Closing the Door on Asylum-Seekers: Persecution on Account of Political Opinion after INS v. Elias Zacarias

William John Wingert

Follow this and additional works at: http://lawdigitalcommons.bc.edu/twlj

Part of the Immigration Law Commons

Recommended Citation
CLOSING THE DOOR ON ASYLUM-SEEKERS: PERSECUTION ON ACCOUNT OF POLITICAL OPINION AFTER INS v. ELIAS ZACARIAS

I. INTRODUCTION

The civil war in Guatemala has taken a terrible toll. Since the mid-1970s, more than 100,000 civilians have been killed and another 40,000 have disappeared. In addition, the war has created 200,000 orphans and 50,000 widows. Like the conflicts in El Salvador and Nicaragua during the past decade, it has resulted in a hemorrhage of displaced persons fleeing from the violence of their homeland.

One evening in January 1987, eighteen-year-old Jairo Elias Zacarias was approached by two guerrillas near his home in Olintepeque, Guatemala. The men wore handkerchiefs over their faces and carried machine guns. The guerrillas tried to persuade the teenager to join their ranks. When Elias Zacarias refused, the men warned him to “think it [over] well” and promised that they would come back for him.

Afraid that the guerrillas would return to “take me and kill me,” Elias Zacarias fled Guatemala in March 1987. On July 12, 1987, he illegally entered the United States near Nogales, Arizona. He was immediately apprehended by officers of the Immigration and Naturalization Service (INS).

Elias Zacarias applied for asylum and the withholding of deportation, claiming that he faced persecution on account of his political opinion. The case of Zacarias v. INS was appealed to the Supreme Court of the United States, where the Court decided the fate of thousands seeking asylum.

3 Id.
5 Tamar Lewin, Supreme Court May Decide Fate of Thousands Seeking Asylum, N.Y. TIMES, Jan. 3, 1992, at 28.
7 Id.
8 Id.
10 Zacarias, 921 F.2d at 847.
11 Lewin, supra note 5, at 28.
12 Id.
political opinion if returned to Guatemala. The asylum-seeker based his claim on Ninth Circuit case law that held forced recruitment by guerrillas to be persecution on account of political opinion for the purposes of the Refugee Act of 1980. The Board of Immigration Appeals (BIA or Board) denied relief, only to have that judgment overruled by the Ninth Circuit Court of Appeals.

On January 22, 1992, the United States Supreme Court reversed the Court of Appeals’ decision granting Elias Zacarias asylum and ordered him deported. The Court determined “persecution on account of . . . political opinion” to be persecution on account of the victim’s political opinion, not the persecutor’s. In reaching that determination, the Court required that the asylum applicant offer some proof that the oppressor’s motive for persecuting him or her was related to the alien’s political stance.

In vindicating the BIA’s position, the Supreme Court put an end to an eight-year long conflict between the Ninth Circuit and the Board over asylum eligibility for individuals who have been targeted for military service by insurgents fighting in their country’s civil war. The decision also places an added burden on asylum applicants fleeing forced recruitment to provide evidence of their oppressors’ motives. If generally applied to petitioners fearing persecution on account of race, religion, nationality, membership in a

---

13 Zacarias, 921 F.2d at 847.
14 The Ninth Circuit has been very active in the area of immigration law in general and in asylum cases in particular. It handles a large number of the cases due to the presence of hundreds of thousands of asylum-seekers living there and the location of a major INS detention center within its jurisdiction. Deborah Anker & Carolyn P. Blum, New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in INS v. Cardoza-Fonseca, 1 INT’L J. REFUGEE L. 67, 68 n.6 (1989). In 1989 and 1990, the circuit handled half of the nation’s immigration litigation. Aliens won 72% of the cases that reached the Ninth Circuit Court of Appeals. This compares with a 38% success rate for aliens in the other circuits. Susan Freinkel, INS, With New Attitude, Setstle Six Class Actions; Offers ‘Out of the Blue,’ LEGAL TIMES, Jan. 27, 1992, at 2.
16 Aliens’ claims for relief from deportation or exclusion are initially presented before immigration courts. The BIA hears appeals from these courts. The BIA’s decisions are reviewed by the court of appeals of the circuit in which the claims arise. David A. Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, 138 U. PA. L. REV. 1247, 1313, 1316 (1990).
17 Zacarias v. INS, 921 F.2d 844, 855 (9th Cir. 1990).
19 Id. at 816.
20 Id. at 817.
particular social group, or political opinion,21 many meritorious asylum claims could fail for lack of such proof.22

There is evidence to suggest that the Supreme Court intends the *Elias Zacarias* decision to be broadly applied. In *Canas-Segovia v. INS*, the Ninth Circuit Court of Appeals granted asylum to two Salvadoran conscientious objectors fleeing punishment under a law of general applicability mandating military service for all men between the ages of eighteen and thirty.23 The Court of Appeals found the severe punishment usually inflicted on those who refuse to serve to constitute persecution on account of religion.24 On February 24, 1992, the Supreme Court vacated the judgment granting asylum to the aliens and remanded it for further consideration in light of *INS v. Elias Zacarias*.25

This Note argues that the *Elias Zacarias* decision, which requires the alien to produce evidence of the persecutor’s state of mind, contravenes the obligation of United States law to effectuate international standards of humanitarian relief. In Part II, the Note examines the recent history of U.S. refugee policy, together with the legislative history and judicial interpretation of the statutory language governing asylum claims. That examination demonstrates an intent to craft U.S. immigration law which domesticates United Nations standards. Part III discusses the case law culminating in the Supreme Court’s decision. The discussion focuses on the conflict between the Ninth Circuit and the BIA over the interpretation of “persecution on account of . . . political opinion” in the context of forced recruitment by guerrillas. Part IV discusses the *Elias Zacarias* decision and assesses its potential impact on subsequent asylum adjudication. Part V critiques the *Elias Zacarias* decision as contrary to the stated intent of U.S. refugee policy and international refugee law. Part VI examines alternatives to *Elias Zacarias* and argues for a return to the *Mogharrabi* standard as more closely conforming to United Nations standards. The Note concludes that in *INS v. Elias Zacarias* the Supreme Court erred in requiring asylees to provide proof of their persecutor’s motives.

---

22 See Lewin, supra note 5, at 28. The article reports that over 100,000 petitions for political asylum are pending. The majority of these are from citizens of Guatemala, El Salvador and Nicaragua. Many involve instances of forced recruitment by insurgents. Id.
23 *Canas-Segovia v. INS*, 902 F.2d 717, 720 (9th Cir. 1990), vacated and remanded, 112 S. Ct. 1152 (1992).
24 *Id.* at 729.
II. The Refugee Act of 1980

The purpose of the Refugee Act of 1980 is to effectuate a coherent refugee policy which conforms to internationally recognized standards of refugee law. This is an attempt to graft the United Nations refugee definition and provision against forced repatriation onto an older practice of regarding refugee relief as an adjunct to U.S. foreign policy. It has not, however, produced a clearly reasoned approach to achieving the Act's goal of conferring a nondiscriminatory humanitarian benefit on exiles. One result of this lack of clarity was the conflict over statutory interpretation that had arisen among the circuits and the BIA over forced recruitment as a form of persecution on account of political opinion for granting asylum.

A. History of U.S. Refugee Policy from World War II to 1980

For most of the period since the end of World War II, the United States' handling of refugee issues was basically a series of temporary responses to emergency situations. The U.S. government refrained from a systematic application of a well thought-out policy. For the most part, legislative enactments in this area during the early Cold War period reflected immediate foreign policy objectives. The resulting legislation consequently lacked criteria for

---

26 Refugee Act, supra note 15.
28 For example, the legislative history reveals that the Refugee Relief Act, Pub. L. No. 203, 67 Stat. 400 (1953), was "designed to implement certain phases of American foreign policy. It is not intended to represent any precedent or commitment on the part . . . of the Government of the United States . . . ." H.R. REP. No. 1069, 83rd Cong., 1st Sess. 1 (1953), reprinted in 1953 U.S.C.C.A.N. 2122, 2123.
30 Central to this controversy is the acceptance of neutrality as a form of political opinion for the purposes of the Act. The Ninth Circuit Court of Appeals formulated the case law in Bolanos-Hernandez v. INS, 767 F.2d 1277, 1287 (9th Cir. 1984). Other circuits have been ambivalent about following the Ninth Circuit's lead. M.A. v. INS, 899 F.2d 304, 315 (4th Cir. 1990) (declining to accept or reject neutrality as "political opinion" for statutory ground for refugee relief); Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1298 (11th Cir. 1990) (rejecting neutrality as political opinion for the purposes of Refugee Act); but see Novoa-Umania v. INS, 896 F.2d 1, 3 (1st Cir. 1990) (setting forth circumstances when persecution of neutrals may constitute political opinion).
31 Anker & Posner, supra note 27, at 12.
32 See id. at 12–13.
33 Id. at 13.
determining refugee eligibility because the statutes granting refugee status varied with the changes in the international political climate.\textsuperscript{34} For example, in 1953 the Refugee Relief Act conferred refugee status on individuals fleeing communist countries.\textsuperscript{35} In 1957, in the wake of the Suez Crisis, that act was amended to include countries of the Middle East.\textsuperscript{36}

