The Politics of Protection: Limits and Possibilities in the Implementation of International Refugee Norms in the United States

By
Scott Busby[1]

This symposium provides us with an opportunity to take stock of one of the most important issues in international human rights advocacy: how to make international human rights norms more than something to muse on while in law school. Fortunately, as Professor Fitzpatrick notes, refugee law is one of the few areas of U.S. law where domestic law is expressly based on international standards. Consequently, U.S. courts and policymakers regularly resort to, or at least address, these standards in making their decisions. This affords human rights advocates a unique chance to promote the use of international norms. Yet, at the same time, the very fact that domestic standards are modeled after international ones means that domestic policymakers and tribunals, whose interests and constraints are often distinct from those of the international community, may construe these international standards in ways that their drafters and advocates may not have anticipated or intended.

Professor Fitzpatrick's paper quite helpfully identifies many of the most important gaps between U.S. and international standards on refugee protection. While the gaps are significant, I will argue that they are not as numerous or profound as Professor Fitzpatrick contends. In particular, I am not convinced of her claim that the U.S. Supreme Court has significantly deviated from Article 33 of the 1951 Convention relating to the Status of Refugees[2] in its interpretation of the standard of proof appropriate to the norm of *non-refoulement*. I will also argue that the Office of the United Nations High Commissioner for Refugees (UNHCR) is more influential in the making of U.S. refugee law and policy than she suggests.

Nevertheless, as Professor Fitzpatrick points out, it is clear that in several important instances, U.S. courts and policymakers have adopted troubling inter-

1. Director, Office of Democracy, Human Rights, and Humanitarian Affairs, National Security Council. Formerly, Assistant General Counsel, Immigration and Naturalization Service. The views expressed herein are my own and do not reflect the official views of the U.S. Government. Many thanks to Anne Glusker, Joanna Ruppel and Bo Cooper for their helpful comments.

2. *Opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

pretations of the international standards governing the treatment of refugees. What motivates these interpretations? What are the pressures and constraints on U.S. policymakers and courts that shape U.S. law and policy on refugees and asylum? By exploring answers to these questions, we may be able to identify effective strategies for encouraging compliance with international refugee norms.[3]

1. Stevic *and* non-refoulement

Professor Fitzpatrick asserts that a proper reading of Article 33 of the Refugee Convention requires that the duty of *non-refoulement* apply to all persons who meet the refugee definition, that is, persons who can establish a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[4] Thus, in her view, the U.S. Supreme Court's decisions in *INS v. Stevic*[5] and *INS v. Cardoza-Fonseca*[6] deviate from the international norm in holding that an applicant must establish that it is "more likely than not" that he or she will face a threat to life or freedom to be eligible for withholding of removal, the provision incorporating the *non-refoulement* duty into U.S. law.[7] She contends that the standard of proof used to determine whether a person is a refugee—whether there is a reasonable possibility of persecution—should be used to determine eligibility for withholding of removal.

While Professor Fitzpatrick's interpretation of the *non-refoulement* standard makes obvious sense from a refugee protection standpoint, the text of Article 33 read in conjunction with the refugee definition in Article 1 of the Convention does not clearly support this view.[8] Article 33 reads, in pertinent part, as follows:

> 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.[9]

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3. Part of my interest here is in shifting our attention from the law to the politics of international refugee protection. In a provocative study of the discourse of rights in American political culture and how it informed the civil rights movement, Stuart Scheingold has argued compellingly that movements for social change in the United States have tended to focus too much on the role of lawyers and litigation in the realization of basic rights for broad groups of people. STUART SCHEINGOLD, THE POLITICS OF RIGHTS (1974). He contends that while litigation may serve to bring about justice in individual cases, it rarely results in lasting change to social or political policy as a whole and may sap social movements of the very sort of grassroots energies that make them effective. Such insights might be fruitfully applied to refugee advocacy as well.

4. Refugee Convention, *supra* note 2, arts. 1, 33.

5. 467 U.S. 407 (1984).

6. 480 U.S. 421 (1987).

7. Immigration and Nationality Act § 241(b)(3), 8 U.S.C. § 1231(b)(3). This relief was formerly known as withholding of deportation.

