

# Restoring the Humanitarian Character of U.S. Refugee Law Lessons from the International Community

By  
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## I.

### INTRODUCTION

Professor Fitzpatrick's essay on "The International Dimension of U.S. Refugee Law" identifies three areas in which U.S. asylum jurisprudence diverges, in her view, from the governing principles of international refugee law on which it is based.<sup>1</sup> Her essay begins with an examination of the Supreme Court's progressively narrow application of the international norm of *non-refoulement*, "whereby no refugee should be forcibly returned to a country where he [or she] fears persecution."<sup>2</sup> She then analyzes a number of lower court decisions which severely constrict the concept of persecution as it is understood under international human rights law. Finally, the author presents a solid critique of the Supreme Court's requirement in *Elias-Zacarias*<sup>3</sup> that the asylum seeker provide proof of the specific motivation of her persecutor as a basis for refugee status. Additionally, Professor Fitzpatrick, in a well-reasoned analysis of four seminal Supreme Court cases and numerous lower court decisions, concludes that a deeper appreciation of human rights norms,<sup>4</sup> and greater deference to the United Nations High Commissioner for Refugees' (UNHCR's) interpretation of state

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1. The author states that "it is sobering to note how frequently U.S. refugee law is at odds with international norms." See Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1 (forthcoming 1997).

2. *Conclusion Adopted by the Executive Committee on International Protection of Refugees Establishing a Sub-Committee of the Whole on International Protection*, U.N. GAOR, 30th Session, Supp. No. 12A, at 14, U.N. Doc. A/10012/Add.1 (1975).

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

4. Fitzpatrick, *supra* note 2, § IV.

obligations toward refugees,<sup>5</sup> would result in "greater consistency between U.S. and international law."<sup>6</sup>

This response essay will first characterize UNHCR's role in the international protection of refugees, as a means of assessing the relevance of UNHCR's perspective to U.S. judicial decision-making in the area of asylum. The paper will then respond to each of the three problematic issues which Professor Fitzpatrick identifies in contemporary U.S. asylum law, by presenting, in each case, a broad proposition of international law which will then be substantiated with reference to relevant principles, guidelines and insights from the international refugee protection community of which UNHCR is a part. Finally, the essay's conclusion will offer a possible rationale for the dissonance, in logical and human terms, between U.S. asylum law and governing principles of international law, which may suggest a means of achieving greater resonance between the two spheres of refugee protection in the future.

## II.

### UNHCR AS CATALYST AND VOICE OF INTERNATIONAL CONSENSUS FOR THE PROTECTION OF REFUGEES

UNHCR does not play a monolithic role in the protection of refugees. Rather, the Office operates within a broader international community which includes individual states, non-governmental organizations, international and regional bodies, and legal scholars and advocates, all of whom influence the treatment of individuals whose flight is motivated by the fear of persecution. Even in its collaboration with governments toward the fuller protection of refugees, UNHCR engages with states in a number of different ways.

Certainly, UNHCR's service as midwife at the birth of modern refugee law is well known, symbolized by the conclusion of the 1951 Convention relating to the Status of Refugees. It is also well established that UNHCR's mandate is to provide international protection and assistance to refugees.<sup>7</sup> Recognition of UNHCR's role as catalyst in the formation of our contemporary refugee protection regime is reflected in the authoritative weight accorded its interpretation of specific treaty provisions, provided in the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Handbook)*.<sup>8</sup>

But if UNHCR inspired, and continues to promote respect for, fundamental principles of *conventional* (i.e., treaty-based) international refugee law, the Office is also a force in the evolution of *customary* law governing the protection of

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5. Fitzpatrick, *supra* note 2, § II.

6. Fitzpatrick, *supra* note 2, § IV.

7. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES: THE CHALLENGE OF PROTECTION 256, at Annex III (1996) (*citing* the Statute of the UNHCR).