The legislative history reveals that these enactments were not intended to have any precedential value, lest they inhibit the government's flexibility in conducting foreign policy.\textsuperscript{37} As a result, a rather haphazard approach evolved.\textsuperscript{38} Furthermore, U.S. refugee policy failed to incorporate the international standards set forth in the United Nations Convention Relating to the Status of Refugees (1951 Convention).\textsuperscript{39}

In order to preserve its credibility within the international community, the U.S. government formulated a more cohesive refugee admissions policy, which was in line with the United Nations standards.\textsuperscript{40} The result was the Refugee Act of 1980.\textsuperscript{41} Principally, it incorporated the United Nations refugee definition,\textsuperscript{42} which Congress intended to be geographically and ideologically nondiscriminatory.\textsuperscript{43} The Act also codified the nonrefoulement obligations.\textsuperscript{44}

\begin{itemize}
  \item \textsuperscript{34} See id.
  \item \textsuperscript{35} Pub. L. No. 203, 67 Stat. 400 (1953).
  \item \textsuperscript{36} Pub. L. No. 85-316, 71 Stat. 639 (1957).
  \item \textsuperscript{37} Anker & Posner, supra note 27, at 13 n.12.
  \item \textsuperscript{38} See id. at 41.
  \item \textsuperscript{39} Opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137. Although the United States took an active role in the discussions leading up to the formulation of the document, it never became a signatory. This was due to various reasons not directly related to the contents of the Convention in its final form. Martin, supra note 16, at 1257.
  \item \textsuperscript{40} Anker & Posner, supra note 27, at 41.
  \item \textsuperscript{41} Refugee Act, supra note 15.
  \item \textsuperscript{42} According to Article 1 A(2) of the 1951 Convention, a "refugee" is an individual who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it." July 28, 1951, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 137, 152, as modified by Article 1.2 of the United Nations Protocol Relating to the Status of Refugees [hereinafter 1967 Protocol], Jan. 31, 1967, 19 U.S.T. 6223, 6223, 606 U.N.T.S. 268, 268.
  \item \textsuperscript{43} Anker & Posner, supra note 27, at 43, 60.
  \item \textsuperscript{44} The nonrefoulement provision is contained in Article 33 of the 1951 Convention, which was incorporated into the 1967 Protocol. It mandates that refugees illegally present in signatory nations are not to be returned to countries where their lives or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. July 28, 1951, art. 33(1), 19 U.S.T. 6259, 6276, 189 U.N.T.S. 137, 176.
\end{itemize}
which the United States assumed when it acceded to the 1967 Protocol\textsuperscript{45} in 1968.\textsuperscript{46} Finally, the Refugee Act contained the newly enacted section 208(a),\textsuperscript{47} which gave a statutory basis to asylum proceedings for the first time.\textsuperscript{48}

The enactment of the Act, however, did not immediately achieve the dual goals of conformity to international standards and of more efficient organization that Congress intended.\textsuperscript{49} On its face, the incorporation of the United Nations refugee definition into the statute appeared to satisfy the first objective.\textsuperscript{50} The passage of time, though, revealed the existence of a significant discrepancy between the concepts that that language encapsulated and the then well-established practice of conducting refugee relief programs in the shadow of U.S. foreign policy objectives.\textsuperscript{51}

## B. Statutory Language

In order for an alien, who is present within the United States or at its borders, to be eligible for asylum\textsuperscript{52} or for the withholding of deportation,\textsuperscript{53} he or she must be determined by the Attorney General to be a "refugee" under the terms of the Immigration and Nationality Act\textsuperscript{54} (INA), as amended by the Act.\textsuperscript{55} Section 101(a)(42) of the INA defines "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 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{56}

\textsuperscript{45} 1967 Protocol, supra note 42.
\textsuperscript{46} Martin, supra note 16, at 1259.
\textsuperscript{47} INA § 208(a), 8 U.S.C. § 1158(a) (1988).
\textsuperscript{49} See generally Anker & Posner, supra note 27, at 64–66.
\textsuperscript{50} See id. at 60.
\textsuperscript{51} See id. at 72–73.
\textsuperscript{52} INA § 208(a), 8 U.S.C. § 1158(a) (1988).
\textsuperscript{53} INA § 243(h), 8 U.S.C. § 1253(h) (1988). The Refugee Act extended this form of relief to aliens present at the border. Anker, supra note 48, at 2 n.3.
\textsuperscript{55} Refugee Act, supra note 15.
Once this determination has been made, the alien becomes eligible for asylum under INA section 208(a) and for the withholding of deportation under INA section 243(h).

Under section 208(a), a refugee establishes eligibility for a grant of asylum by demonstrating a "well-founded fear" of persecution. An asylum applicant demonstrates this by showing that she or he risks a reasonable possibility of persecution in her or his homeland. Although a petitioner may successfully demonstrate a well-founded fear, the Attorney General has the discretion to refuse to grant a refugee asylum in certain instances. Should the request be granted, the asylee is protected against deportation and becomes eligible for lawful permanent resident status after one year's resi-

---

58 8 U.S.C. § 1253(h) (1988). Under § 243(h), the refugee establishes a claim for the withholding of deportation by showing that he or she will be exposed to a clear probability of persecution in the country to which the government is attempting to deport him or her. INS v. Stevic, 467 U.S. 407, 430 (1984). The clear-probability standard is satisfied if the refugee demonstrates that it is more likely than not that he or she will be subject to persecution. Id. at 429–30. Should the refugee satisfy the statutory burden of § 243(h), the withholding of deportation is mandatory. INA § 243(h)(1), 8 U.S.C. § 1253(h)(1) (1988). This form of relief, however, is country-specific, rather than general. Matter of Salim, 18 I. & N. Dec. 311, 315 (BIA 1982). Even if the refugee defeats deportation to the persecuting country, he or she may be deported to any other country which will accept him or her. Id. (applicant protected from deportation to Afghanistan, but not from deportation to Pakistan). Moreover, a withholding of deportation does not confer permanent status in the United States. Anker & Blum, supra note 14, at 68 n.2. A non-deportable alien can live as a refugee in this country only as long as the threat of persecution persists. INA § 243(h)(1), 8 U.S.C. § 1253(h)(1) (1988).
60 Cardoza-Fonseca, 480 U.S. at 423–24, 448. The test for this standard is "a reasonable possibility of persecution." Martin, supra note 16, at 1264 and accompanying notes.
61 INA § 208(a), 8 U.S.C. § 1158(a) (1988). The limits of discretion have been evolving ever since asylum relief was codified by the Refugee Act of 1980. Initially, discretionary denials of asylum were limited to otherwise qualified aliens who fraudulently avoided orderly refugee procedures. Matter of Salim, 18 I. & N. Dec. 311, 316 (BIA 1982) (fraudulently obtained passport triggers denial of asylum). In 1987 the BIA adopted a more generous standard, which takes into account the totality of the circumstances occasioning an alien's fraudulent entry into the country. Matter of Pula, 19 I. & N. Dec. 467, 473, 475 (BIA 1987) (fraudulent entry triggers no discretionary denial of asylum to alien with family in the United States); Anker & Blum, supra note 14, at 70–72. In INS v. Doherty, the Supreme Court recently declined to decide whether foreign policy considerations may also form the basis for discretionary denials of asylum. 112 S. Ct. 719, 724 (1992). The Court, however, held that the Attorney General has broad discretion to grant or deny motions to reopen deportation proceedings. Id.
This statutory language was further specified by a subsequent Supreme Court decision in which the Court relaxed the standard that the BIA was applying to asylum claims.

