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A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms

by
Carolyn Patty Blum*

INTRODUCTION

When the comprehensive Refugee Act was passed in 1980, it was hailed as “one of the most important pieces of humanitarian legislation ever enacted by a United States Congress.”¹ The Refugee Act was one of the first U.S. laws that sought to codify U.S. obligations pursuant to a United Nations multilateral human rights treaty.² To that extent, it was a significant step forward in bringing the U.S. into compliance with its international human rights obligations.

But international human rights treaties are much more than the four corners of a document, to be codified in domestic law. They represent a set of political values, collectively understood, to guarantee and respect the life, liberty and security of individuals by their governments.³ This is the essence of the social

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1. 126 CONG. REC. 1522 (1980) (statement of Rep. Rodino); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in various sections of 8 U.S.C.).

2. At the time of passage of the Refugee Act, the United States was party to the following human rights-related treaties: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 [the Geneva Conventions] (all entered into force for the United States February 2, 1956); Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, U.S.T. 778, 2 Bevans 607, 60 U.N.T.S. 253 (entered into force for the United States March 21, 1929); Protocol Amending the Slavery Convention, with Annex, Sept. 25, 1926, 7 U.S.T. 479, T.I.A.S. 3532, 182 U.N.T.S. 51 (entered into force for the United States March 7, 1956); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. 6418, 266 U.N.T.S. 3 (entered into force for the United States December 6, 1967); Agreement for the Suppression of the White Slave Traffic, Mar. 18, 1904, 35 Stat. 1979, U.S.T. 496, 1 Bevans 424, 1 U.N.T.S. 83 (entered into force for the United States June 6, 1908).

3. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Resolutions, part I, at 71, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The United States became a party to the International Covenant on Civil and Political Rights on September 8, 1992, subject to several reservations, declarations and understandings.

contract that human rights law presupposes—that a state entity exists which is capable of and predisposed to ensuring these rights to citizens.⁴ The refugee is, however, by definition a person who is unable (or unwilling) to receive such protection from the state.⁵ In fact, a refugee's own state may be the source of oppression. Another state, then, must intervene and guarantee those fundamental liberties; if not, the refugee cannot possibly benefit from the core values of human rights law.

Arguably, United States law facially addresses the guarantee of such fundamental liberties. Professor Fitzpatrick notes that U.S. law mirrors the mandates of international refugee law in significant ways. However, she also cites several instances in which U.S. refugee law and policy deviate from those norms. Judicial rulings, executive decisions, and recent legislation reveal that each branch of government has contributed to the continuing divergence between domestic and international refugee law.

On one hand, The Immigration and Naturalization Service (INS), the Board of Immigration Appeals (BIA) and some federal courts, to some extent, have tried to ensure greater consistency between U.S. and international norms.⁶ They have also attempted to ensure fair and meaningful procedures and interpretations of statutory law. In contrast, the United States Supreme Court's narrow and mechanistic interpretations of the Refugee Act, the executive branch's continuing infusion of foreign policy concerns into refugee and asylum decision-making, and Congress' recent reactive and regressive legislative enactments all contribute to a betrayal of the values of international law that should guide U.S. policy. This comment will elaborate on Professor Fitzpatrick's work by focusing on examples illustrating how each branch of government has contributed to this divergence.

I.

DECISIONS OF THE U.S. SUPREME COURT

In the first case before the U.S. Supreme Court interpreting the Refugee Act of 1980, *INS v. Stevic*,⁷ the Court made a fundamental error in interpretation that has significantly affected U.S. refugee law. In that case, the Court determined the standard of proof applicable to withholding of deportation.⁸ The Refugee Act of 1980, in pertinent part, required the INS to withhold deportation of any alien to "any country" where her "life or freedom would be threatened . . .

4. See generally JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* (1993) [orig. ed. 1689]; JOHN RAWLS, *A THEORY OF JUSTICE* (1971); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (1762); THOMAS PAINE, *THE RIGHTS OF MAN* (1791); JOHN STUART MILL, *ON LIBERTY* (1859); THOMAS HOBBS, *LEVIATHAN* (1994) [orig. ed. 1651].

5. See, e.g., *Convention Relating to the Status of Refugees*, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150; JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 135 (1991).

6. Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 *BERKELEY J. INT'L L.* 1 (1997).

7. 467 U.S. 407 (1983).

8. *Id.* at 409.

on account of [her] race, religion, nationality, membership in a particular social group or political opinion."⁹

This language is almost an exact duplication of Article 33 of the U.N. Convention Relating to the Status of Refugees (hereinafter "the Convention").¹⁰ Congress clearly intended the similarity of the two provisions when it revised the language of the withholding provision.¹¹ In so doing, Congress made this section mandatory—it eliminated the ability of the decision-maker to deny this relief as a matter of discretion.¹² Further, the language expanded the bases for seeking such relief in conformance with both Article 33 and the definition of "refugee" in Article 1 of the U.N. Convention.¹³

The most significant factor in the Supreme Court's reasoning was the fact that the language of 243(h) and Article 33 were not exact duplications. There was one significant linguistic difference. The Article 33 provision applied to a "refugee" whose life or freedom would be threatened;¹⁴ in U.S. law, the provisions applied to an "alien" whose life or freedom would be threatened.¹⁵ The *Stevic* Court seized on this different terminology and crafted its decision around it. As a result, the Court concluded that there was no textual reference to refugees; thus, the standard of proof operative for determinations of refugee status in asylum proceedings¹⁶ was irrelevant to applicants for withholding of deportation.¹⁷ Under the *Stevic* decision, an applicant for withholding must prove, by

9. This section, 243(h)(1) of the Immigration and Nationality Act [hereinafter "INA"], reads in full:

The Attorney General shall not deport or return any alien (other than an alien described in section 241(a)(4)(D)) 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.