8. U.N. OFFICE OF THE 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, (Geneva; Office of the U.N. High Commissioner for Refugees, 1979)[hereinafter HANDBOOK]. See Fitzpatrick, *supra* note 1, § II, *citing* INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987).

refugees. UNHCR's relationship with an inter-governmental entity known as "the Executive Committee of the UNHCR Programme" is perhaps the best illustration of the dynamism of UNHCR's ongoing interaction with states, and of the organic character of refugee law itself.

The Executive Committee is composed of member states, including the United States. The member states are selected by virtue of their interests in refugee issues, and serve in an advisory capacity to UNHCR in the exercise of its refugee protection mandate.<sup>9</sup> Every year the Executive Committee adopts "Conclusions on the International Protection of Refugees," analogous to resolutions under international law, which reflect the evolving consensus of states regarding their obligations toward refugees, and hence serve as important evidence of customary refugee law.<sup>10</sup> In convening the Executive Committee, UNHCR galvanizes international response to the ongoing plight of refugees, and in publishing Executive Committee Conclusions, the Office serves as spokesperson for the gathering resolve of the international community to provide meaningful international protection to refugees.

Thus UNHCR plays at least a dual role in the international protection of refugees. In promoting conventional refugee law, especially through dissemination of its *UNHCR Handbook*, UNHCR guides nations in the implementation of their obligations under the 1951 Convention and its 1967 Protocol. Through its interaction with the Executive Committee, UNHCR serves as diplomatic catalyst for the continued growth of customary refugee law. Considered together, then, specific provisions of the *UNHCR Handbook* and individual Conclusions of the Executive Committee represent a powerful pairing of conventional and customary refugee law.

### III.

#### THE NORM OF *NON-REFOULEMENT* IS A FUNDAMENTAL INTERNATIONAL OBLIGATION WHICH STATES OWE TO ALL REFUGEES

In a section entitled "False Interpretations of Non-refoulement," Professor Fitzpatrick criticizes three U.S. Supreme Court decisions which have served to constrict the scope and meaning of this peremptory norm of international refugee law.<sup>11</sup> In *INS v. Stevic*,<sup>12</sup> the Court ruled that a greater burden of proof applied to individuals seeking withholding of deportation, the analogue to *non-refoulement* under U.S. law,<sup>13</sup> than that imposed upon those seeking asylum.<sup>14</sup>

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9. The Executive Committee was composed of 47 member states in 1993, see UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 7, at 256, and has increased to 53 members as of 1997. Interview with UNHCR Senior Legal Officer, UNHCR Regional Office, in Washington, D.C. (Nov. 12, 1997).

10. See *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, U.N. GAOR, 46th Session, Supp. No. 12A, at 6, U.N. Doc. A/46/12/Add.1 (1992).

11. Fitzpatrick, *supra* note 1, § IV.

12. 467 U.S. 407 (1984).

13. *Stevic*, 467 U.S. at 428. (The standard utilized in determining entitlement to withholding of deportation is whether persecution is "more likely than not.")

Three years later, in *INS v. Cardoza-Fonseca*,<sup>15</sup> the Court clarified that the "well-founded fear" standard for asylum was indeed more generous than the "clear probability of persecution" standard applied in withholding-of-deportation cases.<sup>16</sup> Finally, in 1993, with *Sale v. National Centers Council*,<sup>17</sup> the Court held that the norm of *non-refoulement* did not govern the interdiction of Haitian asylum seekers outside U.S. territorial waters.<sup>18</sup>

Professor Fitzpatrick concludes that as a result of these three decisions, "the Supreme Court unmoored U.S. law from the international norms it was adopted to implement."<sup>19</sup> From the perspective of international refugee law, to build on Fitzpatrick's shipboard metaphor, if *Stevic* frayed the mooring which lashed U.S. asylum law to the dock of international refugee law, and *Cardoza-Fonseca* attempted to reinforce that mooring, *Sale* untied the mooring and set U.S. refugee law, quite literally, out to sea.