In 1987 the Supreme Court held in *INS v. Cardoza-Fonseca* a "well-founded fear of persecution" standard applicable to section 208(a) claims. While declining to define that standard precisely, the Court noted that it was more generous than the clear-probability standard, which the Court had previously found applicable to the withholding of deportation claims under section 243(h). It is significant that the Court framed its decision as reflecting relevant distinctions in the 1967 Protocol. The Court found that the legislative history of the Act indicated that Congress had intended to write these United Nations provisions into law.

The effect of the *Cardoza-Fonseca* decision was to read section 208(a) as making eligibility requirements for refugee status coterminous with those for asylum grants. This interpretation, in turn, created "a broad class of refugees who are eligible for a discretionary grant of asylum, and a narrower class of aliens who are given a statutory right not to be deported to the country where they are in danger . . . ." In authorizing a more generous standard for asylum eligibility than for the withholding of deportation, however, the Court implied that the Attorney General was free to rely on his or her discretionary power in denying eligible refugees asylum relief.

In light of the Court's formulation of the Attorney General's discretionary power, many observers initially predicted that *Cardoza-Fonseca* would move the focus of asylum claims away from a debate

---

65 *Id.*
66 *Id.* at 423–24. The well-founded fear standard is composed of two components. The subjective element is the alien's belief that he or she is at risk. *Id.* at 430–31. The objective element is evidence that the risk is a reasonable possibility. *Id.* at 440. The Court implied that as little as a one-in-ten chance of persecution was sufficient to satisfy the standard's requirements. See *id.*
68 *Cardoza-Fonseca*, 480 U.S. at 424.
69 *Id.* ("The Act's establishment of a broad class of refugees who are eligible for a discretionary grant of asylum . . . mirrors the provisions of the United Nations Protocol Relating to the Status of Refugees, which provided the motivation for the enactment of the Refugee Act of 1980.").
70 See *id.* at 423–24. Compare U.N. *Definition supra* note 56 and accompanying text. INA § 208(a), 8 U.S.C. 1158(a) (1988) applies this definition to those seeking asylum "if the Attorney General determines that such alien is a refugee within the meaning of § 1101(a)(42)(A) of this title."
71 *Cardoza-Fonseca*, 480 U.S. at 424.
72 *Id.* at 444–45, 450.
over legal standards and onto credibility determinations and discretionary denials. That result, however, did not occur. Although the Board initially resisted judicial efforts to broaden asylum eligibility by applying too strict a standard to 208(a) claims, it did not follow the Court's suggestion of expanded use of discretionary denials. Rather, after being corrected by the Cardoza-Fonseca Court, the BIA began narrowly interpreting the statutory grounds for determining what constitutes persecution based on the five areas set forth in the Act in order to achieve the same end, as the history of the forced recruitment cases illustrates.

III. THE FORCED RECRUITMENT CASES

The principle question that cases involving forced recruitment by guerrillas raise is what constitutes political opinion under the Act. The BIA construes political opinion to mean that an individual affirmatively supports one of two opposing sides in a political conflict. In addition to this, the Ninth Circuit Court of Appeals recognizes as political opinion a stance which an opposing side attributes

73 The Cardoza-Fonseca Court determined that the subjective element of the well-founded fear standard is satisfied if the alien attests to the fact that his or her fear is real. Obviously, this area is open to self-serving statements. It is therefore important that adjudicators accurately assess the petitioner's credibility. 480 U.S. at 431. This area is rather difficult: courts often confuse the question of whether evidence satisfies the burden of proof with whether evidence is believable. Anker & Blum, supra note 14, at 72. An adequate discussion of credibility issues is beyond the scope of this Note. See id. at 72-76 (discussing credibility analysis).

74 Anker & Blum, supra note 14, at 69.

75 Id. at 70.

76 Id. at 445.

77 In fact, it appears as if the Board is limiting discretionary denials of asylum in the absence of adverse factors. See discussion supra note 61.

78 The INS admitted to discriminating against Guatemalan and Salvadoran asylum-seekers based on foreign policy objectives in American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991). See also Susan Freinkel, INS Moving Away From Its No-Settle Strategy, N.J. L.J., Jan. 20, 1992, at 4. Moreover, the Board's stated resistance to change in this area is based on a fear of substantially increasing refugee admissions through a relaxation of standards. Petitioner's Reply Brief at 13, INS v. Elias Zacarias, 112 S. Ct. 812 (1992) (No. 90-1342). There is, however, another possible rationale for scrutinizing these claims more closely: preventing the circumvention of normal immigration procedures. The mere assertion of an asylum claim accords the alien rights to work and travel in the United States while his or her case is being adjudicated. If the claim is successful, the asylee is protected from prosecution for entering United States territory by knowingly circumventing immigration laws. In addition, asylees' access to permanent residency rights is expedited significantly in contrast to other immigrants who may be required to wait years to obtain this privilege. Martin, supra note 16, at 1267-68, 1288-89.

79 Anker & Blum, supra note 14, at 70.

to an individual, whether or not the person actually holds it.\textsuperscript{81} This is imputed political opinion. Furthermore, the Ninth Circuit recognizes neutrality as a third type of political opinion.\textsuperscript{82} This is an affirmative choice not to support any side.\textsuperscript{83} At issue in the forced recruitment cases is whether the refusal to engage in combat constitutes a political choice for neutrality.

A. Neutrality as Political Opinion

The Ninth Circuit first examined the interpretation of "persecution on account of . . . political opinion" in the context of a Central American civil war in 1984. In \textit{Bolanos-Hernandez v. INS}, a Salvadoran asylum-seeker had been affiliated with both the army and a voluntary civilian police squad that aided the government in preventing guerrilla infiltration.\textsuperscript{84} After severing his ties with these right-wing organizations, Bolanos-Hernandez was approached by the guerrillas who wanted him to use his connections to infiltrate the government.\textsuperscript{85} The guerrillas told Bolanos-Hernandez that if he refused, they would kill him if he did not leave the country.\textsuperscript{86} Because five of his friends, and possibly his brother, had been executed by the guerrillas under similar circumstances, Bolanos-Hernandez fled El Salvador eight days later.\textsuperscript{87}

The Court of Appeals held that Bolanos-Hernandez's refusal to take sides in the civil war constituted neutrality.\textsuperscript{88} Moreover, the court found that by choosing neutrality Bolanos-Hernandez expressed an opinion and took a political stance, which was a political opinion for the purposes of granting relief under the Act.\textsuperscript{89}

In construing Bolanos-Hernandez's neutrality as a political opinion, the court evaluated the applicant's persecution claim under a four-pronged test to determine: 1) if there was a threat to life or freedom, 2) if it was made by the government or a group that the government was unable to control, 3) if the persecution resulted from the petitioner's political beliefs, and 4) if the petitioner was a danger or a security risk to the United States.\textsuperscript{90} Under the third

\textsuperscript{81} Hernandez-Ortiz v. INS, 777 F.2d 509, 517 (9th Cir. 1985).
\textsuperscript{82} Bolanos-Hernandez v. INS, 767 F.2d 1277, 1287 (9th Cir. 1984).
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 1280.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 1287.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 1284.
prong of this standard, the Court of Appeals noted that Bolanos-Hernandez had consciously chosen not to join either side in the conflict.\textsuperscript{91} The court was careful, though, to distinguish this neutrality from mere political indifference.\textsuperscript{92} The court acknowledged that a lack of political involvement in some instances could conceivably not constitute neutrality under this standard.\textsuperscript{93} The court refused to elaborate on the distinction, however.\textsuperscript{94} Rather, the court determined on these facts that Bolanos-Hernandez’s neutrality was a sufficiently overt manifestation of a political stance for the purposes of granting asylum.\textsuperscript{95} In arriving at this decision, the Ninth Circuit attempted to broaden the standard for determining what constitutes political opinion under the Act.