8 U.S.C. § 1253(h)(1) (1980). This section has been recodified by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) as INA § 241(b)(3), 8 U.S.C. § 1251(b)(3) (1996).

10. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 176. Article 33(1) provides:

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.

The United States acceded in 1968 to the U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577. Parties to the Protocol are bound to comply with Convention Articles 2 through 34. Thus, although it is not a Convention signatory, the U.S. is effectively, bound by the Convention through the operation of the Protocol.

11. *Stevic*, 467 U.S. at 426 & n.20 (citing H.R. REP. NO. 96-608 at 17-18 (1979)); see also S. REP. NO. 96-590, 20 (1980).

12. See H.R. REP. NO. 96-608 at 17-18 and discussion in *Stevic*, 467 U.S. at 426.

13. Compare then-governing 8 U.S.C. § 1253(h)(1) (quoted in full, *supra* note 8) with the prior version, 8 U.S.C. § 1253(h) (1976):

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

14. See *supra* note 10.

15. *Stevic*, 467 U.S. at 409.

16. See discussion, *infra* notes 22-23, and accompanying text.

17. *Stevic*, 467 U.S. at 423-24, 428 & n.22.

objective evidence, that she was “more likely than not” to have her life or freedom threatened.¹⁸ The Court set the path for bifurcating withholding of deportation and asylum into separate adjudications governed by two standards of proof, with withholding being decided under the more stringent standard.¹⁹

This narrow view was based on a mechanistic and textually constrained view of the norms of refugee law. The United Nations High Commissioner for Refugees, in his *amicus* brief to the Court, urged an interpretation consistent with international law.²⁰ Article 33, on which the revised 243(h) was wholly based, did not require a separate finding that the applicant’s life or freedom would be threatened. Its purpose was to ensure a universal principle of *non-refoulement* for all refugees—that a refugee cannot be returned to *any* country in which her life or freedom would be threatened.²¹ This principle, as Professor Fitzpatrick informs us, is the cornerstone of refugee protection. The Supreme Court’s constricted analysis betrays the purpose of the mandatory protection of withholding of deportation and its parent, Article 33 of the Convention.

Again, in *INS v. Elias-Zacarias*,²² the United States Supreme Court limited the scope of the Refugee Act with a narrow, grudging construction of the language of the Act. In that case, the Court interpreted the definition of “refugee”²³ and the eligibility criteria for recognition for asylum.²⁴ In particular, the Court was asked to evaluate the phrase “persecution on account of political opinion.” The Court’s ruling, after a cursory analysis,²⁵ concluded that the stat-

18. *Id.* at 429-30. In other words, in *Stevic* the Court held that the “clear probability of persecution” standard applied to claims for withholding of deportation, and that this standard meant the alien must prove persecution to be more likely than not. *Id.* at 429-30.

19. See *Id.* at 421-30. Following *Stevic*, the Court’s next case involving the Refugee Act was *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1986). In *Cardoza*, the Court confirmed what it intimated in *Stevic*: that the standard of proof governing asylum claims was “less stringent” than that governing withholding. 480 U.S. at 443, 446-450.

20. 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).

21. *Id.* at 9-10, 25, 28.

22. 502 U.S. 478 (1992).

23. Section 101 of the INA 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, or political opinion.

8 U.S.C. § 1101(a)(42)(A) (1980).

24. Section 208(a) of the INA provides that:

[t]he Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien’s status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) [8 U.S.C. § 1101(a)(42)(A)].

INA § 208(a), 8 U.S.C. § 1158(a). The language of this section was revised in 1996, but eligibility for asylum based on the refugee definition remains the same. INA § 208(b)(1); 8 U.S.C. § 1158(b)(1) (1996).

25. Justice Scalia delivered the opinion of the Court in less than six full pages. See also Deborah Anker, Carolyn P. Blum, and Kevin R. Johnson, Comment, *INS v. Zacarias: Is There Anyone Out There?*, 4 INT’L J. REFUGEE L. 267, 268 (1992).

ute must be taken at face value—that is, “political opinion” means the opinion of the applicant.²⁶ The Court held that, under the facts of the case before it, the applicant’s opinion could not be inferred from his actions.²⁷ Further, the Court ruled that an applicant must demonstrate that the persecutor sought to punish the applicant because of those political opinions.²⁸ The cramped legal analysis provided little substantive guidance to adjudicators and failed to account for the real difficulties of proof in asylum cases.²⁹ Both the INS³⁰ and some circuit courts,³¹ in their reviews of asylum decisions, have seen the Court’s analysis in *Elias-Zacarias* as a license to deny claims that have all the earmarks of meritorious cases.

In both *Stevic* and *Elias-Zacarias*, the Court chose to ignore the clear mandates of the underlying United Nations treaties on which U.S. domestic legislative language was based. The political values promulgated in those international instruments require a more charitable interpretation of the law in order to effect protection from persecution. However, the Court’s decisions accomplish the opposite result; their constrained and grudging analysis has served to constrict protection available for refugees, leaving them vulnerable to forcible return to persecution.

