubling. If followed, it would eviscerate the asylum rights of aliens punished for their political opinion according to the law of a totalitarian regime. *Savov* asserted to the police officers a belief in the right to freedom of speech for Bulgarians; it is hard to imagine a clearer expression of "political opinion." He was therefore persecuted on account of his political opinion.

131. The BIA, instead, was formerly inclined to stress that "an alien must do more than simply show physical abuse or civil rights or human rights violations in order to demonstrate persecution . . ." *Matter of K — S—*, Interim Decision 3209 at 10 (BIA 1993). The "more" was generally proof concerning the persecutor's motive. See *infra* Section V.

132. *Matter of R—*, Interim Decision 3195 at 6 (BIA 1992). See also *Matter of K— S—*, Interim Decision 3209 at 10-12 (BIA 1993).

133. 858 F.2d 531, 534 (9th Cir. 1988).

134. See, e.g., *Harpinder Singh v. Ilchert*, 63 F.3d 1501, 1508-09 (9th Cir. 1995).

135. *Chanco v. INS*, 82 F.3d 298 (9th Cir. 1996).

136. *Id.* at 301 n.2.

the Court observed that whether prosecution for a politically motivated crime constitutes persecution will depend largely upon:

. . . the legitimacy of the law being enforced. When a government does not respect the internationally recognized human right to peacefully protest, punishment by such a government for a politically motivated act may arguably not constitute a legitimate exercise of sovereign authority and may amount to persecution.<sup>137</sup>

While noting the Handbook's recognition that "excessive or arbitrary punishment for a politically motivated offense" may also support a claim of persecution,<sup>138</sup> the Court further found that in this case the threatened punishment was not disproportionate to the crime.<sup>139</sup> Less obvious human rights norms can constructively guide domestic asylum adjudicators as well. For example, forced psychiatric or medical treatment of disfavored social groups — such as gays and lesbians — appears persecutory in the light of international prohibitions against forced medical experimentation and treatment.<sup>140</sup>

A greater emphasis upon the internationally unlawful character of the foreign government's conduct yields results more consonant with the principles of refugee protection. The Sixth Circuit's analysis in *Perkovic* was guided by sensitivity to human rights standards, awareness of the framework of the refugee regime, and a sincere aim to fulfill the promise of the Refugee Act by conforming U.S. practice to its international obligations.<sup>141</sup> A similar approach by other asylum adjudicators would do much to bridge the gap between domestic asylum law and international standards.

## V.

### THE PERSECUTOR'S MOTIVE

The persecutor's motive assumed an unwarranted importance in U.S. asylum law following the Supreme Court's opinion in *Elias-Zacarias*.<sup>142</sup> In *Elias-Zacarias* the Court imposed a double burden on asylum applicants — first, to prove clearly that they possess a political opinion or recognized status; and, second, to prove that their persecutor is motivated to harm them because of hostility to that opinion or status. The sketchy opinion by Justice Scalia in *Elias-Zacarias*<sup>143</sup> emphasized deference to the BIA's findings<sup>144</sup> and evinced little sensitivity to the international law framework within which the asylum and withholding provisions were drafted.

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137. *Id.* at 302.

138. *Id.* at 302 n.4.

139. *Id.* at 302.

140. See Ryan Goodman, Note, *The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary Medical Intervention*, 105 YALE L. J. 255 (1995).

141. *Perkovic v. INS*, 33 F.3d 615 (6th Cir. 1994). See *supra* text accompanying note 124.

142. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

143. His opinion for the majority consists of twelve paragraphs. See Deborah Anker et al., *The Supreme Court's Decision in INS v. Elias-Zacarias: Is There Any "There" There?*, 69 INTERP. REL. 289 (1992).

144. 502 U.S. at 481.

In a puzzling and questionable analysis, Justice Scalia suggested that Nazi persecution of Jews was not politically motivated, and that harm threatened by Moslem fundamentalists against democrats is not religiously motivated.<sup>145</sup> This aside led the BIA and some lower courts to conclude that asylum must be limited to those threatened by persecutors who act from a singular motive of pure hatred, with no ulterior aim such as to suppress opposition or to take power.<sup>146</sup>

*Elias-Zacarias* illustrates the dangers of a domestic asylum system disconnected from an international framework. The Convention and Protocol do not explicitly address procedural issues such as burden of proof. While this leaves states with considerable flexibility to design their refugee status determination systems, they remain fully obligated to act in good faith and consistently with the treaties' requirements—most importantly the prohibition on *refoulement*. The Handbook speaks generally to evidentiary issues but does not address in detail the issue of the persecutor's motive.<sup>147</sup> To require strict proof of a singular cause of persecution defies both human experience and the premises of refugee law.