B. The BIA’S Forced Recruitment Jurisprudence

1. The Board’s Political Opinion Standard

The Board, on the other hand, did not embrace the Ninth Circuit’s neutrality doctrine.\textsuperscript{96} After the Supreme Court’s \textit{Cardoza-Fonseca} decision, the BIA revised the test it had previously set forth in \textit{Matter of Acosta} for establishing a well-founded fear of persecution on account of political opinion.\textsuperscript{97} In \textit{Matter of Mogharrabi}, the Board held, under its reformulated four-pronged standard, that the petitioner must furnish evidence \textit{“1) that the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; 2) that the persecutor is already aware, or could . . . become aware, that the alien possesses this belief or characteristic; 3) that the persecutor has the capability of punishing the alien; and 4) that the persecutor has the inclination to punish the alien.”}\textsuperscript{98}

\textsuperscript{91} Id. at 1286.
\textsuperscript{92} Id. at 1287 n.18.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 1287.
\textsuperscript{96} See Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1298 (11th Cir. 1990).
\textsuperscript{97} 19 I. & N. Dec. 211, 216 (BIA 1985). Mogharrabi’s well-founded fear standard is virtually identical to the Acosta standard except that the second element no longer contains the phrase “could easily become aware.” Matter of Mogharrabi, 19 I. & N. Dec. 439, 446 (BIA 1987). The BIA changed the second requirement by omitting the word “easily” from that phrase in order to lighten the applicant’s burden of proof to conform with Cardoza-Fonseca. Id.
\textsuperscript{98} 19 I. & N. Dec. 439, 446 (BIA 1987) (granting asylum to Iranian student who demonstrated against the Khomeini government).
In devising this test, the BIA took pains to distinguish this fear from fear arising from retribution over purely personal matters or from the general conditions of violence and unrest in the country at large.\textsuperscript{99} The latter fear would not constitute the basis for a claim of persecution on account of political opinion.\textsuperscript{100} The Board in \textit{Mogharrabi} also determined that an asylum applicant demonstrates a well-founded fear of persecution by showing that a reasonable person in similar circumstances would fear persecution.\textsuperscript{101} Thus, in \textit{Mogharrabi}, the BIA implicitly seemed to reject the Ninth Circuit's determination that neutrality was a political opinion by asserting that an asylee must actually possess a belief which a persecutor opposes on political grounds.

2. The Forced Recruitment Cases

The BIA first applied its analysis to a case involving forced recruitment by Central American guerrillas in 1988 in \textit{Matter of Maldonado-Cruz}.\textsuperscript{102} In that case, the Salvadoran asylum applicant was forcibly removed from his farm by a group of twenty-five insurgents.\textsuperscript{103} He received two days' worth of indoctrination.\textsuperscript{104} During that time, the guerrillas executed one of his friends, who had been similarly abducted, for attempting to escape.\textsuperscript{105} On the following day, Maldonado-Cruz accompanied the guerrilla unit on a raid for supplies on his home town.\textsuperscript{106} He fled to San Salvador the very next night.\textsuperscript{107} Shortly after learning through some neighbors from his home area that the insurgents were looking for him, he left El Salvador.\textsuperscript{108} Through letters from his mother, Maldonado-Cruz...

\textsuperscript{99} \textit{Id.} at 447.
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.} at 445.
\textsuperscript{102} \textit{19 I. & N. Dec. 509} (BIA 1988), \textit{rev'd}, Maldonado-Cruz v. \textit{INS}, 883 F.2d 788 (9th Cir. 1989). The BIA only recognizes circuit court decisions as precedent within the circuit that issued them. This practice limits the effects of a court decision to one particular circuit, thus enabling the BIA to cite as precedent elsewhere its decisions that have already been overruled by a court of appeals. For example, Maldonado-Cruz v. \textit{INS}, 883 F.2d 788 (9th Cir. 1989) and \textit{Matter of Maldonado-Cruz}, \textit{19 I. & N. Dec. 509} (BIA 1988) are the same case, but have different holdings that reflect the different approaches of the Ninth Circuit Court of Appeals and the BIA. See \textit{Perlera-Escobar v. Executive Office for Immigration}, 894 F.2d 1292, 1297 n.4 (9th Cir. 1990).
\textsuperscript{103} \textit{Maldonado-Cruz}, 883 F.2d at 789.
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.} at 789 n.1.
\textsuperscript{106} \textit{Id.} at 789.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.}
learned that the guerrillas continued to seek him out until she convinced them that he was abroad. The BIA refused to grant Maldonado-Cruz asylum status. The Board noted that the guerrillas did not consider the petitioner to entertain any political belief that they found offensive. Rather, the Board determined that the insurgents' threat of harming Maldonado-Cruz stemmed from a need to maintain military discipline. Finding the punishment of deserters devoid of any intent to inflict harm on account of political opinion, the BIA denied the asylum applicant's claim.

Shortly after its decision in Maldonado-Cruz, the BIA underscored the same approach in Matter of Vigil. In that decision, the Board denied asylum to a young male petitioner who claimed to be threatened by forced recruitment by guerrillas because he was neutral in the Salvadoran civil war. Vigil cited three incidents as the basis of his claim of persecution on account of political opinion. First, he feared for his life after having seen the decapitated corpse of a stranger who was his age. Second, guerrillas forcibly recruited some participants at a soccer game that the petitioner missed due to illness. Third, a gun battle broke out in his home town between the insurgents and government forces on election day. Vigil had to hide under his bed for eight hours in order to avoid injury.

Noting the alien's admission that he had kept his neutrality secret, the BIA distinguished Vigil's neutrality from Bolanos-Hernandez' neutrality. The Board concluded that Vigil had not manifested a political stance that was sufficiently public to have elicited persecution.

109 Id.
111 Id. at 514.
112 Id. at 517.
113 Id.
114 Id. at 518.
116 Id. at 575.
117 Id.
118 Id.
119 Id.
120 Id. at 575–76.
121 Id. at 576.
122 Id.
123 Id. at 576–77.
The BIA also distinguished the guerrillas' intent to recruit from their intent to persecute.\textsuperscript{124} The purpose of recruitment is to supply the insurgents with soldiers and not to persecute young men who are recruited.\textsuperscript{125} The Board then held that recruitment did not constitute persecution on account of political opinion for the purposes of the Act.\textsuperscript{126}

\textit{Vigil} and \textit{Maldonado-Cruz} established that the BIA will examine the group's motivation for threatening the petitioner with harm in analyzing a claim of persecution on account of political opinion made in the context of a civil war under the \textit{Mogharrabi} standard.\textsuperscript{127} The Board will not view every act of violence committed by the group as necessarily reflecting a desire to persecute.\textsuperscript{128} Unless a group threatens to punish an individual for entertaining an opposing political stance, the BIA will not grant asylum claims on this ground.\textsuperscript{129} These Board decisions set the stage for a direct confrontation with the Ninth Circuit's position on what constitutes persecution on account of political opinion in this context.

\textbf{C. The Ninth Circuit's Forced Recruitment Jurisprudence}

The Ninth Circuit Court of Appeals rejected the BIA's approach when it reviewed the Board's decision in \textit{Maldonado-Cruz}.\textsuperscript{130} Relying on its own reasoning from \textit{Bolanos-Hernandez v. INS},\textsuperscript{131} the court reversed the BIA's ruling and held that an alien fleeing forced recruitment by guerrillas was threatened with persecution on account of political opinion.\textsuperscript{132} As in \textit{Bolanos-Hernandez}, the Ninth Circuit looked to the general statutory intent of "persecution on account of... political opinion" and found neutrality to be sufficient to constitute political opinion.\textsuperscript{133}

Applying its analysis in \textit{Bolanos-Hernandez} to the facts before it in \textit{Maldonado-Cruz}, the Court of Appeals cited the petitioner's refusal to join the guerrillas as a manifestation of his political opinion of neutrality.\textsuperscript{134} The court noted that Maldonado-Cruz was

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{124} \textit{Id.} at 577.
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Id.} at 578.
\item \textsuperscript{127} \textit{Id.} at 577–78; Matter of Maldonado-Cruz, 19 l. \& N. Dec. 509, 513 (BIA 1988).
\item \textsuperscript{128} See Matter of Maldonado-Cruz, 19 l. \& N. Dec. at 513.
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} Maldonado-Cruz v. INS, 883 F.2d 788, 791 (9th Cir. 1989).
\item \textsuperscript{131} 767 F.2d 1277 (9th Cir. 1984).
\item \textsuperscript{132} \textit{Maldonado-Cruz}, 883 F.2d at 791.
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.}
\end{itemize}
\end{footnotesize}
abducted by the guerrillas against his will and that the insurgents persistently sought him out at his home after he escaped from them. Consequently, the court held that the petitioner had satisfied both the clear-probability and the well-founded fear standards that he risked persecution on account of his neutral political belief.

The Ninth Circuit's analysis closely paralleled the BIA's test of persecution on account of political opinion in Mogharrabi in many ways. Succinctly stated, the Board requires that an alien possess a political belief of which a persecutor could become aware and which the persecutor has both the desire and ability to overcome. In Bolanos-Hernandez and Maldonado-Cruz, the Court of Appeals found that the asylees' refusal to aid the guerrillas' cause was a political opinion, that their fleeing recruitment was an overt manifestation of that political stance, and that the guerrillas' killing of their friends under similar circumstances was an indication that the petitioners were reasonably at risk.