8. According to Article 31 of the Vienna Convention on the Law of Treaties, a "treaty shall be interpreted in good faith in accordance with ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." U.N. Doc. A/CONF.39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875 (1969) [hereinafter Vienna Convention].

9. Refugee Convention, *supra* note 2, art. 33 (emphasis added).

The phrase "life or freedom would be threatened" suggests that the drafters may not have intended to make all refugees eligible for *non-refoulement* protection. Had the drafters intended that the coverage of the non-*refoulement* prohibition be co-extensive with that of the refugee definition, they could have conformed the language of Article 33 to the language of the refugee definition by providing that no refugee shall be returned to the frontiers of territories where he has a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group or political opinion. The fact that the drafters did not make this choice argues against Professor Fitzpatrick's position.

Furthermore, the words "would be threatened" appear to suggest the "more likely than not" standard of proof adopted by the Court in *Stevic*. As the Court noted, had the drafters meant for the standard of proof for *non-refoulement* protection to be lower than the preponderance of the evidence standard, they could have used the verbs "could" or "might."[10] They did not.

Moreover, the fact that the standard of proof for *non-refoulement* is more stringent than that used to determine refugee status could be viewed as consistent with the fact that the *non-refoulement* prohibition is a mandatory duty by which states *must* abide while the provision of asylum to a refugee is discretionary. Because states must abide by the *non-refoulement* duty, it is understandable that they might expect the applicant to show a greater probability of harm than for asylum. Thus, while Professor Fitzpatrick's interpretation of Article 33 is appealing in its policy implications, it would appear to be at odds with the text of Article 33 itself.[11] Subsequent interpretations by UNHCR and its Executive Committee in favor of a co-extensive application of the refugee definition and the principle of *non-refoulement* are certainly important statements of policy, but they are questionable grounds on which to overlook the seemingly plain language of Article 33.[12] Therefore, U.S. interpretation of the standard of proof applicable to the norm of *non-refoulement* would appear to have some basis in the text of the Convention, even though it creates the troubling possibility—albeit remote in the context of U.S. law and practice—that a person who meets

10. Stevic, 467 U.S. at 422.

11. Professor Fitzpatrick cites the brief submitted by UNHCR in *Stevic* in support of her view on this point. Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 8 n.51 (1997). While UNHCR clearly took issue with the government's position in that case, its almost exclusive concern was that the refugee definition itself, to which the same standard of proof was being applied at that time, not be construed to require a showing of a "clear probability" of persecution. In its brief, UNHCR does not address the text of Article 33 itself, nor does it consider that the standards of proof for refugee status and *non-refoulement* could be distinct. 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 (1983)(No. 82-973).

12. *See* J. Moore, *Restoring the Humanitarian Character of U.S. Refugee Law Lessons from the International Community*, 15 Berkeley J. Int'l L. 51 (1997). Other than the plain meaning of the text of the Convention, the Vienna Convention permits reference to state practice in interpreting the terms of treaties. Vienna Convention, *supra* note 9. If UNHCR Executive Committee conclusions are read as evidence of state practice on this point, these conclusions may very well support the position taken by Professor Fitzpatrick. Nevertheless, since membership on the UNHCR Executive Committee is limited to 50 states, it would probably require a comprehensive survey of state practice regarding *non-refoulement* and its application before such a position could be sustained.

the refugee definition could still be subject to return to a country where he or she might face persecution.

2. *The Role of the UNHCR*

Professor Fitzpatrick describes the role of UNHCR in the application of refugee law in the United States as "fairly marginal."[13] She claims that UNHCR does not exercise much influence over the course of legislative and administrative policy-making.[14] She further notes that UNHCR is not formally involved in the adjudication of individual claims and that "its views [on individual cases] are not uniformly considered nor given a particular weight."[15]