#### A. Non-Refoulement and Extraterritoriality

As Professor Fitzpatrick indicates in her essay, UNHCR has been explicit in its criticism of the U.S. Supreme Court decision in *Sale* and has clarified its position that the principle of *non-refoulement* binds governments extraterritorially as well as within their national borders.<sup>20</sup> UNHCR's criticism of *Sale*'s non-extraterritoriality ruling is consistent with over two decades of international legal authority regarding the character of the norm of *non-refoulement*, as reflected in *UNHCR Executive Committee Conclusions*<sup>21</sup> as well as in statements of the UNHCR itself.<sup>22</sup>

#### B. Non-Refoulement and Refugee Status

If the *Sale* decision is sobering in its outright rejection of UNHCR's view of the extra-territorial character of the norm of *non-refoulement*, the Supreme Court's decisions in *Stevic* and *Cardoza-Fonseca* appear somewhat less extreme

14. *Id.* at 428. (In contrast to withholding of deportation, eligibility for asylum is based upon the "well-founded fear of persecution" which itself is the heart of the international definition of a refugee.)

15. 480 U.S. 421 (1987).

16. *Id.* at 449.

17. \_\_\_ U.S. \_\_\_, 113 S. Ct. 2549 (1993).

18. *Id.* at 2563.

19. Fitzpatrick, *supra* note 1, § I.

20. Fitzpatrick, *supra* note 1, § II, citing UN High Commissioner for Refugees Responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*, 32 I.L.M. 1215 (1993). See also Fitzpatrick, *supra* note 1, at \_\_\_ (noting that "[i]n *Sale*, the Court pointedly ignored the UNHCR's explication of the plain text of Article 33. . .").

21. As early as 1982, the Executive Committee concluded that "the principle of non-refoulement . . . was progressively acquiring the character of a peremptory norm of international law," or one for which no derogation can be tolerated. *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, U.N. GAOR, 46th Session, Supp. No. 12A, at 6, U.N. Doc. A/46/12/Add.1 (1992).

22. Recently, UNHCR has stated that "perhaps the most important feature of the 1951 Convention is the principle known as non-refoulement . . ." UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 8, at 257.

in their divergence from international norms. Nevertheless, the combined effect of the two earlier cases may be every bit as threatening to the universal application of the peremptory norm as was the decision in *Sale*. For, as Professor Fitzpatrick suggests, *Stevic* and *Cardoza-Fonseca* serve to create a second-class citizenship for those refugees who are deemed ineligible for withholding of deportation or *non-refoulement*.<sup>23</sup>

Efforts to refute the subtle textual and historical analysis found in *Stevic* and *Cardoza-Fonseca* regarding the relationship between refugee status and the norm of *non-refoulement* require more than a simple criticism of the distinction between the “well-founded fear of persecution” and the “clear probability of persecution” standards articulated in both cases.<sup>24</sup> An outright rejection of *Stevic*’s “double standard”—based on the text of the 1951 Convention alone—may fail, given that the Convention itself uses different terminology to refer to refugees under Article 1 as compared with Article 33.<sup>25</sup> Rather, in order to most convincingly refute the logic of *Stevic*, we must demonstrate that the Supreme Court’s failure to extend the norm of *non-refoulement* to all refugees violates the spirit of the international treaty.<sup>26</sup>

The ultimate question with respect to the proper scope of application of the norm of *non-refoulement*, and the one which captures the spirit of this peremptory norm, is whether all refugees can claim its protection. The answer, as reflected in the Final Act of the 1951 Convention drafting conference, the provisions of the Convention itself, and pronouncements of UNHCR and its Executive Committee over a period of twenty years, is an unequivocal yes.

### 1. The “Final Act” and the 1951 Convention

Participants in the *United Nations Conference of Plenipotentiaries*, which adopted the text of the 1951 Convention, were fully aware that refugees had no entitlement to asylum, and that the provision of asylum was dependent upon the sovereign discretion of states. Thus, the text of the Final Act of the Conference appeals to states to “continue to receive refugees in their territories . . . in order that these refugees may find asylum. . . .”<sup>27</sup>

In contrast to the Final Act’s aspirational tone with respect to the provision of asylum, the text of Article 33 of the 1951 Convention utilizes the language of obligation with respect to the principle of *non-refoulement*: “No Contracting

23. “[A]n unlucky subset” of refugees, as she refers to it. Fitzpatrick, *supra* note 2, § II.