Nevertheless, some courts have given a broad reading to *Elias-Zacarias*. Possibly the most absurd example is *Adhiyappa v. INS*,<sup>148</sup> in which credible death threats by Tamil insurgents in Sri Lanka against a pro-government Tamil university professor were found not to be motivated by hostility to his political opinion. Instead of merely holding abstract pro-government views, Adhiyappa had acted on those views by joining the anti-separatist Ceylon Worker's Congress and by providing information to the government concerning separatist activities.<sup>149</sup> His actions, according to the BIA and the Sixth Circuit, made him ineligible for asylum for two reasons: (1) the death threats could be presumed to be revenge for his acts rather than his anti-separatist opinions; and (2) his position as a university professor provided him with a presumed additional motive to cooperate with the government in order to preserve his job.<sup>150</sup>

Following the perverse logic of Justice Scalia's parsing of the statutory text, rather than any sensible understanding of refugee law, the Sixth Circuit held:

Petitioner argues that an alien should be afforded more protection—not less—if he acts on his political opinions, thereby incurring retaliation, rather than simply

145. 502 U.S. at 482.

146. See, e.g., *Adhiyappa v. INS*, 58 F.3d 261 (6th Cir. 1995), cert. denied, \_\_\_ U.S. \_\_\_, 116 S.Ct. 1261 (1996). But as the Second Circuit pointed out in *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994), "[n]othing in *Elias-Zacarias* suggests . . . that where an applicant fears persecution for both political and religious beliefs, that refugee should be denied eligibility for asylum." *Osorio* further held that "the plain meaning of the phrase 'on account of the victim's political opinion' does not mean persecution solely on account of the victim's political opinion." *Id.* at 1028 (emphasis in original) (noting that Aleksandr Solzhenitsyn's disputes with the Soviet government could be characterized as both literary and political). In *Osorio* the Court reversed the denial of asylum to a Guatemalan labor leader, ruling that the BIA had erred in finding that his dispute with the Guatemalan government was economic rather than political.

147. See note 90 *supra*.

148. 58 F.3d 261 (6th Cir. 1995), cert. denied, \_\_\_ U.S. \_\_\_, 116 S.Ct. 1261 (1996).

149. *Id.* at 263, 269.

150. *Id.* at 267-68.

holding them close to his heart and causing no trouble for the opposition. However, this court's obligation is to enforce the law as written, not as it should be written. Congress has enumerated certain attributes which are protected. This list provides protection for individuals who are persecuted on account of their political opinion, but it does not include all individuals who are persecuted because their actions tend to obstruct the activities of politically-motivated organizations, even where those activities may be in part motivated by political opinion. The statute provides protection only where the past or anticipated persecution is on account of political opinion, regardless of whether the persecuted acts on that opinion; we are bound to follow that standard.<sup>151</sup>

Dissenting Judge Daughtrey correctly identified the flaw in this reasoning: [I]t is difficult to see how persecutors can identify targets of persecution based on political opinion, except through political expression and activity. Unlike race, political opinion is perceived only by its expression.<sup>152</sup>

The paradox is plain. Asylum applicants who have never articulated a political opinion may fail both *Elias-Zacarias* tests, being unable to prove either that they possess a political opinion or that their alleged persecutor is motivated by hostility to that opinion. Yet, according to *Adhiyappa*, asylum applicants who *have* manifested their political opinion may fail the second test, because their persecutor might seek to punish them for the manifestation rather than the opinion.

The notion that the Convention and Protocol intended to exclude individuals such as *Adhiyappa* from protection is insupportable. Article 1F of the Convention<sup>153</sup> strongly implies that even persons who commit politically motivated crimes—surely one of the most vigorous means of demonstrating political opinion—are included within the refugee definition. Moreover, nothing in the legislative history of the Refugee Act suggests that Congress intended asylum adjudicators to engage in such a tortured dissection of motivation in applying the refugee definition codified at INA § 101(a)(42)(A).