While it is true that UNHCR's views are not always followed by the U.S. government, it is misleading to suggest that they are not taken seriously by the U.S. officials responsible for refugee policy and decisionmaking. The U.S. government regularly consults UNHCR on significant issues relating to the treatment of refugees and asylum seekers. For instance, the U.S. government extensively sought UNHCR's advice when the Clinton administration reversed the policy of summary return of Haitian asylum seekers in May 1994. The U.S. government agreed to permit and fund an extensive UNHCR monitoring operation aboard the U.S.N.S. Comfort (where Haitian asylum seekers were screened for refugee status in June 1994) and at the safe haven for Haitian asylum seekers that was established at Guantanamo Bay Naval Base in July 1994 after the Comfort operation was abandoned. Indeed, the safe haven policy towards Haitian asylum seekers that the U.S. government ultimately adopted was largely consistent with the approach that had been recommended by UNHCR from the beginning of the Haitian crisis.[16] The U.S. government also solicited UNHCR's guidance in the establishment of the screening program for interdicted Cuban asylum seekers in May 1995 that remains in effect.[17] In addition, the United States continues to take more refugee cases recommended for resettlement by UNHCR than any other country.[18] The United States has also reoriented its

13. Fitzpatrick, *supra* note 11, at 12.

14. *Id.*

15. *Id.* at 12-13.

16. In most respects, UNHCR agreed with and collaborated in the implementation of the safe haven operation, with the exception of its termination. In late December 1994, the United States decided to bring the Haitian safe haven operation to a close by screening all individuals under a standard designed to capture those persons who would be at risk of serious harm upon their return to Haiti. Those found to meet the standard were kept at Guantanamo for another six months and, eventually, were paroled into the United States. UNHCR contended that the proper conclusion to the safe haven would have been to screen all persons who feared return according to the Refugee Convention's well-founded fear standard. *See* Roberto Suro, *U.N. Refugee Agency Says U.S. Violates Standards in Repatriating Haitians*, WASHINGTON POST, Jan. 11, 1995, at A18.

17. *See Cuban Update: INS Issues Shipboard Processing Guidelines Screening Guidelines for Cuban Operation*, 72 INTERP. REL. 40 (Oct. 16, 1995).

18. *See* UNHCR, THE STATE OF THE WORLD'S REFUGEES: IN SEARCH OF SOLUTIONS 93 (1995). In calendar year 1996, for instance, the United States took 16,932 of the 28,330 refugees who were recommended for resettlement by UNHCR and were travel-ready. UNHCR RESETTLEMENT SECTION, WORLDWIDE RESETTLEMENT STATISTICS FOR 1996 (1996).

screening priorities for overseas refugee processing, placing UNHCR-referred cases at the top of the list.[19]

Nevertheless, as with many other countries, there are important issues on which the United States and UNHCR differ. As Professor Fitzpatrick points out, the United States does not agree with UNHCR's view that, as a matter of law, the Refugee Convention or Protocol forbids a country from interdicting asylum seekers on the high seas and returning them to their country of origin without first screening them. The United States and UNHCR also continue to disagree on the application of criminal bars to refugee protection. Since the passage of the Immigration Act of 1990, the United States has taken the position that it may define a set of crimes as "particularly serious" and summarily deny both asylum and withholding of removal to any person convicted of such crimes.[20] UNHCR has argued that such a *per se* bar to refugee protection is contrary to the case-by-case approach to refugee status determination which, in its view, the Convention and Protocol require.

Finally, UNHCR has expressed serious concern about several facets of the recently passed Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[21] especially the establishment of new expedited removal procedures that apply to asylum seekers who arrive at U.S. ports of entry without valid immigration documents, and the imposition of a one-year time period within which persons must file for asylum after arriving in the United States.[22] While these differences are important, they should not be read to suggest that the United States does not give considerable weight to the views of UNHCR in formulating refugee and asylum policy.

Regarding the adjudication of individual asylum and refugee claims, Professor Fitzpatrick suggests that UNHCR's lack of a formal role in the U.S. process also reflects an unwillingness to adhere to international standards. Such a suggestion, however, fails to take adequate account of UNHCR's general role in refugee status determination procedures around the world. UNHCR has always sought to emphasize that states have final responsibility for determining who

19. *State Department Introduces New Processing Priorities, Reduction in FY 95 Refugee Admissions*, REFUGEE REP., Oct. 27, 1994, at 8-9.

20. *See* Immigration and Nationality Act § 241(b)(3)(B), 8 U.S.C. § 1231 (providing that an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least five years shall be considered to have committed a particularly serious crime).

21. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

22. Although President Clinton signed this bill into law on September 30, 1996, he expressly indicated that "rigid guidelines for asylum applications" are inconsistent with international principles of refugee protection and that he would seek to "correct" such a provision. Statement of President William J. Clinton on Signing the Omnibus Consolidated Appropriations Act, 1997, 116 WL 13336078 (October 7, 1996). The Department of Justice has sought to ameliorate the effects of this new provision by adopting interim regulations that construe the application of the deadline and the exceptions that apply to it in ways that minimize its impact on bona fide asylum claimants. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10338 (1997).

meets the refugee definition.[23] Indeed, it is rare that UNHCR is involved in refugee status determination in developed countries such as the United States, which have the resources to establish status determination procedures of their own. It is generally the case that UNHCR has a formal role in the refugee status determination process only in countries that do not have such resources. Thus, it is incorrect for Professor Fitzpatrick to imply that the United States is out of step with international refugee standards because it does not provide UNHCR with a formal role in its refugee status determination process.

Professor Fitzpatrick's characterization of U.S. decisionmakers' attitudes towards UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* ["*Handbook*"] as "erratic" is also somewhat misleading. The Supreme Court has noted that the *Handbook* disclaims any binding effect on states in their application of the refugee definition.[24] Nevertheless, the Supreme Court's description of the *Handbook* as "significant guidance in construing the Protocol" has generally served to encourage U.S. decision-makers to consider the *Handbook's* recommendations, where applicable, in interpreting the refugee definition. An unpublished survey of precedential U.S. court decisions that cite the *Handbook* suggests that its recommendations have been followed more frequently than they have not.[25] Indeed, even in cases where the *Handbook* has not been followed, courts have generally felt compelled to explain why they chose to diverge from the *Handbook's* recommendations.[26] Thus, while the *Handbook* is officially presented as non-binding on U.S. adjudicators and is sometimes not followed, it exercises greater influence over U.S. decision-making in individual refugee cases than Professor Fitzpatrick's description suggests.

In sum, Professor Fitzpatrick's characterization of the influence of UNHCR in the formation of refugee policy in the United States as "fairly marginal" fails to do justice to UNHCR's important contributions to the development of refugee policy and law in the United States, and to the willingness of U.S. policymakers to consult and work with UNHCR on virtually all important issues bearing on refugee protection. While there remain gaps between the views of UNHCR and

23. *See* UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 1 (1992) [hereinafter HANDBOOK] ("The assessment as to who is a refugee, i.e., the determination of refugee status under the 1951 Convention and the 1967 Protocol, is incumbent upon the Contracting State in whose territory the refugee finds himself at the time he applies for recognition of refugee status.").

24. INS v. Cardoza-Fonseca, 480 U.S. at 439, n.22; *See* HANDBOOK, *supra* note 23, at foreword, ¶¶ I and VII.

25. V. Carter, U.S. Cases Referencing the Handbook on Procedures and Criteria for Determining Refugee Status (May 1995) (unpublished manuscript on file with the author). Of course, because many of the HANDBOOK's recommendations are quite general, courts have sometimes construed these provisions in narrower ways than some, including UNHCR, view as appropriate. *See, e.g., Matter of R—*, Interim Decision 3195 (BIA 1992). Nevertheless, the fact that such courts cite the HANDBOOK in reaching their decisions suggests that they view it as an important authority in reaching a conclusion in the case, thereby generally enhancing its status.

26. *See, e.g.*, Garcia v. INS, 7 F.3d 1320 (7th Cir. 1993) (rejecting application of balancing test recommended in paragraph 154 of the HANDBOOK); Ramirez-Ramos v. INS, 814 F.2d 1394 (9th Cir. 1987) (same).

the U.S. government on certain matters, there are many important areas of agreement and collaboration as well.

3. *The Politics of Protection*

Despite the oft-stated intention of the United States to uphold international refugee standards, there are often significant pressures on it to deviate from such standards. What are these pressures and how do they affect the formation of policy?