II. EXECUTIVE DECISIONS

The elimination of foreign policy considerations from refugee law and policy provided a central impetus for the Refugee Act of 1980. To accomplish this goal, the U.S. adopted the United Nations definition of “refugee” to guide both

26. *Elias-Zacarias*, 502 U.S. at 482.

27. *Id.* at 482-83 & n.2.

28. *Id.* at 483.

29. See, e.g., UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, ¶¶ 190, 196, 197, 203, 204, U.N. Doc. HCR/IP/4/Eng. (1979) [hereinafter UNHCR HANDBOOK]; *Bolaños-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984).

30. See, e.g., *Matter of K-S-*, Int. Dec. 3209 (BIA 1993) (Sikh threatened by extremists and arrested, tortured, and interrogated by police about political beliefs and activities found not to fear “political” persecution); *Matter of R-*, Int. Dec. 3195 (BIA 1992) (same); *Matter of T-*, Int. Dec., 3187 (BIA 1992) (Sri Lankan beaten and harassed by both government supporters and by rebels denied relief). See also *Karen Musalo, Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT’L L. 1179, 1205-09 (1994) (discussing *Matter of R-*, *supra*, and two other post-*Zacarias* cases in which the Board of Immigration Appeals denied asylum to torture victims).

31. See, e.g., *Bartesaghi-Lay v. INS*, 9 F.3d 819 (10th Cir. 1993) (Peruvian threatened with death by guerrillas found to be at risk not due to his pro-government political opinion but due to his knowledge of guerrilla activities, which in the Court’s view did not constitute political persecution); *Ozdemir v. INS*, 46 F.3d 6 (5th Cir. 1994) (ethnic Kurd who was arrested, detained, beaten and interrogated in Turkey after he participated in an anti-government demonstration found not to fear political persecution); *Adhiyappa v. INS*, 58 F.3d 261 (6th Cir. 1995); *cert. denied*, 116 S.Ct. 1261, 134 L.Ed. 2d 210, 64 USLW 3616, 64 USLW 3623 (1996) (Sri Lankan considered a “traitor” to Tamil separatists and threatened with death held not to fear political persecution).

overseas refugee processing and in-country asylum processing.³² This definition is ideologically neutral, defining a refugee solely in terms of the refugee's reasonable fear of persecution in his or her home country. Yet throughout the 1980's, the executive branch consistently made decisions which apparently were motivated more by foreign policy concerns than by proper application of neutral human rights protections.³³ This tendency was most blatant in the U.S. treatment of refugees from El Salvador and Guatemala.³⁴ Both of these Central American countries were plagued by intensive government terror campaigns against civilian targets as a tactic to destroy support for guerrilla movements.³⁵ Many thousands were killed or tortured; others disappeared; hundreds of thousands more fled the repressive conditions in their homelands, many making their way to the U.S.³⁶ The United States government supported the Salvadoran government by extending military aid, and refused to break ties with the Guate-

32. For the definition of "refugee" and the provision for asylum in U.S. law, see *supra* notes 23 and 24. The United Nations definition of "refugee" is also incorporated in domestic law governing overseas refugee admissions. See INA § 207; 8 U.S.C. § 1157 (1980).

33. See, e.g., AMNESTY INTERNATIONAL, REASONABLE FEAR: HUMAN RIGHTS AND U.S. REFUGEE POLICY (1990); GENERAL ACCOUNTING OFFICE, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN—FEW DENIED APPLICANTS DEPORTED (1987); Kevin R. Johnson, A "Hard Look" at the Executive Branch's Asylum Decisions, 1991 UTAH L. REV. 279 (1991); Elizabeth K. Hartsis, *Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label*, 9 AM. U.J. INT'L L. & POL'Y 269 (1993); Kerry E. Knobelsdorff, *I.N.S. v. Canas-Segovia: Keeping Politics In and Refugees Out*, 8 CONN. J. INT'L L. 657 (1993); Carolyn P. Blum, *Political Assumptions in Asylum Decision-Making: The Example of Refugees from Armed Conflict*, in REFUGEE POLICY: CANADA AND THE UNITED STATES 282 (Howard Adelman, ed., 1991); Note, *Prisoners of Foreign Policy: An Argument for Ideological Neutrality in Asylum*, 104 HARV. L. REV. 1878 (1991).

34. See, e.g., Jeffrey L. Romig, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295 (1985); Arthur Helton, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. L. REV. 498 (1986).

35. See, e.g., UNITED NATIONS, GENERAL ASSEMBLY, REPORT OF THE ECONOMIC AND SOCIAL COUNCIL, SITUATION OF HUMAN RIGHTS IN EL SALVADOR; U.N. DOC. A/39/636 (1984); *Situation of Human Rights and Fundamental Freedoms in El Salvador*, G.A. Res. 39/119, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/RES/39/119 (1984); AMNESTY INTERNATIONAL, EXTRAJUDICIAL EXECUTION IN EL SALVADOR (1984); AMERICAS WATCH, EL SALVADOR'S DECADE OF TERROR: HUMAN RIGHTS SINCE THE ASSASSINATION OF ARCHBISHOP ROMERO (1991) [hereinafter DECADE OF TERROR]; AMERICAS WATCH, CLOSING THE SPACE: HUMAN RIGHTS IN GUATEMALA, MAY 1987-OCTOBER 1988 (1988); KENNETH ANDERSON, MAXIMIZING DENIABILITY: THE JUSTICE SYSTEM AND HUMAN RIGHTS IN GUATEMALA: A REPORT OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP (1989); AMERICAS WATCH, MESSENGERS OF DEATH: HUMAN RIGHTS IN GUATEMALA, NOVEMBER 1988-FEBRUARY 1990 (1990) [hereinafter MESSENGERS OF DEATH]; AMERICAS WATCH & PHYSICIANS FOR HUMAN RIGHTS, GUATEMALA: GETTING AWAY WITH MURDER (1991) [hereinafter GETTING AWAY].