The crucial difference between the two approaches lay in the understanding of what constitutes political opinion. Here the gap between the Ninth Circuit Court of Appeals and the BIA widened after Maldonado-Cruz. The Board in Maldonado-Cruz required a demonstration that a persecutor is acting pursuant to political motives for the applicant's claim to succeed. In presenting its analysis, the BIA rejected the presumption that evidence of imminent punishment by itself is sufficient to prove persecution. Rather, the Board discussed various reasons why the guerrillas might seek to punish an individual. The BIA noted that punishing deserters was necessary to maintain order within the guerrilla unit. The Board concluded that the guerrillas had no intention to inflict harm on account of political opinion when they inflicted punishment in order to maintain military discipline.

135 Id. at 793.
136 Id. The Ninth Circuit Court of Appeals accepts general documentary evidence as sufficient to establish an asylum claim. It requires more specific evidence of the likelihood that the alien is at serious risk in order to satisfy the clear-probability standard for withholding of deportation. It goes without saying that if an applicant meets the latter requirements, he or she satisfies the former as well. See infra notes 158–161 and accompanying text.
137 See supra note 98 and accompanying text.
138 Maldonado-Cruz, 883 F.2d at 791; Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286, 1287 (9th Cir. 1984).
140 Id. at 513.
141 Id. at 514–15.
142 Id. at 515.
143 Id. at 517.
In rejecting the BIA’s attempt to distinguish the disciplining of a deserter from persecution on account of political opinion, the Court of Appeals showed itself to be less inclined than the Board to look deeply into the nature of the threat. The court implied that once it had determined that a group was a “political entity,” any punishment inflicted by the group would fall within the meaning of persecution on account of political opinion. The court distinguished this from “random violence” by noting that the guerrillas had singled out the asylee for punishment. By taking this approach, the court avoided scrutinizing the persecuting group’s motives for its actions. In 1990 the conflict over the importance of the oppressor’s motivation finally came to a head in Zacarias v. INS.

The BIA denied Elias Zacarias’ claims for withholding deportation and asylum relief because it concluded that Guatemalan guerrillas do not practice forced recruitment. The denial was supported by a routine advisory letter from the State Department. That letter mentioned in passing that forced recruitment was in fact practiced by Guatemalan guerrillas. Citing this practice referred to in the letter, the Court of Appeals reviewed the BIA’s factual findings under the “substantial evidence” standard and found them substantially unreasonable.

---

144 See Maldonado-Cruz v. INS, 883 F.2d 788, 791 (9th Cir. 1989).
145 Id. at 791–92.
146 See id. at 791.
147 921 F.2d 844 (9th Cir. 1990); see discussion of facts supra notes 5–12 and accompanying text.
148 Id. at 851.
149 The letter reads in pertinent part: “The applicant alleges fear of persecution because of civil conflict that afflicts parts of Guatemala and has caused various hardships and dangers, including forced recruitment by opposing forces . . . . Persons who flee their homelands due to national armed conflicts in which they are random victims of violence, intimidation, or recruitment are not generally classifiable as refugees under U.S. law.” Id. at 847.
150 Id.
151 Id. at 848. Prior to Elias Zacarias, the Ninth Circuit reviewed BIA decisions under a “substantial evidence” standard. The Ninth Circuit’s approach was a heightened standard, which permitted the court to review more readily denials of refugee relief if it determined that the immigration judge’s decision was not based on substantial evidence. Mendoza Perez v. INS, 902 F.2d 760, 765 (9th Cir. 1990) (Sneed, J., concurring). Other circuits generally showed BIA decisions more deference. Id. The Supreme Court put an end to this Ninth Circuit practice by explicitly ruling that a reviewing court may reverse only if the evidence is “so compelling that no reasonable factfinder could fail to find the requisite fear.” INS v. Elias Zacarias, 112 S. Ct. 812, 817 (1992).
152 Zacarias, 921 F.2d at 848. There is considerable irony in the court’s approach. These letters are routine to the process and usually not understood as reflecting a very detailed analysis of a particular country’s political situation. Moreover, the plain intent of the letter
In evaluating Elias Zacarias' claim, the Court of Appeals offered an alternative analysis to the Board's insistence on demonstrating the guerrillas' persecutory motive. In a rather sweeping statement, the court interpreted almost the entire line of Ninth Circuit forced recruitment cases as meaning that what constituted a persecuting group no longer needed to be restricted to a "political entity" or a "politically motivated group." The Zacarias court understood a persecuting group to be "a group which engages in violence." The court inferred that a threat made by any individual member of such a group is made by the group as a whole, thereby obviating the need for any deeper scrutiny into the nature of the threat.

Given the Court of Appeals' assessment of persecutory motivation in Zacarias, certain parameters of the Ninth Circuit's analytic framework can be culled from these forced recruitment cases. First, the court did not inquire into the asylum-seeker's state of mind. The applicant's refusal to join a guerrilla unit sufficed to establish a political belief for which the alien may be persecuted.

Second, the court accepted general documentary evidence, such as newspaper articles or routine State Department advisory letters, as satisfying the objective element of the "well-founded fear" standard for asylum eligibility. More specific evidence of the frequency of forced recruitment in the country at large or among the petitioner's associates was needed to meet the clear-probability standard for withholding deportation.

In articulating its political opinion analysis, the Bolanos-Hernandez court emphasized that this type of scrutiny should not extend to the motivation prompting the particular political choice for three reasons. First, it is not proper for the government to inquire into an individual's motives for a political decision. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1287 (9th Cir. 1984). Second, accurately evaluating the political and nonpolitical dimensions of a particular stance is very difficult. Id. Finally and most importantly, persecutors are often indifferent to the individual's motivation. Id. It is usually the victim's actions, rather than his or her motives, which elicit the persecutory response. Id. As a result, in enumerating these concerns, the court in effect narrowed the focus of its political opinion inquiry to establishing that some overt manifestation of a consciously chosen position had taken place and that manifestation had resulted in a serious individualized threat to life or freedom from a political group.

in Elias Zacarias' case was to support a denial of his claim, not to promote it. See Martin, supra note 16, at 1310–15 (discussing the role of advisory letters in refugee adjudication).

153 Maldonado-Cruz v. INS, 883 F.2d 788, 791 (9th Cir. 1989).
154 Zacarias, 921 F.2d at 851.
155 Id.
156 In articulating its political opinion analysis, the Bolanos-Hernandez court emphasized that this type of scrutiny should not extend to the motivation prompting the particular political choice for three reasons. First, it is not proper for the government to inquire into an individual's motives for a political decision. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1287 (9th Cir. 1984). Second, accurately evaluating the political and nonpolitical dimensions of a particular stance is very difficult. Id. Finally and most importantly, persecutors are often indifferent to the individual's motivation. Id. It is usually the victim's actions, rather than his or her motives, which elicit the persecutory response. Id. As a result, in enumerating these concerns, the court in effect narrowed the focus of its political opinion inquiry to establishing that some overt manifestation of a consciously chosen position had taken place and that manifestation had resulted in a serious individualized threat to life or freedom from a political group. Id.

157 Maldonado-Cruz, 883 F.2d at 791.
158 Bolanos-Hernandez, 767 F.2d at 1288.
159 Zacarias v. INS, 921 F.2d 844, 848 (9th Cir. 1990).
160 Id. at 855.
161 Id. See discussion of clear-probability standard supra note 58.
Finally, the court focused more on the likelihood that the applicant would be at risk than on the persecutor’s reasons for perpetrating the oppression.\(^{162}\) The Court of Appeals’ decision in Zacarias broadened this statutory basis for asylum eligibility beyond the approach that the Ninth Circuit had articulated to that point. Fearing the further relaxation of the Ninth Circuit’s standard, the INS, in turn, petitioned the Supreme Court to review the dispute.\(^{163}\)

IV. INS v. Elias Zacarias

The Supreme Court affirmed the BIA’s interpretation of “persecution on account of . . . political opinion” in the context of guerrilla recruitment in all respects.\(^{164}\) In addressing the question of whether a guerrilla organization’s attempt to coerce performance of military service constituted persecution under the Act, Justice Scalia, writing for the majority of the Court, rejected the Court of Appeals’ characterization of such recruitment as “political kidnapping.”\(^{165}\) Instead, he noted that an individual may have many reasons for wanting to resist recruitment.\(^{166}\) Not all of these reasons are clearly politically motivated.\(^{167}\) Unless an applicant can demonstrate that he entertains a political opinion and is at risk of persecution for having that belief, the asylum-seeker cannot satisfy

---

\(^{162}\) See Arteaga v. INS, 836 F.2d 1227, 1232–33 (9th Cir. 1988). Citing the Supreme Court in Cardoza-Fonseca as suggesting that a one-in-ten chance of persecution occurring would make a fear well-founded, the Ninth Circuit Court of Appeals elaborated: “A specific verbal threat by the guerrillas directed at an individual whose identity and residence are known to the guerrillas is sufficient to create a well-founded fear.” \(^{id}\).