The most important, and obvious, factor to keep in mind about the politics of refugee protection is that they are deeply intertwined with concerns about the control of U.S. borders. Such concerns take on special salience in the context of asylum. David Martin has spoken aptly of asylum as the "wild card in the ordinary immigration deck"[27]—the extraordinary benefit that permits a person to jump to the front of the regular immigration line. In the case of a bona fide refugee, such line-cutting is, of course, absolutely essential since a person facing persecution is not in a position to wait in line. But it also makes asylum an extremely attractive vehicle for persons who neither qualify for nor wish to wait in that same line. This has led some to view asylum as the weak link in an overall immigration enforcement strategy—an invitation to avoid playing by the regular immigration rules.

Additionally, the movement of asylum seekers to the United States is almost always enmeshed with general international migration patterns from the countries of the South to those of the North.[28] The marked differences in standards of living between the South and North continue to give citizens of countries of the South ample and understandable reason to journey to the North, often at serious personal risk. This means that asylum seekers frequently travel alongside people who are looking for greater economic opportunity. This comingling of migratory flows muddies the waters for policymakers seeking to protect bona fide refugees while ensuring an orderly approach to migration.

Moreover, the process of discerning the bona fide refugee from the ordinary migrant is expensive and time-consuming. The refugee definition we have inherited from the Convention and Protocol, for better or worse, requires an individualized determination of a person's status. This means that each asylum seeker is entitled to a personal hearing with a trained government official. In most cases, such decisions are subject to extensive administrative and judicial review. Such deliberate and extended consideration is difficult to accomplish with the massive and sudden flow of people that refugee movements often in-

27. David Martin, *The Refugee Act of 1980: Its Past and Future, in* TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES, 1982 MICH. Y.B. INT'L L. STUD. 91 (1982). *See also* David Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1267-68 (1990).

28. Such was not the case at the time much of the current international refugee regime came into being. In the late 1940s and early 1950s, most refugees had either been displaced by the cataclysmic events of World War II or were fleeing communism in the Soviet bloc nations. *See* G. LOESCHER, BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS 32-55 (1993).

volve. The time it may take to decide whether a person is a refugee also permits asylum applicants to develop other means of remaining in the United States.

Furthermore, the process of asylum adjudication is tremendously difficult.[29] Adjudicators must assess the credibility of stories set in faraway places related by persons who more often than not speak different languages, in both real and cultural terms. Would-be refugees are not held to the same evidentiary standards as ordinary litigants, and rightly so. For instance, there is generally no requirement to produce documentation supporting one's claim — credible testimony by itself may do.[30] Given the urgent circumstances that propel the flight of bona fide refugees, it should not be any other way. Yet it also makes the asylum process uniquely vulnerable to fraud and abuse.

Even in instances where it is determined that a person is not entitled to refugee status, it is very expensive and difficult to repatriate that person. In a world of limited resources, it makes far more sense to detain and remove persons who pose a serious threat to U.S. society (e.g., criminal aliens) than to do the same for failed asylum seekers.[31] This means that many asylum seekers who are found not to warrant protection may be able to opt out of the regular immigration process as soon as it no longer works to their benefit. This further raises the anxiety level of policymakers when faced with decisions on whether to provide protection to sizable groups of asylum seekers on U.S. territory.

All of these factors make decisionmakers cautious at best, and intransigent at worst, when it comes to adopting generous policies regarding the admission of asylum seekers to U.S. territory. The U.S. response to the Haitian and Cuban refugee crises in the 1990s provide ripe examples of this phenomenon. U.S. officials recognized that there were substantial numbers of bona fide refugees in both groups. One of their chief concerns, however, was that holding out the possibility of access to U.S. territory would create a very powerful magnet for others (whether or not at risk of persecution) to flee. Indeed, such a "magnet effect" was borne out in both cases in which screening operations were established for Haitians that offered them a chance of reaching U.S. territory.[32] As a consequence, policymakers felt compelled to build and maintain nearly insuper-

29. *See* Martin, *supra* note 27. My discussion here is much indebted to Martin's in-depth analysis of the asylum decisionmaking process.

30. *See, e.g.*, 8 CFR § 208.13(a); HANDBOOK, *supra* note 23, at ¶ 196, *but see* Matter of Dass, 20 I&N Dec. 120 (BIA 1989); Matter of S-M-J-, Int. Dec. 3303 (BIA 1997)(where reasonable, applicant bears burden of producing corroborating evidence relating to the specifics of his or her claim or an explanation as to why such information was not presented).