The U.N.-sponsored truth commission on El Salvador ultimately vindicated the assertions by human rights advocates that the Salvadoran government and military were overwhelmingly responsible for the atrocities suffered by Salvadoran civilians, despite suggestions to the contrary by United States officials. See AMERICAS WATCH, *El Salvador: Accountability and Human Rights: The Report of the United Nations Commission on the Truth for El Salvador*, 5 News from Americas Watch 1-3, 29 & n.98 (Aug. 10, 1993). Although the Truth Commission's report does not dwell on the U.S. role in El Salvador's civil war, *id.* at 29, recently-released information from the U.S. government suggests that State Department officials at best selectively reported and at worst knowingly lied to the American public about what was happening in El Salvador, *id.* at 32-36.

36. See, e.g., Romig, *supra* note 34 (estimating 300,000 to 500,000 undocumented Salvadorans in the United States at that time).

malan military.³⁷ In the game of Cold War politics, it was still more important to the U.S. to oppose radical insurgents and their civilian allies than to oppose official brutality.

Throughout the 1980's, despite the well-documented massive human rights abuses in both countries, the acceptance rates for Salvadoran asylum-seekers hovered around 2.5% and for Guatemalans at less than 1%.³⁸ In comparison, refugees from countries under Communist rule or from countries with which the U.S. had frosty relationships received asylum in far greater numbers.³⁹ These statistics highlight the failure of the United States to remove foreign policy concerns and apply neutral human rights protections.

Finally, however, a class action lawsuit, *American Baptist Churches v. Thornburgh*⁴⁰ (ABC), sought some measure of justice for the Salvadoran and Guatemalan refugees. By the end of the 1980's, the INS acknowledged that its procedures for deciding asylum claims were fundamentally flawed. The government agreed to settle the ABC case and re-adjudicate all Salvadoran and Guatemalan cases.⁴¹

The government's reaction to Cuban and Haitian refugees in the 1990's further demonstrates discriminatory treatment on the basis of foreign policy concerns. The U.S. Coast Guard physically prohibited Haitian refugees from gaining access to the U.S. by interdiction of refugee boats before they reached land.⁴² This floating "Berlin Wall"⁴³ meant that the U.S. turned away thousands of Haitian refugees, even during the repressive junta rule from 1991-

37. See, e.g., DECADE OF TERROR, *supra* note 35; MESSENGERS OF DEATH, *supra* note 35, at 79-85; GETTING AWAY, *supra* note 35, at 77-79; WALTER LAFEVER, INEVITABLE REVOLUTIONS: THE UNITED STATES IN CENTRAL AMERICA (1993); CYNTHIA G. BROWN, WITH FRIENDS LIKE THESE: THE AMERICAS WATCH REPORT ON HUMAN RIGHTS AND U.S. POLICY IN LATIN AMERICA (1985); NOAM CHOMSKY, TURNING THE TIDE: U.S. INTERVENTION IN CENTRAL AMERICA AND THE STRUGGLE FOR PEACE (1985); LAWYERS COMMITTEE FOR HUMAN RIGHTS, BUREAUCRACY AND DIPLOMACY: HUMAN RIGHTS AND U.S. FOREIGN POLICY (1989); LAWYERS COMMITTEE FOR HUMAN RIGHTS AND THE WATCH COMMITTEES, THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1985 (1985); LAWYERS COMMITTEE FOR HUMAN RIGHTS AND THE WATCH COMMITTEES, THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1986 (1986); LAWYERS COMMITTEE FOR HUMAN RIGHTS AND THE WATCH COMMITTEES, THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1987 (1987); LAWYERS COMMITTEE FOR HUMAN RIGHTS AND THE WATCH COMMITTEES, THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1988 (1988).

38. Carolyn Patty Blum, *The Settlement of American Baptist Churches v. Thornburgh: Landmark Victory for Central American Asylum-Seekers*, 3 INT'L J. REFUGEE L. 347, 349, 350 n.18 (citing INS and GAO statistics).

39. For example, a General Accounting Office (GAO) survey in 1987 found that Polish applicants had a 49% approval rate and Iranians had a 66% approval rate, compared to Salvadorans' 2% approval rate. General Accounting Office, *supra* note 32. The disparity was higher for applicants whose claims were similar (involving arrest, imprisonment, threats and/or torture): 3% for Salvadorans, 55% for Poles, and 64% for Iranians. *Id.*

40. 760 F. Supp. 796 (N.D. Cal. 1991).

41. See *id.* at 799-800.

42. Exec. Order No. 12,324, 3 C.F.R. 180 (1982), reprinted in 8 U.S.C. § 1182 (1987; found in 1986 amendment to § 1182); Agreement on Interdiction of Haitian Immigration to the U.S., Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559, 3559; Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992).

43. See, e.g., Stuart Taylor, *Haitians Face Inhumanity of Bush's 'Floating Berlin Wall,'* AMERICAN LAWYER, Aug. 10, 1992, at 26.