\(^{163}\) Zacarias v. INS, 921 F.2d 844 (9th Cir. 1990), \(^{cm. granted}, 111 S. Ct. 2008 (1991).\) See discussion supra note 78.


\(^{165}\) See \(^{id.}\) at 815. Ninth Circuit case law distinguished forced recruitment by guerrillas from apparently similar cases involving military conscription by a government. Mark R. von Sternberg, Emerging Bases of “Persecution” in American Refugee Law: Political Opinion and the Dilemma of Neutrality, 13 Suffolk Transnat’l L.J. 1, 13 (1989). The Ninth Circuit Court of Appeals reasoned that governments have the presumption of legitimacy. See Kaveh-Haghigy v. INS, 783 F.2d 1321, 1323 (9th Cir. 1986) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416–37 (1964) (discussing “act of state” doctrine as precluding courts from sitting in judgment on a foreign government’s acts within its own territory)). The Court of Appeals has found that governmental conscription is justified as part of an effort at self-defense. See \(^{id.}\) (absent exceptional circumstances, government conscription of young men for military service is not persecution). Guerrilla units, in contrast, lack this presumption of legitimacy. The Court of Appeals has, consequently, characterized guerrillas’ forced recruitment practices as kidnapping. Arteaga v. INS, 836 F.2d 1227, 1232 n.8 (9th Cir. 1988). The BIA, on the other hand, has never recognized this distinction. Matter of Maldonado-Cruz, 19 I. & N. Dec. 509, 517 (BIA 1988).


\(^{167}\) \(^{id.}\).
this statutory ground for relief.\textsuperscript{168} Justice Scalia implied that these elements are unlikely to be satisfied in instances of forced recruitment, because the petitioner must show that the guerrillas intend to "persecute him because of that political opinion, rather than because of his refusal to fight with them."\textsuperscript{169}

In substantially rejecting forced recruitment by guerrillas as a basis upon which claims of persecution on account of political opinion can arise, the Supreme Court imposed an additional requirement on asylum claims. Henceforth, an asylum petitioner must show by either direct or circumstantial evidence that the oppressor's motives are political.\textsuperscript{170} The mere existence of a generalized "political" motive underlying the oppressor's threat to the alien is insufficient to establish a claim of persecution.\textsuperscript{171} In order to demonstrate the political aspect of the persecution with adequate clarity, the applicant must establish a link between his or her own beliefs and the nature of harm with which he or she is threatened.\textsuperscript{172} Thus, Elias Zacarias affirmed the BIA's position set forth in Matter of Maldonado-Cruz, which held that "[i]n analyzing a claim of persecution made in the context of a civil war, it is necessary to look to the motivation of the group threatening harm."\textsuperscript{173}

The key to this analysis is an examination of the victim's motives for the behavior that elicits the oppression.\textsuperscript{174} Justice Scalia suggested that oppression can only reasonably be inferred to be politically motivated if the victim's conduct is clearly shown to be of a sufficiently political nature that it is likely to trigger a political response.\textsuperscript{175} Victim behavior too far removed from an overt manifestation of political belief, in turn, casts suspicion on the political nature of the oppressor's motives.\textsuperscript{176}

By focusing so closely on both the oppressor's and the victim's states of mind, the Supreme Court effectively makes these claims much harder to prove. Conceivably, the asylum applicant could be required to prove the motives of the leaders of the oppression in order to establish that a policy of persecution existed. The alien may also have to prove the motives of the particular individuals

\textsuperscript{168} Id.

\textsuperscript{169} Id.

\textsuperscript{170} Id. at 817.

\textsuperscript{171} Id. at 816.

\textsuperscript{172} See id.

\textsuperscript{173} 19 I. & N. Dec. 509, 513 (BIA 1988).

\textsuperscript{174} See Elias Zacarias, 112 S. Ct. at 816.

\textsuperscript{175} See id.

\textsuperscript{176} See id.
involved in the threatening activity in order to ascertain that they were not acting unilaterally or for some ulterior motive such as personal vendetta or debt collecting.

Requiring proof of the persecutor's intent magnifies, rather than ameliorates, the difficulties of establishing asylum claims. The problems of producing evidence in cases arising out of distant lands are exacerbated by the chaotic conditions of civil war. Merely determining the identities of the persecutors could be formidable. Elias Zacarias, for example, was accosted by masked men. Scrutinizing their motives would be an even more exacting task.

Moreover, evidence of persecution or threats of persecution is something that the oppressor would be eager to conceal in order to avoid subsequent prosecution. As the Bolanos-Hernandez court noted: "Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution."

V. RECHARTING UNITED STATES REFUGEE RELIEF

The approach the Court adopted in Elias Zacarias may well address the government's fear of substantially expanding the number of refugee admissions through a relaxation of standards. The resulting constriction of this statutory ground for asylum eligibility, however, contravenes the U.N. refugee policy's purpose of conferring humanitarian relief on displaced persons. It is these international standards which the Act was meant to incorporate into the immigration law of the United States.

A. International Refugee Standards

The United States acceded to United Nations refugee policy when it signed the 1967 Protocol in 1968. The Refugee Act of

---

177 See Rodriguez-Rivera v. INS, 848 F.2d 998, 1006 (9th Cir. 1988) (alien denied asylum because single guerrilla's threatening activity not motivated by guerrilla unit's desire to recruit alien).
178 Florez-de Solis v. INS, 796 F.2d 330, 335 (9th Cir. 1986) (retribution for unpaid financial debt not political).
180 Zacarias v. INS, 921 F.2d 844, 847 (9th Cir. 1990).
181 Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984).
182 See supra note 78.
184 See supra notes 40-48 and accompanying text.
185 See supra note 42.
1980 codified those international standards, as the legislative history indicates. In 1987 the Supreme Court in INS v. Cardoza-Fonseca interpreted the Act as conforming U.S. domestic law to United Nations policy. Moreover, the international community evaluates U.S. refugee policy in terms of its fidelity with United Nations standards. It is therefore instructive to compare the Supreme Court’s decision with current United Nations policy.

The Office of the United Nations High Commissioner for Refugees (UNHCR) amicus curiae brief indicates that Elias Zacarias frustrates United Nations policy in two ways. First, the Supreme Court has now in effect mandated that exiles meet higher standards of proof than the United Nations requires for conferring a humanitarian benefit. Second, in contrast to the United Nations position, the Elias Zacarias Court has substantially rejected forced recruitment as a political activity that can occasion refugee relief.

1. Standards for Proving Persecution

The High Commissioner construes the pertinent United Nations language codified in the Act as conferring a humanitarian benefit on the asylum-seeker. In using the phrase “well-founded fear,” the UNHCR’s emphasis is placed on the alien’s state of mind in order to ascertain that he or she is afraid and that the fear is

\[\text{\textsuperscript{187}} \text{See supra note 29. See U.N. Definition supra note 42.} \]
\[\text{\textsuperscript{188}} 480 U.S. 412, 436–40 (1987).\]
\[\text{\textsuperscript{189}} \text{The Supreme Court’s decision has drawn international criticism. In a recent letter to the New York Times, the Chairman of Canada’s Immigration and Refugee Board, R. G. L. Fairweather, accused the Supreme Court of ignoring the United Nations refugee definition, which United States law domesticates, in reaching its decision in Elias Zacarias. R. G. L. Fairweather, Temporary Sanctuary Tends to Get Permanent; Political Persecution, N.Y. Times, Mar. 7, 1992, at 24. Mr. Fairweather concluded: “Most jurisdictions have held that refusal to join a guerrilla organization in like circumstances is evidence of a political opinion.” Id.} \]
\[\text{\textsuperscript{190}} \text{The Statute of the Office of the United Nations High Commissioner for Refugees created that office and authorized it to interpret and implement United Nations refugee policy. G.A. Res. 428, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950). The UNHCR provides protection and material aid to refugees in various parts of the world. It also monitors signatory States’ procedures for making asylum determinations and intervenes on behalf of individual asylum-seekers. Martin, supra note 16, at 1254.} \]
\[\text{\textsuperscript{191}} \text{The role which the UNHCR has played in United States asylum cases has changed over the past fifteen years. Under the Carter administration, the UNHCR exercised considerable influence over the content of State Department advisory letters in cases involving Haitian applicants. This practice came to an end under the Reagan administration. Currently, the UNHCR assists petitioners 1) by locating pro bono counsel; 2) by filing amicus curiae briefs in cases likely to have a significant effect on the asylum process; and 3) by advising petitioners’ counsels on particular applications. Martin, supra note 16, at 1319–20.} \]
\[\text{\textsuperscript{192}} \text{UNHCR Brief, supra note 183, at 16.} \]
objectively reasonable.\textsuperscript{193} Nothing in the language or the UNHCR's \textit{Handbook on Procedures and Criteria for Determining Refugee Status (Handbook)}\textsuperscript{194} interpretation of the language requires proof of the persecutor's intention in determining refugee status.\textsuperscript{195} Indeed, such a requirement is incompatible with United Nations practice.\textsuperscript{196}