31. In fiscal year 1996 (October 1995 - October 1996), the INS removed 68,551 individuals from the United States, of whom 36,864 individuals—a clear majority—were criminal aliens. INS STATISTICAL YEARBOOK 1996.

32. In both the initial pre-screening operation for Haitians established by President Bush in the wake of the overthrow of President Aristide in September 1991 and the screening operation established aboard the U.S.N.S. Comfort in May 1994, applicants who were found to meet the refugee standard, or something approximating that standard, were brought to the territory of the United States. The rejected were repatriated. In both instances, the screening process became overwhelmed by applicants, rendering both policies ineffectual and making changes inevitable. *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY 879-882 (3d ed. 1995).

able barriers to U.S. territory to stanch the flow of migrants, whether refugees or not.

The interpretation of the refugee definition is frequently affected by similar concerns. Individual decisionmakers and courts are frequently wary of making asylum available to broad groups of individuals. The Supreme Court's opinion in *INS v. Elias-Zacarias* was arguably driven, in part, by the policy concern that granting protection to persons at risk of harm from a political movement in the context of a civil war could make most victims of civil wars eligible for refugee status.[33]

A similar fear is evident in jurisprudence on the meaning of the "social group" component of the refugee definition.[34] While this category is no broader on its face than the other grounds on which a valid refugee claim may be founded, courts and litigants alike have been inclined to identify categories of persons that defy ordinary description as a social group in order to avoid the appearance that too many people might thereby become eligible for refugee status. In one case, a litigant avowed that she was a member of the social group of "women who have been previously battered and raped by Salvadoran guerrillas."[35] In another well-known example, the UNHCR Executive Committee recommended that women "who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live" may be identified as a possible "social group."[36] In both instances, the obvious motivation is to reassure decisionmakers that these interpretations of "social group" will not result in *all* women from certain societies gaining refugee status, even though it is clear that mere possession of a race, a nationality, a religion, or a gender is insufficient to qualify a person for refugee status. Implicit in these positions is the view that such consequential decisions about the control of U.S. borders are best left to the legislative and executive branches of government.[37]

4. *Advocacy Strategies*

Given these factors, what is an advocate on behalf of international norms to do? First, it is important to recognize that, in light of the often profound political stakes surrounding refugee and immigration issues, U.S. courts will almost always be reluctant to impose onerous duties on the other branches of government in this arena, especially if it entails granting admission to or permanent status in the United States.[38] This was made painfully obvious by the litigation

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

34. *See, e.g.*, Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986); Gomez v. INS, 947 F.2d 660, 664 (2nd Cir. 1991) ("Possession of broadly-based characteristics such as youth or gender will not by itself endow individuals with membership in a particular social group.").

35. Gomez, 947 F.2d at 663-64.

36. UNHCR Executive Committee Conclusion No. 39, para. (k) (1985).

37. *See* M.A. v. INS, 899 F.2d 304 (4th Cir. 1990)(en banc).

38. This proposition holds up better with regard to class actions than to individual case adjudication since the stakes are generally higher in class actions. Nevertheless, while legal challenges to U.S. refugee policy and law often fail, there are several important cases in which the courts have played an indispensable role in shaping U.S. treatment of asylum seekers or the adjudication of their asylum claims. *See, e.g.*, American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal.

relating to both the Haitian and Cuban interdiction operations.[39] Thus, advocates for compliance with international norms should be cautious when seeking the assistance of the courts in achieving that compliance.

Second, successful advocacy requires framing the issues, to the extent possible, to speak to the concerns of decisionmakers while still promoting compliance with international norms. Despite its many problems, the safe haven for Haitians established at Guantanamo in July 1994 accomplished both of these objectives: it offered temporary protection to those who needed it in a safe (albeit not always hospitable) place, and it deterred other migrants from trying to reach U.S. soil.[40] Unfortunately, the direct applicability of this experiment to other refugee crises is likely to be limited, given that it was predicated on the willingness and ability of the U.S. government to address the root causes giving rise to that refugee flow. Nevertheless, it does suggest that the establishment of refugee protection options outside the United States may serve to encourage U.S. compliance with the principle of *non-refoulement*, while also alleviating concerns about illegal migration.