24. *INS v. Stevic*, 467 U.S. at 428; *INS v. Cardoza-Fonseca*, 480 U.S. at 449.

25. Article 1 focuses on the “well-founded fear of persecution,” whereas Article 33 includes the phrase “life or freedom would be threatened.”

26. While nations must be allowed, within certain limits, to implement their international legal obligations in the context of their own domestic legal frameworks, they may not violate the spirit of the treaty obligations which they are obligated to uphold. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 26 and 27, 1155 U.N.T.S. 131.

27. Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, July 25, 1951, Austl.-Yugo., sec. IV, 138 U.N.T.S. 148.

The UNHCR Handbook itself acknowledges that asylum is a discretionary act on the part of sovereign states when it states that “[t]he Handbook does not deal with . . . the granting of asylum to refugees.” HANDBOOK, *supra* note 8, para. 24, at 7.

State shall expel or return ("refouler") a refugee in any manner to the frontiers of territories where his life or freedom would be threatened . . ."<sup>28</sup> In interpreting the text of the Convention, Guy Goodwin-Gill, a preeminent international jurist in the field of refugee law, concludes that the obligation of *non-refoulement* is owed to *all* refugees: "The principle of *non-refoulement*, as it appears in article 33 of the 1951 Convention, applies clearly and categorically to refugees within the meaning of article 1."<sup>29</sup>

Given that asylum cannot be guaranteed to refugees, the norm of *non-refoulement* becomes their only absolute claim to protection. If this right did not flow to all refugees, it is questionable whether the concept of international refugee protection would have any real meaning.<sup>30</sup>

## 2. *Statements of UNHCR and Conclusions of the Executive Committee*

UNHCR, in its own characterization of the fundamental norm, clearly rejects the notion that *non-refoulement* applies to a mere sub-class of refugees, when it states that "non-refoulement . . . prohibits the . . . forcible return of refugees to a country where they may have reason to fear persecution . . ."<sup>31</sup> UNHCR's very choice of words implicitly rejects the *Stevic* double standard between "well-founded fear" and refugee status, on the one hand, and "clear probability of persecution" and withholding of deportation (or *non-refoulement*), on the other. By linking *non-refoulement* and "reason to fear persecution," UNHCR clearly indicates that entitlement to *non-refoulement* and eligibility for asylum stem from the same basic phenomenon of fear-motivated flight.

It is in the Conclusions of the Executive Committee of the UNHCR Programme, however, that we find the most explicit and constant statements that *non-refoulement* is a minimal form of protection guaranteed to *all* refugees. Over the fifteen-year period from 1975 to 1990, *Executive Committee Conclusions on International Protection* refer to the principle of *non-refoulement* no less than twenty-four times. These declarations are variously worded, but share a common emphasis upon "the fundamental importance of the principle of non-refoulement."<sup>32</sup>

28. Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 138 U.N.T.S. 176.

29. GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 137 (1996). Goodwin-Gill further states that "[t]he legal, and to some extent logical, relationship between article 33(1) and article 1 of the 1951 Convention/1967 Protocol is evident in the correlation established in State practice, where entitlement to the protection of *non-refoulement* is conditioned simply upon satisfying the well-founded fear criterion." *Id.* at 138.

30. "*Non-refoulement* has always been, and remains, indispensable to international protection. It is expressed as an obligation of states in the 1951 Convention, and has gained universal recognition through regional refugee instruments and as a part of customary international law." UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *THE STATE OF THE WORLD'S REFUGEES: THE CHALLENGE OF PROTECTION* 10 (1993).

31. *Id.* at 171.