The High Commissioner contends that to do otherwise would essentially mandate standards of proof similar to a criminal law inquiry into the persecutor's mens rea.\textsuperscript{197} But the purpose of international refugee law is to grant relief to the victim, not to convict the oppressor.\textsuperscript{198} Requirements of persecutory intent would more likely than not frustrate this goal in many meritorious cases. In the alternative, the High Commissioner requires that there only be some nexus between a political stance and the feared persecution.\textsuperscript{199} Proof of the persecutor's motive is merely a sufficient, but not a necessary, element in establishing this nexus.\textsuperscript{200}

2. Recognition of Forced Recruitment by Guerrillas as Persecution on Account of Political Opinion

Focusing more precisely on the issue at hand, the High Commissioner points out that the United Nations acknowledges that forced recruitment by guerrillas may be a form of persecution on account of political opinion.\textsuperscript{201} Citing the \textit{Handbook}, the brief maintains that absent an explicit verbal expression, the applicant's conduct as a whole may be understood to imply an adverse political belief.\textsuperscript{202} Thus, it is possible that the refusal to join a guerrilla unit would be perceived by the insurgents as an indication of "anti-guerrilla" sentiment.\textsuperscript{203} Therefore, "[r]egardless of the precise characterization of an individual's motives, the conscious refusal to join

\textsuperscript{193} UNHCR Brief, \textit{supra} note 183, at 11–12. This approach replicates the Supreme Court's analysis of this standard in \textit{Cardoza-Fonseca}. See discussion of well-founded fear standard \textit{supra} note 66 and accompanying text.


\textsuperscript{195} UNHCR Brief, \textit{supra} note 183, at 12.

\textsuperscript{196} Id.

\textsuperscript{197} Id. at 16.

\textsuperscript{198} Id.

\textsuperscript{199} Id. at 4.

\textsuperscript{200} Id. at 15.

\textsuperscript{201} Id. at 19.

\textsuperscript{202} Id. at 18–19.

\textsuperscript{203} Id. at 19.
a guerrilla group inevitably places the individual in political opposition to that group.\textsuperscript{204} This results in an analytical framework in which the state of mind of the persecutor is not important.\textsuperscript{205} Rather, the focus is on the asylum-seeker's behavior and his or her fear of the oppression it may elicit.\textsuperscript{206} This feared oppression becomes persecution when an act or a threat of violence is specifically directed towards an individual by either government or antigovernment forces.\textsuperscript{207} These elements form the contours of the nexus between political belief and the feared persecution.\textsuperscript{208} It is this nexus which distinguishes persons qualifying for refugee status under international law from individuals fleeing generalized conditions of violence in a country torn by civil strife.\textsuperscript{209}

\textbf{B. Repudiation of United Nations Position}

The Supreme Court rejected the United Nations standard of proof for conferring refugee relief by requiring some evidence of the persecutor's intent.\textsuperscript{210} The Court also found that forced guerrilla recruitment is not necessarily a form of persecution on account of political opinion.\textsuperscript{211} The \textit{Elias Zacarias} Court arrived at its decision by relying on the plain language of the Refugee Act of 1980.\textsuperscript{212} The Court chose this approach in spite of the Act's legislative history, which indicated that the Act was designed to domesticate United

\textsuperscript{204} Id. at 18 (emphasis in the original text). Justice Scalia takes exception to this. INS v. Elias Zacarias, 112 S. Ct. 812, 816 (1992) ("That seems to us not ordinarily so, since we do not agree with the dissent that only a 'narrow, grudging construction of the concept of 'political opinion,' ... would distinguish it from such quite different concepts as indifference, indecisiveness and risk-averseness.").

The question of when a rejection of tactics, such as the use of armed force, implies a rejection of the political goals which those tactics are intended to achieve is open to debate. Determining motivation can be a complicated and imprecise task. The issue probably can best be decided on a case by case basis. Nevertheless, the difficulty of ascertaining motives should not obscure the fact that persecutors are often indifferent to the individual's motivation. It is usually the victim's actions, rather than his or her motives, which elicit the persecutory response. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1287 (9th Cir. 1984).

\textsuperscript{205} UNHCR Brief, \textit{supra} note 183, at 11.

\textsuperscript{206} Id.

\textsuperscript{207} Id. at 20.

\textsuperscript{208} Id. at 17.

\textsuperscript{209} Id. at 20.


\textsuperscript{211} Id. at 816.

\textsuperscript{212} Id.
Nations refugee standards. The *Elias Zacarias* Court's interpretation of the Act also ignored the Supreme Court's earlier decision in *Cardoza-Fonseca*, which accorded a greater deference to the United Nations position on matters involving refugees. By narrowly adhering to the text of the Act, however, the Court avoided having to consider more generous international humanitarian standards which would have conflicted with the result the *Elias Zacarias* majority wanted to effectuate.

Three dissenting justices objected to the constriction of asylum eligibility as being contrary to the spirit of *Cardoza-Fonseca*. By interpreting the plain language of the Act as narrowing the grounds for asylum eligibility in this area, the *Elias Zacarias* Court turned away from the *Cardoza-Fonseca* Court's call for the creation of "a broad class of refugees who are eligible for a discretionary grant of asylum."

Writing for the dissent in *Elias Zacarias*, Justice Stevens also criticized Justice Scalia's method of interpretation as running contrary to ordinary canons of statutory construction. In delivering the Court's opinion in *Cardoza-Fonseca*, Justice Stevens listed the factors relevant to interpreting the 1980 Act. They are "the plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history." To these Justice Stevens added the "longstanding principle of construing ambiguities in deportation statutes in favor of the alien." Given the broader scope which these principles of interpretation call for, Justice Stevens concluded that *Elias Zacarias* refusal to join the guerrilla forces constituted a political opinion under the Act. The dissent's exposition of the disparity between the Court's rulings in *Elias Zacarias* and *Cardoza-Fonseca* highlights the abrupt change in United States refugee policy, which the Supreme Court apparently seeks to achieve.

---

213 See discussion supra notes 40-48 and accompanying text.
216 *Cardoza-Fonseca*, 480 U.S. at 424.
217 *Elias Zacarias*, 112 S. Ct. at 819 (Stevens, J., dissenting).
218 *Cardoza-Fonseca*, 480 U.S. at 449.
220 Id. at 819 (Stevens, J., dissenting) (quoting *Cardoza-Fonseca*, 480 U.S. at 449).
221 Id. (Stevens, J., dissenting).
VI. A SEARCH FOR ALTERNATIVES

A. Overturning Elias Zacarias

In light of the foregoing, some commentators have called for Congress to overturn the Elias Zacarias decision. Domesticating the United Nations refugee policy by merely giving congressional authorization to the Ninth Circuit's Zacarias standard, however, would not address the serious reservations that other circuits have with this attempt to distinguish being at risk because of one's political views by using such an inexact analysis.

The line of cases culminating in the Court of Appeals' Zacarias decision required an alien to establish that he or she was at risk because a political entity had singled him or her out for punishment. This approach focused on showing that the applicant would truly be subject to harm if repatriated. Considerably less emphasis was given to demonstrating that the asylum-seeker had overtly manifested a political stance or that the group was seeking to punish him or her because of that position.

In fact, proving the political dimension of a claim based on persecution on account of political opinion under this theory became practically unnecessary. If the alien could show that he or she was likely to suffer great harm, he or she needed only further establish that the oppressor had some affiliation with a political group. The fact that the asylum-seeker had been singled out for persecution was sufficient to distinguish this risk of harm from the risk imposed on the general populace facing the daily dangers of living in a country in the throes of a civil war.