Third, successful advocacy in individual cases means making judicious use of arguments in favor of expanding the refugee definition.[41] Creative efforts to expand the scope of the refugee definition to cover large groups of asylum seekers have more often than not come to naught.[42] Advocacy for protection under the definition is best accomplished by arguing for the applicability of the definition on a case-by-case basis. Of course, in some instances, there will be many similarly situated applicants who deserve Convention refugee status. In these cases, pressure to grant refugee status to all such individuals is important. However, in many other instances, there will be a mixed group of applicants, some of whom may qualify for Convention status, and others who will be fleeing for

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1991)(upholding settlement agreement in which the U.S. government agreed to readjudicate the asylum claims of Salvadorans and Guatemalans who had been improperly denied); Orantes-Hernandez v. INS, 919 F.2d 549 (9th Cir. 1990)(upholding permanent injunction entered by district court requiring the INS, among other things, to inform detained Salvadorans of their right to counsel and their right to apply for political asylum); Mendez v. Reno, CV 88-04995 TJH(Tx) (C.D. Cal. Aug. 12, 1993), reported in 70 INTERP. REL. 1132 (Aug. 30, 1993) (settlement agreement reached to provide new asylum interviews to applicants improperly denied by the Los Angeles INS office). However, these cases arguably have brought about compliance with existing U.S. law or regulation rather than fundamental changes in U.S. refugee law or policy.

39. Sale v. Haitian Centers Council, 509 U.S. 155 (1993); Cuban-American Bar Association v. Christopher, 43 F.3d 1412 (11th Cir. 1995). In the context of the Haitian summary return policy, it would appear that the hunger strike undertaken by Randall Robinson, combined with the increased pressure from the Congressional Black Caucus, had a far greater effect on the change in policy than did the many filings in federal court. *See* Howard Kurtz, *A Striking Success: The PR Firm Behind Robinson's Haiti Protest*, WASHINGTON POST, June 23, 1994.

40. *See* T. Alexander Aleinikoff, *Safe Haven: Pragmatics and Prospects*, 35 VA. J. INT'L L. 71 (1994). Interestingly, a similar approach was recommended by a consortium of U.S. nongovernmental organizations shortly before the Clinton Administration took office.

41. David Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, *in* REFUGEE POLICY: CANADA AND THE UNITED STATES (H. Adelman ed., 1991).

42. *See, e.g.*, Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986) (arguing that young urban Salvadoran males are members of a particular social group); Matter of Medina, Interim Decision 3078 (BIA 1988) (arguing that Salvadorans should be granted temporary protection under the Geneva Conventions).

different reasons. In these instances, rather than trying to squeeze such individuals into the Convention refugee definition, it may make more sense to advocate for other forms of protection, including temporary protected status (TPS) or other forms of administrative relief like deferred action status.[43]

These strategies for enhancing U.S. compliance with international refugee norms may not come across as especially satisfying. In particular, lawyers and law students may disapprove, given that I am discouraging the use of the legal arena in many instances to make large-scale changes to refugee policy. Nonetheless, the commitment to advocating for international refugee norms, in light of the often delicate political environment surrounding immigration issues, appears to require this sort of pragmatic approach. Politics is invariably messier and more complicated than the legal process, with its clear rules and arbiters. Frequently, however, the pursuit of political strategies may be a more effective way of encouraging compliance with international refugee norms than expending the bulk of one's energies in court.

43. An example of the way in which the Attorney General's prosecutorial discretion may be exercised to provide protection beyond the scope of the refugee definition is the policy that was in place for nationals of the People's Republic of China who faced harm relating to the coerced family planning policies of that country. *See New Policy Helps Chinese Persecuted Under Family Planning Policy*, 71 INTERP. REL. 1027, Aug. 8, 1994. This policy was brought to an end by a recent change to the U.S. refugee definition, which makes such individuals eligible for asylum. *See* section 101(a)(42) of the Immigration and Nationality Act, as amended by section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996)).