1994,⁴⁴ without determining whether they were bona fide refugees.⁴⁵ During the same period, the U.S. allowed boatloads of Cubans to enter national territory,⁴⁶ and made them beneficiaries of special legal provisions.⁴⁷

Even after the U.S. government established refugee camps for Haitians and Cubans at Guantanamo Naval Base, it failed to treat the two groups equally.⁴⁸ After President Aristide returned to power in Haiti, and under unsettled and dangerous conditions, the U.S. forced almost all Haitian residents of Guantanamo to return to Haiti.⁴⁹ The Guantanamo Haitians included hundreds of children with relatives in the U.S., many of whom would have no means of support on the island.⁵⁰ The Cubans, on the other hand, were admitted *en masse* into the U.S. without any determination of refugee eligibility. In contrast to the treatment of the Haitian children, Guantanamo Cuban children were given priority. While the U.S. concluded an agreement with Cuba to accept for repatriation future asylum-seekers,⁵¹ current relations between the two countries bode ill for the continuation of that policy.

Both of these examples illustrate the U.S. failure to comply with the mandates of refugee and human rights norms requiring the determination of refugee status without discrimination based on country of origin.⁵² While major im-

44. See, e.g., AMNESTY INTERNATIONAL, HAITI: THE HUMAN RIGHTS TRAGEDY—HUMAN RIGHTS VIOLATIONS SINCE THE COUP (1992); AMNESTY INTERNATIONAL, HUMAN RIGHTS HELD RANSOM (1992); LAWYERS' COMMITTEE FOR HUMAN RIGHTS, HAITI, A HUMAN RIGHTS NIGHTMARE (1992).

45. See, e.g., Thomas D. Jones, *The Haitian Refugee Crisis: A Quest for Human Rights*, 15 MICH. J. INT'L L. 77 (1993); Juan C. Montes, *Haitian Interdiction on the High Seas: A U.S. Policy of Bias and Inconsistency*, 5 ST. THOMAS L. REV. 557 (1993); Arthur C. Helton, *The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 N.Y.L. SCH. J. HUM. RTS. 325-32 (1993); Malissia Lennox, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 703-04 (1993); Suzanne Gluck, *Intercepting Refugees at Sea: An Analysis of the United States' Legal and Moral Obligations*, 61 FORDHAM L. REV. 865, 868-74 (1993).

46. See, e.g., Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.U. SCH. J. HUM. RTS. 269 (1993).

47. Cuban Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

48. See Cuban American Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1427-29 (11th Cir. 1995); CHERYL LITTLE AND FLORIDA RURAL LEGAL SERVICES OF MIAMI, NOT IN THEIR BEST INTEREST: A REPORT ON THE US GOVERNMENT'S FORCIBLE REPATRIATION OF GUANTANAMO'S UNACCOMPANIED HAITIAN CHILDREN 3 (1995) [hereinafter NOT IN THEIR BEST INTEREST] (on file with author); Janice D. Villiers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the United States*, 60 BROOK. L. REV. 841 (1994); Joan Fitzpatrick, *Flight from Asylum: Trends Toward Temporary 'Refuge' and Local Responses to Forced Migrations*, 35 VA. J. INT'L L. 13 (1994).

49. See, e.g., Sandra Marquez, *No Change in Policy for Haitians at Guantanamo*, REUTERS, May 3, 1995, reprinted in NOT IN THEIR BEST INTEREST, *supra* note 48, at 56; Larry Rohter, *U.S. Starts the Return of Haitians from Guantanamo*, N.Y. TIMES, Jan. 7, 1995, at A1, cited in Fitzpatrick, *supra* note 48.

50. NOT IN THEIR BEST INTEREST, *supra* note 48.

51. See, e.g., Cuban American Bar Ass'n, 43 F.3d at 1418; U.S. Committee for Refugees, *Recent Developments: Cuba and U.S. Agree on Plan to Stop Boat Departures*, REFUGEE REPORTS at 5-7 (1994).

52. The principle of non-discrimination is fundamental in human rights law. See, e.g., Convention Relating to the Status of Refugees, *supra* note 5, Art. 3, 19 U.S.T. at 6259, 189 U.N.T.S. at 156 ("The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin"); Universal Declaration of Human Rights, *supra*

provements in the domestic asylum process have occurred, particularly since the advent of a new regulatory scheme in 1990,⁵³ concerns about equal treatment remain, both in broad policy⁵⁴ and in individual determinations⁵⁵.

III.

RECENT LEGISLATION

Two major legislative enactments⁵⁶ in 1996 dramatically changed the domestic asylum process. Congress enacted provisions that undermine access to domestic asylum procedures for most asylum-seekers in contravention of the

note 3, Article 1, U.N. GAOR, 3d Sess., Resolutions, part I, at 72 (equality of all); *id.*, Art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"); *id.*, Art. 7, at 73 (equality before the law; equal protection of the laws without discrimination); International Covenant on Civil and Political Rights, *supra* note 3, Art. 2, 999 U.N.T.S. at 173 ("Each State Party . . . undertakes to respect and to ensure . . . the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"); *id.*, Art. 24, 999 U.N.T.S. at 179 (children's rights to protection "without any discrimination as to race, colour, sex, language, religion or national or social origin, property or birth"); *id.*, Art. 26, 999 U.N.T.S. at 179 (equality before the law; equal protection of the law; prohibition of and protection from "discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status").

