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

by
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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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contract that human rights law presupposes—that a state entity exists which is capable of and predisposed to ensuring these rights to citizens. The refugee is, however, by definition a person who is unable (or unwilling) to receive such protection from the state. 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. 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, 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. 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...
on account of [her] race, religion, nationality, membership in a particular social group or political opinion.\footnote{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").\footnote{10} Congress clearly intended the similarity of the two provisions when it revised the language of the withholding provision.\footnote{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.\footnote{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.\footnote{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;\footnote{14} in U.S. law, the provisions applied to an "alien" whose life or freedom would be threatened.\footnote{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 proceedings\footnote{16} was irrelevant to applicants for withholding of deportation.\footnote{17} Under the Stevic decision, an applicant for withholding must prove, by

\footnote{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.


\footnote{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.

\footnote{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).

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

\footnote{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.

\footnote{14} See supra note 10.

\footnote{15} Stevic, 467 U.S. at 409.

\footnote{16} See discussion, infra notes 22-23, and accompanying text.

\footnote{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.\textsuperscript{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.\textsuperscript{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 \textit{amicus} brief to the Court, urged an interpretation consistent with international law.\textsuperscript{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 \textit{non-refoulement} for all refugees—that a refugee cannot be returned to \textit{any} country in which her life or freedom would be threatened.\textsuperscript{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 \textit{INS v. Elias-Zacarias},\textsuperscript{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"\textsuperscript{23} and the eligibility criteria for recognition for asylum.\textsuperscript{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,\textsuperscript{25} concluded that the stat-

\textsuperscript{18} Id. at 429-30. In other words, in \textit{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. \textit{Id.} at 429-30.

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


\textsuperscript{21} \textit{Id.} at 9-10, 25, 28.


\textsuperscript{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.


\textsuperscript{24} Section 208(a) of the INA provides that:

\textit{[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).

ute must be taken at face value—that is, "political opinion" means the opinion of the applicant.\textsuperscript{26} The Court held that, under the facts of the case before it, the applicant's opinion could not be inferred from his actions.\textsuperscript{27} Further, the Court ruled that an applicant must demonstrate that the persecutor sought to punish the applicant because of those political opinions.\textsuperscript{28} The cramped legal analysis provided little substantive guidance to adjudicators and failed to account for the real difficulties of proof in asylum cases.\textsuperscript{29} Both the INS\textsuperscript{30} and some circuit courts,\textsuperscript{31} in their reviews of asylum decisions, have seen the Court's analysis in \textit{Elias-Zacarias} as a license to deny claims that have all the earmarks of meritorious cases.

In both \textit{Stovic} and \textit{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.

\section*{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

\begin{itemize}
  \item \textsuperscript{26} \textit{Elias-Zacarias}, 502 U.S. at 482.
  \item \textsuperscript{27} Id. at 482-83 & n.2.
  \item \textsuperscript{28} Id. at 483.
  \item \textsuperscript{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). \end{itemize}
overseas refugee processing and in-country asylum processing. 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. This tendency was most blatant in the U.S. treatment of refugees from El Salvador and Guatemala. 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. 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. 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).


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. 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%. 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. 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* (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.

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. This floating "Berlin Wall" meant that the U.S. turned away thousands of Haitian refugees, even during the repressive junta rule from 1991-

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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.


41. See id. at 799-800.


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

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. 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. 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. 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, 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. While major im-


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, concerns about equal treatment remain, both in broad policy and in individual determinations.

III. RECENT LEGISLATION

Two major legislative enactments 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

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[Notes and Citations]

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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.

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.\footnote{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).} At the airport or other point of entry, the refugee must declare either intent to apply for asylum, or fear of persecution\footnote{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).} before receiving any information about available procedures.\footnote{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).} Failure to do so results in immediate summary removal without any administrative or judicial oversight.\footnote{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.}

Authorities will interview a refugee who acknowledges fear, to determine if the refugee has a “credible fear of persecution.”\footnote{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).} 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.”\footnote{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.} Authorities may conduct the interview soon after the refugee’s arrival in the U.S., either at the airport or at a detention center.\footnote{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.} The statute stipulates that it is mandatory to hold the refugee, pending a decision.\footnote{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.} Only after the refugee succeeds in establishing that she has a credible fear of persecution will her asylum application pass into the normal application process during a removal proceeding.\footnote{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.}
Even then, however, the refugee remains in detention pending a determination on the application’s merits.\textsuperscript{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.\textsuperscript{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.\textsuperscript{69} For nearly all refugees, no administrative or judicial review of that decision is available.\textsuperscript{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 \textit{refoulement}, a guarantee required both by U.S. treaty and domestic legal obligations.\textsuperscript{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.\textsuperscript{72}

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

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


\textsuperscript{69} \textit{Id.}; \textit{see also} 8 C.F.R. § 3.25(c).

\textsuperscript{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 petition 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).

\textsuperscript{71} \textit{See supra} notes 9-10, 21 and accompanying text.

normally be avoided, especially in situations in which the applicant has established the basis of her asylum claim. 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. 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.

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. 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.

In view of these factors, especially the difficulties in securing assistance and preparing asylum requests, time limits on filing asylum requests are singularly inappropriate.

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).


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).
Failure 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.

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”).