This set a generous standard of refugee relief. As a result, the BIA and most courts were reluctant to follow the Ninth Circuit's

223 E.g., Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1299 (11th Cir. 1990) (requiring proof of persecutor's intent).
224 See supra notes 144–46 and accompanying text.
225 See supra note 146.
226 See supra note 146 and accompanying text.
227 Id.
228 Id.
approach. Indeed, one court decried it as a "sinkhole that would swallow the law." 

B. A Modified Mogharrabi Approach

It is possible to craft a suitable standard based on Board precedent that avoids many of the pitfalls of both the Supreme Court's and the Ninth Circuit Court of Appeals' decisions. Moreover, this approach conforms more closely with the United Nations position for conferring humanitarian relief because it imposes a less demanding nexus between the victim's belief and the persecutory activity. A discussion of recent BIA decisions will illustrate the advantages of this alternative.

1. Mogharrabi Revisited

The Elias Zacarias decision goes beyond the standard for determining persecution on account of political opinion that the BIA set forth in Matter of Mogharrabi. By requiring proof of the oppressor's motivation, the Court has created a greater burden for aliens who have been subject to actual persecution than it requires for aliens who have established that they are at risk, but who have not been actually pursued by an oppressor.

In Matter of Mogharrabi, the Board granted asylum to an Iranian student. The petitioner had participated in anti-Khomeini demonstrations in the United States and had engaged in an acrimonious political discussion with an official in the Iranian Interests Section of the Algerian Embassy in Washington, D.C. The asylee presented no evidence that he had ever experienced persecution as a result of these incidents. Indeed, the BIA acknowledged that it was not certain that the Iranian government was even aware that the applicant had been involved in these events. Nevertheless, the Board held that a reasonable person in these circumstances could fear persecution if his activities had become known to the Iranian government, because Khomeini's regime was known frequently to oppress its political opponents.

229 Mendoza Perez v. INS, 902 F.2d 760, 767 (9th Cir. 1990) (Sneed, J., concurring).
230 Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1298 (11th Cir. 1990).
232 Id. at 447.
233 See id. at 448.
234 Id.
In arriving at this determination, the Board found that the asylee had satisfied its four-pronged standard in the following manner. First, the student had manifested a political opinion by arguing in the Algerian Embassy and by participating in anti-Khomeini demonstrations. Second, these manifestations were sufficiently public that a foreign government thousands of miles away might become aware of them. The BIA held that the third and fourth elements of its standard were met because the Khomeini government was generally known to oppress its political opponents with some degree of regularity.

The Board engaged in no discussion of whether the form which the asylum-seeker's political opposition took was one which routinely elicited a persecutory response from the Iranian government. Many governments frequently seek to punish individuals who oppose them by means of violence. Fewer governments attempt to inflict harm on those who express their opposition in other ways. In Mogharrabi, the Board did not even bother to determine whether the petitioner's behavior was sufficiently similar to the behavior of others whom the Khomeini regime had persecuted for their political activities in the asylee's homeland.

The BIA also made no inquiry to determine if the Iranian government had ulterior, nonpolitical motives for wanting to punish Mogharrabi. Once the applicant had demonstrated a political opinion against a regime that was generally known to harm its opponents, the Board concluded that the alien was sufficiently at risk to be awarded asylum.

2. Forced Recruitment's Impact on Mogharrabi

If the Elias Zacarias decision goes beyond the Board's approach in Mogharrabi, the BIA itself took the first steps towards developing the standard in that direction. Since Bolanos-Hernandez, the BIA and the courts have struggled with distinguishing being at risk because of the general level of violence in a war-torn country from being at risk because of one's political views. In an attempt to address this issue, the Board applied Mogharrabi to cases involving forced

235 See supra note 98 and accompanying text.
237 Id.
238 Id.
239 See Bolanos-Hernandez v. INS, 767 F.2d 1277, 1284 (9th Cir. 1984).
recruitment by guerrillas by expanding its approach to require a more explicit showing of the persecutor's motives.\(^{240}\)

Although the BIA broadened the Mogharrabi test to defeat asylum claims in guerrilla recruitment cases such as Maldonado-Cruz and Vigil,\(^{241}\) the Board was careful not to fly in the face of Bolanos-Hernandez. Bolanos-Hernandez made a deliberate and considered decision not to join either side in the civil war in El Salvador.\(^{242}\) He severed his ties to the right-wing organizations with which he had been affiliated and refused to use his connections to infiltrate the government on the rebels' behalf.\(^{243}\) Vigil, on the other hand, did not express his desire to remain neutral to anyone when he was in El Salvador.\(^{244}\) He fled his country because he feared for his life if he were forced to fight in either the guerrilla or government forces.\(^{245}\) In distinguishing Bolanos-Hernandez from Vigil, the Board maintained that an asylee must articulate and affirmatively take a political position, even one of neutrality, and that the alien must demonstrate that he could be "singled out" for persecution because of that position.\(^{246}\) Thus, in Vigil the BIA indicated that an asylum claim might be successfully advanced under this standard in recruitment cases similar to Bolanos-Hernandez.\(^{247}\)

C. An Alternative Approach

It is possible to carve out an alternative to the Supreme Court's position, which imposes on the alien an almost insurmountable burden of proof, and the Ninth Circuit's approach in Zacarias, which may not adequately filter out nonmeritorious asylum claims. In fact, the BIA's standard as originally applied in Mogharrabi is a position that essentially avoids the excesses of these two alternatives. That approach could be modified to require an alien to show that he or she has affirmatively taken a political stance, of which an oppressor


\(^{241}\) See discussion supra notes 102-29 and accompanying text.


\(^{243}\) Id. at 1287.


\(^{245}\) Id.

\(^{246}\) Id. at 576-77. The BIA held that satisfying these two elements was a necessary, but not sufficient, condition for establishing Vigil's asylum claim based on persecution on account of political opinion. The Board also noted that the alien needed to demonstrate that the guerrillas' desire to harm him was rooted in something more than the alien's attempt to evade recruitment. Id. at 577.

\(^{247}\) See id. at 577.
could become aware, and that he or she has been singled out for harm by a political group.248 No additional proof of the persecutor’s motivation, either circumstantial or direct, should be necessary. Rather, once these circumstances have been established, the petitioner should be granted asylum absent some evidence that he or she is at risk for nonpolitical reasons.

Commentators have noted that requiring evidence of the persecutor’s state of mind often shifts the discussion in asylum adjudication away from the life-threatening situations that confront many asylum applicants.249 Creating an inference in favor of an oppressor’s persecutory motives absent clear evidence to the contrary would reorient that discussion to an examination of the severity of the risk which the alien faces.250 This refocusing would address more directly the central purpose of United States refugee law: protecting those who are at serious risk.251

The creation of such an inference and the proof that the alien has been singled out for harm by a political group, however, are insufficient to settle the case. Some evidence that the applicant has affirmatively taken a political stand that the oppressing group seeks to overcome should be necessary to distinguish asylees from those fleeing the general level of violence in their homeland.

Under this proposed standard, refugee relief would still be awarded in cases of forced guerrilla recruitment like Bolanos-Hernandez. It would be denied in cases like Vigil and Elias Zacarias. This manner of distinguishing between these two sets of cases, however, would not require proof of the persecutor’s state of mind, which the Supreme Court now seems willing to impose not only on asylum claims based on persecution on account of political opinion, but also on claims based on persecution on account of religion.252

VII. CONCLUSION

The eight-year struggle to craft a standard for granting asylum to aliens fleeing forced recruitment has had a profound effect on the development of persecution on account of political opinion under the Refugee Act. The particular problems presented by these

248 Id. at 576–77.
250 See id. at 24.
251 Id. at 25.
252 See supra note 24 and accompanying text.
cases have skewed the debate about what constitutes a valid asylum claim. By requiring proof of the persecutor's intent, the Supreme Court has laid a heavy burden on those seeking humanitarian relief. This higher standard distorts the purpose of the Act, which is to bestow protection on those at serious risk because of their political beliefs.

An alternative way of resolving forced recruitment cases, and other asylum claims based on persecution on account of political opinion generally, is to return to the BIA's *Mogharrabi* standard. Demonstrating that an alien has affirmatively assumed a political stance for which he risks persecution is an easier task than producing evidence of an oppressor's motives. While this approach differs from the more generous United Nations standard, it avoids the egregious constriction of asylum relief fashioned by the *Elias Zaccarias* Court.

*William John Wingert*