The UNHCR in its *Elias-Zacarias* brief argued that asylum applicants need only establish “some nexus” between their (possibly unarticulated) political opinion and the feared persecution.<sup>154</sup> Subsequently several courts, remarking on the futility and artificiality of searching for a singular motive for political action,<sup>155</sup> have rejected the crabbed approach illustrated by *Adhiyappa*.<sup>156</sup> In an effort to keep the artificial logic of *Elias-Zacarias* from swallowing up asylum,

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151. *Id.* at 268.

152. *Id.* at 270.

153. Convention, *supra* note 49.

154. HANDBOOK, *supra* note 80, at 4.

155. In *Osorio v. INS*, 18 F.3d 1017, 1027 (2d Cir. 1994), the Second Circuit noted that the HANDBOOK at paras. 66-67 finds it “immaterial whether the persecution arises from any single one of [these] reasons or from a combination of two or more of them.” *Accord* *Harpinder Singh v. Ilchert*, 63 F.3d 1501, 1509-10 (9th Cir. 1995).

156. See, e.g., *Jagraj Singh v. Ilchert*, 801 F. Supp. 313 (N.D. Cal. 1992); *Hardev Singh v. Moschorak*, 53 F.3d 1031 (9th Cir. 1995); *Harpinder Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995); *Surinder Singh v. Ilchert*, 69 F.3d 375 (9th Cir. 1995); *Osorio v. INS*, 18 F.3d 1017 (9th Cir. 1994); *Rajaratnam v. Moyer*, 832 F.Supp. 1219 (N.D. Ill. 1993) (all reversing administrative denials of asylum based on a narrow reading of the “on account of” factor).

courts have turned for guidance to sources such as the UNHCR Handbook,<sup>157</sup> which grounds its analysis in the realities of the refugee experience and the basic principles of international refugee law.<sup>158</sup> While allusions to international human rights standards in these cases tend to be inexplicit<sup>159</sup> or to receive secondary emphasis,<sup>160</sup> sensitivity to the values implicit in human rights norms assists these courts in achieving greater consistency between U.S. and international law.

Recent decisions by the BIA have dramatically departed from the rigid *Elias-Zacarias* framework toward a flexible approach recognizing that persecutors often act from mixed motives. In the important *en banc* decision of *Matter of S— P—*,<sup>161</sup> the Board signaled that:

Persecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the [Refugee] Act and others not. Proving the actual, exact reason for persecution or feared prosecution may be impossible in many cases. An asylum applicant is not obliged to show conclusively why persecution has occurred or may occur.<sup>162</sup>

Persecutors may act from motives that are a mixture of the ideological, the instrumental and the emotional. In *Matter of S— P—*, Sri Lankan security forces apparently wished to extract information from the applicant concerning his captivity by Tamil insurgents, but also desired to punish him for imputed loyalty to the rebels.<sup>163</sup> While being held by Sri Lankan security officials, the applicant was also used as an outlet for their frustration—subjected to beatings and torture, unaccompanied by interrogation—when the tide of battle turned in the insurgents' favor.<sup>164</sup> The Board noted that in "mixed motive cases, it is important to keep in mind the fundamental humanitarian concerns of asylum law,"<sup>165</sup> in particular the intent of Congress in 1980 to bring U.S. law into conformity with the Protocol and "give 'statutory meaning to our national commitment to human rights and humanitarian concerns.'"<sup>166</sup>

Significantly, the BIA stressed the international illegality of the punitive measures imposed by Sri Lankan agents in reversing the denial of asylum.<sup>167</sup> Observing that no prosecution had ever been commenced against the appli-

157. HANDBOOK, *supra* note 80.

158. See, e.g., *Osorio*, *supra* note 156, 18 F.3d at 1027-28; *Harpinder Singh v. Ilchert*, *supra* note 156, 63 F.3d at 1509.

159. For example, in *Rajaratnam*, *supra* note 156, 832 F. Supp. at 1222, the District Court held simply that "while the government has the legitimate right to combat terrorism through the arrest and interrogation of suspected terrorists, this right does not include the beating and torture of the detainees."

160. In *Jagraj Singh v. Ilchert*, *supra* note 156, 801 F. Supp. at 319 n.3, Judge Patel noted that official torture such as that experienced by the petitioner violates international law, citing the Universal Declaration of Human Rights, *supra* note 117.