53. 8 C.F.R. §§ 208, 236, 242, 253 (July 27, 1990). Among other things, the 1990 regulations established a new division of professional asylum officers independent of INS district offices and the INS Examinations Division. 8 C.F.R. § 208. Additional changes in the regulations were made in late 1994. 8 C.F.R. §§ 208, 242, 274a, 299 (Nov. 29, 1994, effective Jan. 4, 1995). Interim Regulations to implement change to asylum law under IIRIRA were published March 6, 1997. Procedures for Asylum and Withholding of Removal, 62 Fed. Reg. 10,337 (1997).

54. See *supra* notes 33-50 and accompanying text. As this Article was going to press, legislation, supported by the White House, passed that perpetuates the discriminatory treatment of refugees based on nationality and ideology. The Nicaraguan Adjustment and Central American Relief Act (NACARA) of 1997, signed into law as part of the D.C. Appropriations Act, offers a generous amnesty program for Nicaraguans and some Cubans, enabling them to adjust their status to lawful permanent residents. Salvadorans, Guatemalans and former Eastern Bloc nationals are simply put back in the same position they were in prior to draconian changes in the 1996 Immigration Act. The inclusions of Salvadorans and Guatemalans at all was the result of massive lobbying by advocacy groups that have, for years, sought to rectify the government's egregious discriminatory treatment of those groups. Despite attempts to lobby for the inclusion of Haitians, they were, once again, left out. The Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. No. 105-100 (1997); American Immigration Lawyers Association, *Nicaraguan Adjustment and Central American Relief Act (NACARA)*, PRACTICE ADVISORY (Dec. 1, 1997); National Immigration Forum, *Nicaraguan Adjustment and Central American Relief Act* (Nov. 1997).

55. In fiscal year 1995, INS asylum officers approved 3.4% of Salvadoran asylum applications, 7.1% of Guatemalan asylum applications, and 20.0% of Pakistani asylum applications. U.S. COMMITTEE FOR REFUGEES, 1995 STATISTICAL ISSUE, REFUGEE REPORTS 12 (December 31, 1995) (tabulating data from the U.S. INS) (figures for fiscal year 1995 are preliminary). Asylum approval rates for decisions by American immigration judges in the same period were 4.5% for Salvadorans, 7.0% for Guatemalans, and 9.5% for Pakistanis. *Id.* at 13. In comparison, 1995 asylum approval rates for the Canadian Immigration and Refugee Board were significantly higher for each group: 39.5% for Salvadorans, 58.4% for Guatemalans, and 73.7% for Pakistanis. Centre for Refugee Studies, *A Summary of Claims Processed by Immigration and Refugee Board*, REFUGEE, January 1996, at 33 (reporting data from Canada's Immigration and Refugee Board). These discrepancies between the U.S. and Canada, even when considering refugee claims from the same sending country, are troubling.

56. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 28, and 42 U.S.C.) [hereinafter AEDPA]; Illegal Immi-

intent and mandate of international refugee law. The domestic asylum process is currently even more inaccessible to refugees fleeing their countries of origin.

The most pernicious of these new laws requires immigration officers at U.S. borders to summarily remove any refugee who arrives undocumented or with fraudulent travel documents.⁵⁷ At the airport or other point of entry, the refugee must declare either intent to apply for asylum, or fear of persecution⁵⁸ before receiving any information about available procedures.⁵⁹ Failure to do so results in immediate summary removal without any administrative or judicial oversight.⁶⁰

Authorities will interview a refugee who acknowledges fear, to determine if the refugee has a "credible fear of persecution."⁶¹ While the law provides that the refugee must be allowed to consult with a person of her choosing, the statute cautions that the government is not responsible for the expense of such consultation, and the meeting cannot "unreasonably delay the process."⁶² Authorities may conduct the interview soon after the refugee's arrival in the U.S., either at the airport or at a detention center.⁶³ The statute stipulates that it is mandatory to hold the refugee, pending a decision.⁶⁴ Only after the refugee succeeds in establishing that she has a credible fear of persecution⁶⁵ will her asylum application pass into the normal application process during a removal proceeding.⁶⁶

gration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 and 18 U.S.C.) [hereinafter IIRIRA].

57. INA § 235(a)(1); 8 U.S.C. § 1225(a)(1) (1996). The categories of aliens subject to summary removal are those subject to INA § 212(a)(6)(A); 8 U.S.C. § 1182(a)(6)(A)(1992) (aliens present in the U.S. without being admitted or paroled or who arrive at a non-designated point of entry); INA § 212 (a)(6)(C)(i); 8 U.S.C. § 1182(a)(6)(C)(i) (1992) (aliens who seek to procure or have procured a visa or other documentation or admission in to the U.S. by fraud or willful misrepresentation); INA § 212(a)(6)(C)(ii); 8 U.S.C. § 1182(a)(6)(C)(ii) (1992) (aliens who falsely represent themselves as U.S. citizens for any purpose or benefit under the immigration laws); INA § 212(a)(7)(A)(1); 8 U.S.C. § 1182(a)(7)(A)(1) (1992) (aliens who are not in possession of valid documents for admission at time of application to enter). The Attorney General retains the discretionary authority to apply the summary removal procedures to any alien who has lived in the United States for two years or less. INA § 235(b)(1)(A)(iii)(I) and (II); 8 U.S.C. § 1225(b)(1)(A)(iii)(I) and (II) (1996). That decision is unreviewable. INA § 235(b)(1)(A)(iii)(I); 8 U.S.C. § 1225(b)(1)(A)(iii)(I) (1996).