32. *Conclusion Endorsed by the Executive Committee on Non-refoulement*, U.N. GAOR, 32nd Session, Supp. No. 12A, at 12, U.N. Doc. A/32/12/Add.1 (1977). See also *Conclusions Adopted by the Executive Committee on International Protection of Refugees Establishing a Sub-Committee of the Whole on International Protection*, U.N. GAOR, 30th Session, Supp. No. 12A, at 14, U.N. Doc. A/10012/Add.1 (1975); *Conclusions Adopted by the Executive Committee on International Protec-*

Among the twenty-four Executive Committee Conclusions affirming the norm of *non-refoulement*, nine clearly characterize it as a fundamental principle which applies to all refugees, as demonstrated in the declaration that “. . . protection is seriously jeopardized by [the] . . . refoulement of refugees.”<sup>33</sup>

*tion of Refugees*, U.N. GAOR, 32nd Session, Supp. No. 12A, at 12, U.N. Doc. A/32/12/Add.1 (1977); *Conclusion Endorsed by the Executive Committee on Determination of Refugee Status*, U.N. GAOR, 32nd Session, Supp. No. 12A, at 14, U.N. Doc. A/32/12/Add.1 (1977); *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, U.N. GAOR, 33rd Session, Supp. No. 12A, at 17, U.N. Doc. A/33/12/Add.1 (1978); *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, U.N. GAOR, 34th Session, Supp. No. 12A, at 16, U.N. Doc. A/34/12/Add.1 (1980); *Conclusions Endorsed by the Executive Committee on Refugees Without a Country of Asylum*, U.N. GAOR, 34th Session, Supp. No. 12A, at 17, U.N. Doc. A/34/12/Add.1 (1980); *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, U.N. GAOR, 35th Session, Supp. No. 12A, at 14, U.N. Doc. A/35/12/Add.1 (1980); *Conclusions Endorsed by the Executive Committee on Problems of Extradition Affecting Refugees*, U.N. GAOR, 35th Session, Supp. No. 12A, at 15, U.N. Doc. A/35/12/Add.1 (1980); *Conclusions Endorsed by the Executive Committee on Temporary Refuge*, U.N. GAOR, 35th Session, Supp. No. 12A, at 16, U.N. Doc. A/35/12/Add.1 (1980); *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, U.N. GAOR, 36th Session, Supp. No. 12A, at 16, U.N. Doc. A/36/12/Add.1 (1981); *Conclusions Endorsed by the Executive Committee on Protection of Asylum Seekers in Situations of Large-Scale Influx*, U.N. GAOR, 36th Session, Supp. No. 12A, at 17, U.N. Doc. A/36/12/Add.1 (1981); *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, U.N. GAOR, 37th Session, Supp. No. 12A, U.N. Doc. A/38/12/Add.1 (1982); *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, U.N. GAOR, 38th Session, Supp. No. 12A, at 23, U.N. Doc. A/38/12/Add.1 (1983); *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, U.N. GAOR, 39th Session, Supp. No. 12A, at 23, U.N. Doc. A/39/12/Add.1 (1984); *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, U.N. GAOR, 41st Session, Supp. No. 12A, at 28, U.N. Doc. A/41/12/Add.1 (1987); *Conclusion Endorsed by the Executive Committee on Accession to International Instruments and Their Implementation*, U.N. GAOR, 41st Session, Supp. No. 12A, at 29, U.N. Doc. A/41/12/Add.1 (1987); *Conclusions Adopted by the Executive Committee on Detention of Refugees and Asylum-Seekers*, U.N. GAOR, 41st Session, Supp. No. 12A, at 31, U.N. Doc. A/41/12/Add.1 (1987); *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, U.N. GAOR, 42nd Session, Supp. No. 12A, at 39, U.N. Doc. A/41/12/Add.1 (1988); *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, U.N. GAOR, 43rd Session, Supp. No. 12A, at 7, U.N. Doc. A/43/12/Add.1 (1988); *Conclusion Endorsed by the Executive Committee on International Solidarity and Refugee Protection*, U.N. GAOR, 43rd Session, Supp. No. 12A, at 9, U.N. Doc. A/43/12/Add.1 (1988); *Conclusions Adopted by the Executive Committee on International Protection of Refugees*, U.N. GAOR, 44th Session, Supp. No. 12A, at 8, U.N. Doc. A/44/12/Add.1 (1990); *Conclusions on the Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner From a Country in Which They Had Already Found Protection*, U.N. GAOR, 44th Session, Supp. No. 12A, at 11, U.N. Doc. A/44/12/Add.1 (1990). See generally OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, CONCLUSIONS ON THE INTERNATIONAL PROTECTION OF REFUGEES ADOPTED BY THE EXECUTIVE COMMITTEE OF THE UNHCR PROGRAMME (1991).