161. *Matter of S— P—*, Interim Decision 3287, 1996 BIA LEXIS 25 (BIA 1996).

162. *Id.* at 8-9.

163. *Id.* at 25.

164. *Id.* at 5, 23-25.

165. *Id.* at 16.

166. *Id.* at 16 [citing S. REP. NO. 96-256, 96th Cong., at 1, 4 (1980), reprinted in 1980 U.S.C.C.A.N. 141, 144].

167. *Id.* at 6.

cant,<sup>168</sup> the BIA listed several factors that may distinguish harm inflicted to punish or modify political views from valid punishment for criminal acts; these include: “[c]onformity to procedures for criminal prosecution or military law including developing international norms regarding the law of war”; the extent to which antiterrorism laws are applied to peaceful as well as violent expressions of opinion; and whether the applicant suffered “arbitrary arrest, detention, and abuse.”<sup>169</sup> With respect to international humanitarian law, the BIA noted that “violations of the [1949] Geneva Convention [Relative to the Protection of Civilian Persons in Time of War] may support an inference that the abuse is grounded in one of the protected grounds under the asylum law.”<sup>170</sup>

The approach adopted by the BIA in *Matter of S— P—* to the “on account of” aspect of the refugee definition is responsive to the concerns of commentators critical of *Elias-Zacarias* and its progeny. Karen Musalo has urged the adoption of presumptions in favor of persecution claims in mixed cases, drawing on discrimination and free expression law and principles of international human rights protection.<sup>171</sup> Others<sup>172</sup> have suggested a “proximate motive” test<sup>173</sup> or similar presumptions favorable to the applicant.<sup>174</sup> In expressing a “generous standard for protection in cases of doubt,”<sup>175</sup> *Matter of S— P—* is “the closest the Board has come to explicitly adopting the United Nations High Commissioner for Refugees (UNHCR)’s ‘benefit of the doubt’ principle.”<sup>176</sup>

## VI.

### CONCLUSION

Litigating international law issues in United States courts is often an uphill battle, owing to judges’ typical unfamiliarity with and resistance to international standards. Yet the unique status of refugee and asylum law ideally should provide a comparative haven for proponents of the domestic enforceability of international norms. The United States has not only ratified the key treaty, Congress has adopted implementing legislation with the explicit intent of conforming fully

168. *Id.* at 20.

169. *Id.*

170. *Id.* at 20 n.3.

171. Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT’L L. 1179 (1994).

172. Sachin D. Adarkar, Comment, *Political Asylum and Political Freedom: Moving Towards a Just Definition of “Persecution on Account of Political Opinion” Under the Refugee Act*, 42 UCLA L. REV. 181, 219-220 (1994); James M. Moschella, Comment, *Osorio v. Immigration and Naturalization Service: The Second Circuit and “Well-Founded Fear of Persecution on Account of Political Opinion,”* 21 BROOK. J. INT’L L. 471, 492-94 (1995).

173. Adarkar, *supra* note 172, at 220:

[T]he courts should focus on the proximate motive of the persecutor. If the immediate factual result the persecutor wishes to bring about through his actions is to inflict punishment upon an applicant because the persecutor perceives the applicant to have manifested her political independence with respect to the persecutor, then the persecution should be considered “on account of” political opinion.

174. Moschella, *supra* note 172 at 494-501.

175. *Matter of S— P—*, *supra* note 161 at 16.

176. Deborah Anker et al., *The BIA’s New Asylum Jurisprudence and Its Relevance for Women’s Claims*, 73 INTERP. REL. 1173, 1179 (1996) (citing HANDBOOK, *supra* note 80, at para. 48).

to international obligations. Statutory language tracks international texts in unmistakable fashion. The transnational subject matter makes the international dimension transparent even to the most parochial adjudicator. An authoritative international guide, the UNHCR Handbook, exists on many important interpretive issues and the well-respected UNHCR eagerly dispenses advice to domestic decision-makers.

In this light, it is sobering to gauge how frequently U.S. refugee law is at odds with international norms. Even where the international standard is clear and peremptory (as in the case of *nonrefoulement*), embodied in a ratified treaty, and specifically implemented in domestic legislation for the express purpose of fulfilling international obligations, both administrators and courts resist giving international law its full effect. In *Stevic*<sup>177</sup> the Supreme Court privileged prior domestic law over the terms of the Protocol and assumed that the President and the Senate did not intend to change the domestic *status quo* when they brought the United States within the international refugee regime. No weightier reasons than accommodation of administrative lethargy and lack of generosity toward the treaty's intended beneficiaries can be given to explain the Court's conclusion.