58. INA § 235(b)(1)(A)(i); 8 U.S.C. § 1225(b)(1)(A)(i) (1996).

59. 8 C.F.R. § 235.3(b)(4). See also Pistone and Schrag, *The 1996 Immigration Act: Asylum and Expedited Removal—What the INS Should Do*, 73 INTERPRETER REL. 1565, 1572-5 (1996).

60. INA § 242 (a)(2)(A); 8 U.S.C. § 1252 (a)(2)(A) (1996).

61. INA § 235(b)(1)(A)(ii); 8 U.S.C. § 1225(b)(1)(A)(ii) (1996).

62. INA § 235(b)(1)(B)(iv); 8 U.S.C. § 235(b)(1)(B)(iv) (1996).

63. The INS has indicated that it intends to conduct most interviews at service detention facilities within 48 hours of an applicant's arrival. 62 Fed. Reg. 10,319 (1997).

64. The alien may be released only for a medical emergency or to meet a "legitimate law enforcement objective." 8 CFR § 253.3(b)(4)(ii); Interim Rule 62 Fed. Reg. at 10,356.

65. Credible fear of persecution is defined as:

a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208.

INA § 235(b)(1)(B)(v); 8 U.S.C. § 1225(b)(1)(B)(v) (1996).

66. INA § 235(b)(1)(B)(ii); 8 U.S.C. § 1225(b)(1)(B)(ii) (1996).

Even then, however, the refugee remains in detention pending a determination on the application's merits.⁶⁷

If the refugee fails to meet the burden of demonstrating a credible fear of persecution, she may seek a review of that decision before an Immigration Judge.⁶⁸ However, that hearing must occur within 24 hours or, at most, after no more than 7 days. Moreover, the Immigration Judge may conduct the hearing by telephone, on video, or in person.⁶⁹ For nearly all refugees, no administrative or judicial review of that decision is available.⁷⁰

These provisions are offensive to international standards in several critical respects. First, the new legislative enactments are fundamentally at odds with the circumstances which most refugees confront. For example, few refugees have the luxury of obtaining valid travel documents while fleeing persecution. It is common, then, for refugees to enter the U.S. with no travel documents, or papers obtained only to facilitate exit from the country of oppression. To punish refugees for failure to obtain proper documents amounts to punishing them because of their status as refugees.

Second, the summary removal procedure has few safeguards to protect bona fide refugees from *refoulement*, a guarantee required both by U.S. treaty and domestic legal obligations.⁷¹ The burden is on the refugee to declare a fear of persecution immediately upon arrival in the U.S. Few refugees will even be aware that such a declaration is required; others will be reluctant to speak of the reasons they left their home country to uniformed strangers in a foreign land.

Third, the credible fear standard by which a refugee must prove fear of persecution simply does not exist in international law. Under international standards articulated by the United Nations High Commissioner for Refugees (UNHCR), the appropriate screening standard for asylum-seekers at the border is whether their claims are "manifestly unfounded," a standard requiring far less proof than the United States' credible fear of persecution.⁷²

Finally, the mandatory detention provisions also offend international standards. The UNHCR Executive Committee has concluded that detention should

67. Release from detention is subject to the regulations governing parole of aliens. See Revised 8 CFR § 212.5(a).

68. INA § 235(b)(1)(B)(iii)(III); 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (1996).

69. *Id.*; see also 8 C.F.R. § 3.25(c).

70. Only an alien who alleges, under oath, that she is a lawful permanent resident, a refugee admitted under INA § 207 or a person granted asylum under INA § 208 may seek administrative review of the Immigration Judge's decision. INA § 235(b)(1)(C); 8 U.S.C. § 1225(b)(1)(C) (1996). Similarly, habeas corpus jurisdiction is limited to a determination whether the petitioner is an alien, whether the petition was ordered removed under INA § 235(b) and whether the petitioner can prove she is one of the above-listed categories. INA § 242(e)(2); 8 U.S.C. § 1252(e)(2) (1996). Otherwise, the statute strips courts of jurisdiction to review any decision relating to an individual in summary removal proceedings. INA § 242(a)(2)(A); 8 U.S.C. § 1252(a)(2)(A) (1996). The statute allows for a challenge to the validity of the expedited removal system and its implementing regulations and guidelines subject to strict venue and temporal limitations. INA § 242(e)(3)(A-D); 8 U.S.C. § 1252(e)(3)(A-D) (1996).

71. See *supra* notes 9-10, 21 and accompanying text.

72. Letter from Anne Willem Bijleveld, UNHCR Representative in Washington, to Sen. Orrin Hatch, (Sept. 20, 1996) (citing UNHCR Executive Committee Conclusion No. 30 (1983)) [hereinafter Bijleveld Letter] (on file with author).

normally be avoided, especially in situations in which the applicant has established the basis of her asylum claim.⁷³ International norms clearly mandate, at a minimum, releasing asylum-seekers once they have established eligibility under the credible fear of persecution standard.