33. *Conclusions Adopted by the Executive Committee on International Protection of Refugees* (1988), *supra* note 32. See also *Conclusions Adopted by the Executive Committee on International Protection of Refugees Establishing a Sub-Committee of the Whole on International Protection* (1975), *supra* note 32; *Conclusions Adopted by the Executive Committee on International Protection of Refugees* (1977), *supra* note 32; *Conclusions Adopted by the Executive Committee on International Protection of Refugees* (1980), *supra* note 32; *Conclusions Endorsed by the Executive Committee on Refugees Without a Country of Asylum* (1980), *supra* note 32; *Conclusions Adopted by the Executive Committee on International Protection of Refugees* (1981), *supra* note 32; *Conclusions Adopted by the Executive Committee on International Protection of Refugees* (1984), *supra* note 32; *Conclusion Endorsed by the Executive Committee on International Solidarity and Refugee Protection* (1988), *supra* note 32. See generally OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, *supra* note 32.

Most significantly, however, on at least four occasions during the same fifteen-year period the Executive Committee explicitly stated that the norm of *non-refoulement* serves to protect refugees against return to a situation in which persecution is feared. Thus in 1975, the Executive Committee called on states "scrupulously to observe the principle whereby no refugee should be forcibly returned to a country where he [or she] fears persecution."<sup>34</sup> Then in 1979 it cautioned states that "[a]ction where a refugee is obliged to return . . . to a country where he has *reason to fear persecution* constitutes a grave violation of the recognized principle of *non-refoulement*."<sup>35</sup>

The direct pronouncements of UNHCR combined with the *Conclusions of the Executive Committee of the UNHCR Programme*, of which the United States is a member, provide an authoritative interpretation of Article 33 of the 1951 Convention. These declarations signify that under conventional as well as customary international law, all refugees are entitled to the protection of the norm of *non-refoulement*. Hence both sources of international law challenge the notion that *non-refoulement* protects only the limited class of refugees who can demonstrate a "clear probability of persecution."<sup>36</sup>

#### IV.

#### EXTRAJUDICIAL PUNISHMENT AS A WEAPON OF COUNTER-INSURGENCY CONSTITUTES PERSECUTION.

In a subsequent section entitled "The Nature of Persecution," Professor Fitzpatrick examines a number of Circuit Court and BIA decisions which held that the term "persecution" does not apply to situations in which human rights abuses are used to extract confessions or to retaliate against political activity.<sup>37</sup> She cautions that cases such as *Nakeswaran v. INS*,<sup>38</sup> in which the BIA denied asylum to a Sri Lankan Tamil who had already suffered severe human rights abuses, "suggest that the . . . use of torture or summary execution to maintain political control is legitimate or understandable in the context of civil strife."<sup>39</sup> On this basis, Professor Fitzpatrick urges that greater "[s]ensitivity to human rights standards . . . would do much to bridge the gap between domestic asylum law and international standards."<sup>40</sup>

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34. *Conclusions Adopted by the Executive Committee on International Protection of Refugees Establishing a Sub-Committee of the Whole on International Protection* (1975), *supra* note 32. See also *Conclusion Endorsed by the Executive Committee on Non-refoulement* (1977), *supra* note 32; *Conclusions Adopted by the Executive Committee on International Protection of Refugees* (1980), *supra* note 32. See generally OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, *supra* note 32.

35. *Conclusions Endorsed by the Executive Committee on Refugees Without a Country of Asylum* (1980), *supra* note 32 (emphasis added). See generally OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, *supra* note 32.

36. *But see INS v. Stevic*, 467 U.S. 407, 428 (1984).

37. Fitzpatrick, *supra* note 1, §§ III, IV.

38. 1994 U.S. App. LEXIS 10101 (1st Cir. 1994).