Where the Government acts out of powerful political motives<sup>178</sup> and in conscious disregard of international obligation<sup>179</sup> the Supreme Court has been no less accommodating. In construing the Protocol in *Sale*<sup>180</sup> to fit the narrow constraints the Government preferred to impose on domestic law, the Supreme Court did international law a double disservice. First, the Court ignored the UNHCR's plea to avoid placing a falsely narrow interpretation on the treaty, which might set a destructive example for other states parties.<sup>181</sup> Second, the Court supplied the Executive Branch with a cynical defense to international criticism for breaching the Protocol, muting the effect of international condemnation of the interdiction policy.<sup>182</sup> Falsely acquitted of the charge of being an international law-breaker, the Executive remained free to continue refoiling Haitian asylum-seekers until shamed by domestic political forces into reversing the policy.<sup>183</sup>

The erratic approach taken by courts and the BIA toward the UNHCR *amicus* participation and its Handbook, moreover, illustrates the lack of a clear,

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177. 467 U.S. 407 (1984).

178. See Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEORGETOWN IMMIG. L. J. 1 (1993). See also notes 68-69 *supra* for discussion of judicial deference to federal officials with respect to aliens' treaty rights in cases with political implications.

179. The Government's argument in *Sale* that Article 33 does not constrain its actions on the high seas marked a sharp departure from earlier Executive Branch interpretations of U.S. obligations. 509 U.S. at 190 and 190 n.3 (Blackmun, J., dissenting).

180. 509 U.S. 155 (1993).

181. UNHCR Brief, *supra* note 98 at 2-3.

182. The Court spoke either plaintively or cynically of the discongruity between its interpretation of Article 33 and the "moral weight" of the principle of *nonrefoulement*. 509 U.S. at 179.

183. Harold Hongju Koh, *Refugees, the Courts, and the New World Order*, 1994 UTAH L. REV. 999, 1017 (describing the hunger strike by Randall Robinson and pressure by the Congressional Black Caucus).

consistent framework for synthesizing international standards with domestic asylum law. While uneven deference is better than none, cases citing the Handbook rarely convey the sense that their outcome is driven by the international referent.

Constricted readings of the phrase “persecution on account of” have posed an acute barrier to asylum in the United States. While the international definition of persecution is general and open-ended, its lack of precision has freed U.S. adjudicators to deny asylum to many *bona fide* claimants. In rejecting valid claims of persecution, decision-makers may ignore the guidance of relevant international human rights norms. Promising cases such as *Perkovic v. INS*<sup>184</sup> and *Matter of S— P—*,<sup>185</sup> however, draw explicitly on international human rights standards to reach results consistent with the humanitarian aims of refugee law. Although less clearly tied to international norms, the Ninth Circuit’s *Blanco-Lopez*<sup>186</sup> principle—finding persecution where the government resorts to extrajudicial punishment rather than lawful prosecution—likewise promises to bring U.S. asylum law into greater harmony with the protective principles of international refugee law.

The arid logic of the focus upon the persecutor’s motive, stemming from the Supreme Court’s decision in *Elias-Zacarias*,<sup>187</sup> opened a chasm between U.S. asylum law and the basic objectives of refugee protection. Adjudicators seeking to keep domestic law attuned to the international refugee regime have found the Handbook helpful in defeating the notion that the *sine qua non* of refugee status is the persecutor’s singular non-instrumental motive of pure hostility toward his victim. Even where they do not cite the Handbook or human rights standards, opinions rejecting a broad reading of *Elias-Zacarias* represent an important movement toward conforming United States practice to international law. Given that this objective ostensibly animated the drafting of the Refugee Act of 1980, it is a movement long overdue.

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184. 33 F.3d 615 (6th Cir. 1994). See text at notes 124-30 *supra*.

185. Interim Decision 3287, 1996 BIA LEXIS 25 (BIA 1996). See text at notes 161-76 *supra*.

186. 858 F.2d 531, 534 (9th Cir. 1988).

187. 502 U.S. 478.