One of the most egregious legislative revisions to the statutory asylum provisions created a one-year time limit within which an asylum-seeker must file a request for asylum in the United States.⁷⁴ Those who fail to meet the deadline will be ineligible for asylum and subject to removal. Exceptions to this restriction permit consideration of the late application, but only if (1) changed circumstances exist which materially affect the applicant's eligibility for asylum or (2) extraordinary circumstances caused the delay in the filing of the application.⁷⁵

This new provision also profoundly miscomprehends the situation of most asylum-seekers. Few are aware of the intricacies of U.S. asylum law when they arrive here. In addition to coping with the trauma of having fled dangerous and oppressive conditions and leaving family and friends behind, asylum-seekers must adjust to a new, unfamiliar environment. They are immediately concerned with trying to meet basic survival needs and not necessarily with the potential legal consequences of the passage of time. Further, many asylum-seekers are very wary of authority figures, such as government officials, and may be extremely reluctant to seek information or assistance from government offices.⁷⁶ In addition, the asylum process is complicated, requiring the assistance of a lawyer or other trained professional. Inexpensive or free legal services for asylum seekers are scarce and are unavailable through government-funded programs.⁷⁷ In view of these factors, especially the difficulties in securing assistance and preparing asylum requests, time limits on filing asylum requests are singularly inappropriate.⁷⁸

The UNHCR expressed grave concerns about a filing deadline in the following statement:

73. *Id.*

74. The applicant must demonstrate by clear and convincing evidence that she complied with the one year requirement. INA § 208(a)(2)(B); 8 U.S.C. § 1158(a)(2)(B) (1996). In addition, an alien who has previously applied for asylum and has been denied may not apply. INA § 208(a)(2)(C); 8 U.S.C. § 1158(a)(2)(B) (1996).

75. INA § 208(d)(6); 8 U.S.C. § 1158(d)(6) (1996).

76. *See, e.g.*, UNHCR HANDBOOK, *supra* note 29, at ¶ 198.

77. Legal Services Corporation funds can be used only for certain kinds of cases and to represent certain categories of people; aliens seeking asylum and withholding are not included in these categories. 45 C.F.R. § 1626.4 (1996). New restrictions prohibit legal services attorneys from using non-LSC funds for ineligible aliens as well.

78. Numerous advocates vociferously opposed the imposition of a time limit before the passage of IIRIRA. *See, e.g.*, Philip G. Schrag, *Don't Gut Political Asylum*, WASH. POST, Nov. 12, 1995, at C7; National Immigration Forum, *Summary Removal and Asylum Procedures Punish the Persecuted and Impede the INS*, Feb. 2, 1996 (on file with author); Letter from Niels Frenzen, Public Counsel to Volunteer Political Asylum Attorneys and Los Angeles Volunteer Lawyer Program (Jan. 24, 1996) (on file with author); Letter from the Committee to Preserve Asylum to the Senate Judiciary Committee (Dec. 21, 1995) (on file with author); Lawyers Committee for Human Rights, *Urgent Call for Action* (no date) (on file with author); Lawyers Committee for Human Rights, Refugee Project, *Help Preserve U.S. Asylum Law* (no date) (on file with author).

[F]ailure to submit an asylum request within a certain time limit should not lead to an asylum request being excluded from consideration as outlined in UNCHR Executive Committee Conclusion No. 15 (1979). The United States is obliged to protect refugees from return to danger regardless of whether a filing deadline has been met.⁷⁹

Perhaps this position was the inspiration for President Clinton's remarks upon signing the legislation that he would "seek to correct provisions in this bill that are inconsistent with international principles of refugee protection, including the imposition of rigid filing deadlines for asylum applications."⁸⁰ To date, the executive branch has indicated no intent to seek revisions of this section. Furthermore, despite marked changes in the asylum system,⁸¹ Congress continues to implement draconian measures that are illogical and unnecessary, endangering refugees and defying our international refugee law obligations.

V.

CONCLUSION

United States refugee law and policy continues to diverge from the aims and requirements of international refugee law. All branches of government continue to demonstrate a palpable lack of respect for the political values underlying the human rights protections for refugees, values enshrined in our founding documents and political culture. As a wealthy and powerful nation, the U.S. should set the standard for compliance with international refugee norms. To do so, the United States must charitably interpret the legal provisions that govern the assessment of refugee claims, treat refugees without discrimination, and craft legislation which would foster protection of refugees, thereby bringing the U.S. into further compliance with international human rights norms.

79. Bijleveld Letter, *supra* note 72.

80. Statement by President Clinton accompanying signing of the IIRIRA, White House Press Release, Office of the Press Secretary, *The White House Virtual Library*, (Oct. 1, 1996) <<http://library.whitehouse.gov>>.

81. The 1995 asylum regulations, *supra* note 52, streamlined the asylum system. Under those provisions, asylum officers perform a screening function, granting some cases after an interview with the applicant and referring most others to an immigration judge for a formal hearing. 8 C.F.R. §§ 208.9, 208.14. In most cases, asylum officers will not be required to issue written decisions following the interview. 8 C.F.R. §§ 208.14, 208.17. An asylum application may be used to begin removal if the asylum officer does not grant asylum. 8 C.F.R. § 208.3(c)(1). The asylum application also may be used to satisfy the INS' burden of proof for removal. 8 C.F.R. § 208.3(c)(7).

For a good overview and explanation of the 1995 regulations, see Jeanne A. Butterfield, *The New Asylum Regulations: A Practitioner's Guide*, in 95-01 IMMIGRATION BRIEFINGS 1 (1995). INS Commissioner Doris Meissner has claimed that the old asylum system was "out of control and fraught with abuse." William Branigin, *INS Chief Highlights Reform in Political Asylum System*, WASH. POST, Jan. 5, 1996, at A2. According to Meissner, the streamlined regulations have been a "dramatic success" in reducing fraud, as evidenced by the fact that asylum filings are down 57%. *Id.* See also Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 16 AM. U. J. INT'L L. & POL'Y 43 (1994) (discussing reasoning behind new regulations). *But see* Butterfield, *supra* at 3 (explaining misperceptions that contributed to "the perceived asylum crisis").