39. Fitzpatrick, *supra* note 1, § III.

40. Fitzpatrick, *supra* note 1, § IV.

There is simply no basis under international refugee law for the failure to define as persecution the targeted use of human rights abuses as a tool of counter-insurgency by the government, or as a means of retaliation by insurgent groups.<sup>41</sup> The international law definition of persecution, "laconic" though it may be,<sup>42</sup> focuses on the nature of the harm, and not the objective behind its occurrence. Thus the limited references to persecution in Articles 1 and 33 of the 1951 Convention speak only to the "well-founded fear of being persecuted"<sup>43</sup> and to whether "life or freedom would be threatened."<sup>44</sup>

If we look to the *Handbook* for further elaboration, persecution likewise is defined there in terms of the *character* of the violation, and not its purpose. Thus the *Handbook* confirms that "a threat to life or freedom . . . is always persecution [and] . . . [o]ther serious violations of human rights . . . would also constitute persecution."<sup>45</sup> Moreover, the *Handbook* is explicit with regard to the fact when "a person guilty of a common law offence [is] . . . liable to excessive punishment, [such treatment] . . . may amount to persecution . . . ."<sup>46</sup>

It would appear that in failing to define as persecution the use of human rights abuses as a means of political control, U.S. courts are using what appears to be a restrictive concept of *persecution* as a means of limiting the *grounds* on which refugee status may be conferred. To this extent, decisions such as *Nakeswaran*, which ostensibly narrow the definition of persecution, actually have much in common with others such as *INS v. Elias-Zacarias*,<sup>47</sup> which require the asylum seeker to provide proof of the persecutor's motive. It is this latter issue which is the subject of the final element of Professor Fitzpatrick's critique of U.S. asylum law.

## V.

### INTERNATIONAL LAW DOES NOT REQUIRE ABSOLUTE SYMMETRY BETWEEN THE BASIS FOR THE REFUGEE'S FEAR AND THE MOTIVATION BEHIND THE PERSECUTOR'S HARMFUL ACTION.

In her final section entitled "The Persecutor's Motive,"<sup>48</sup> Professor Fitzpatrick examines a number of U.S. asylum cases which demonstrate "an increasing reliance upon restrictive concepts of causation."<sup>49</sup> According to the author, *Elias-Zacarias* and its progeny require a showing by the applicant that she possesses a particular opinion or other status (derived from one of the five enumerated grounds), as well as proof that her "persecutor is motivated to harm [her]

41. One might note the irony of a definition of persecution which would not encompass the most brutal use of power for political ends.

42. Fitzpatrick, *supra* note 1, § IV, citing Grahl-Madsen at 193.

43. Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A), sec. 2, 138 U.N.T.S. 152.

44. Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 138 U.N.T.S. 176.

45. *HANDBOOK*, *supra* note 8, para. 51, at 14.

46. *Id.*, para. 57, at 15.

47. 502 U.S. 478 (1992).

48. Fitzpatrick, *supra* note 1, § IV.

49. Fitzpatrick, *supra* note 1, § I.

... because of hostility to that opinion or status."<sup>50</sup> Professor Fitzpatrick points to "the arid logic of [*Elias-Zacarias*'] . . . focus on the persecutor's motive"<sup>51</sup> as an illustration of "the dangers of a domestic asylum system unmoored from an international framework."<sup>52</sup>

From the perspective of international refugee protection, the dangers of *Elias-Zacarias* are actually twofold. The initial problem with the Supreme Court's reasoning, and the one stressed in Professor Fitzpatrick's essay, is its emphasis upon the motive of the persecutor rather than the asylum seeker's subjective fear and experience of persecution.

The *Handbook* is explicit in requiring officials responsible for refugee status determination to assume the perspective of the asylum seeker, and to assist him or her in articulating a well-founded fear of persecution: "Often the applicant himself may not be aware of the reasons for the persecution feared. *It is not, however, his duty to analyse his case to such an extent as to identify the reasons in detail.*"<sup>53</sup> Implicit in the language of paragraph 66 of the *Handbook* is the understanding that individuals can be persecuted "for the wrong reasons" or for reasons which they do not understand, and that their ignorance should not result in a denial of protection.

The second problematic aspect of *Elias-Zacarias* is that in addition to proof of motive, the refugee must demonstrate that in mistreating her, the persecutor explicitly sought to punish her for possessing the exact political opinion or other status which she articulates as the basis for her claim.<sup>54</sup> This showing is often referred to as the "nexus requirement."<sup>55</sup> In establishing this additional element, the Supreme Court is mandating a symmetrical relationship between the refugee's self-concept, on the one hand, and the persecutor's perception of her, on the other, which simply may not occur in the world as we know it.

If we consult those paragraphs of the *Handbook* which address the issue of political opinion, we see the explicit recognition that a direct correspondence between the refugee's opinion and the basis for her persecution will often be lacking, in part because the persecutor may mask the true basis for the mistreatment: "[I]t may not always be possible to establish a causal link between the opinion expressed and the related measures suffered or feared by the applicant. Such measures have only rarely been based expressly on 'opinion.'"<sup>56</sup>

In requiring an absolute symmetry between the persecutor's motive and the refugee's political opinion or status, *Elias-Zacarias* does more than "unmoor" U.S. asylum law from international refugee law: it perverts the human face of persecution, its perpetrators and its victims alike. In asking the refugee to un-

50. Fitzpatrick, *supra* note 1, § IV.

51. Fitzpatrick, *supra* note 1, § V.

52. Fitzpatrick, *supra* note 1, § IV.

53. HANDBOOK, *supra* note 8, para. 66, at 17 (emphasis added).

54. 502 U.S. at 481.

55. See Fitzpatrick, *supra* note 1, at 37 and ns. 135 and 81, citing Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Respondent, at 12 and 4, *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (No. 90-1342).

56. HANDBOOK, *supra* note 8, para. 81, at 19.

derstand the reasons for her persecution, we require her to penetrate the twisted logic of her persecutor, and to render it logical. Such an interpretation of the "for reasons of"<sup>57</sup> or "on account of"<sup>58</sup> requirement not only adds insult to injury, but risks the return of the refugee to a situation of far greater injury in violation of the principle of *non-refoulement*.<sup>59</sup>

Just as a "laconic" definition of persecution enables international refugee law to respond to "the ingenuity of evil,"<sup>60</sup> a flexible nexus requirement will allow U.S. asylum law to penetrate the perverse rationalizations of evil. Only by rejecting an absolute symmetry requirement can the mechanism of refugee protection remain sufficiently supple and humane to serve *all* those who flee such evil.

## VI.

### RESTORING THE INTERNATIONAL CHARACTER OF U.S. REFUGEE LAW: TOWARD A HUMANITARIAN VISION OF NATIONAL SELF-INTEREST

In Professor's Fitzpatrick's view, the gap between U.S. and international refugee law reflects a tendency of U.S. courts to "accommodat[e] administrative lethargy," as well as demonstrating "ungenerosity toward the [1951 Convention]'s intended beneficiaries."<sup>61</sup> It is likely that the lack of consistency between the two realms of refugee protection is also the product of the subversion of universal humanitarian concerns to the short-term prerogatives of sovereignty, which often result in a preoccupation with control of national borders and the exclusion of "outsiders."

If we seek to preserve the human face of refugee protection, more will be required than a sophisticated analysis of the content of international refugee law. In order to truly enhance the humanitarian dimension of domestic refugee law, the United States must be asked to cultivate a vision of enlightened national self-interest. This perspective will be based on the understanding that only if they provide meaningful protection to refugees can states seek to address the causes of flight and the ravages of persecution, such that the need for international protection is alleviated.

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57. Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A), sec. 2, 138 U.N.T.S. 152.

58. 8 U.S.C. § 1101(a)(42) (1970 & Supp. 1996).

59. Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 138 U.N.T.S. 176.

60. Fitzpatrick, *supra* note 2, § III, *citing* Grahl-Madsen at 193.

61. Fitzpatrick, *supra* note 1, § IV.