"Political Opinions" of Refugees: Interpreting International Sources

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"POLITICAL OPINIONS" OF REFUGEES: INTERPRETING INTERNATIONAL SOURCES

In many countries, persons feel compelled by conscience to resist a regime they believe is oppressive. They may condemn such a regime through active resistance, stated neutrality, silence, or refusal to enter military service. They may even have hostile opinions attributed to them that are not their own. In each case, they are vulnerable to persecution by the government or other forces that the government cannot or will not control. To escape this threat, some of these persons seek refuge in the United States. They hope for protection from a government that espouses democracy, civil rights, and judicial impartiality. Instead, they are confronted with a standard that, while intended to address their plight, is applied in an inconsistent and frequently ungenerous manner.

To receive asylum in the United States, persons must show that they are "refugees." They do so by demonstrating fear of persecution on account of political opinion, race, religion, nationality, or social group membership. The most common basis for an asylum claim is political opinion. However, there is no consistently applied interpretation of "persecution on account of political opinion" in United States law. An appropriate construction of the term would consider its development in the historical context of refugee law. This Comment explores the spirit of international instruments and interpretive materials, as well as United States legislative history behind the Refugee Act of 1980. An analysis of these materials will provide a more accurate interpretation of "persecution on account of political opinion" and present a clearer picture of a "refugee.”

I. CURRENT UNITED STATES LAW AND THE INTERNATIONAL ORIGINS OF THE DEFINITION OF "REFUGEE"

A. The Refugee Act of 1980

The Refugee Act of 1980 (Refugee Act) governs asylum procedures for refugees in the United States and establishes an overseas refugee admissions program. This Act 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...


2. Aliens can apply for asylum, 8 U.S.C. § 1158 (1982), or withholding of deportation or exclusion, id. § 1253(h) (1982), in three ways. If the alien is already in exclusion or deportation proceedings, both applications are considered by the Immigration Judge ("IJ"). 8 C.F.R. § 208.3(b) (1987). If a judge has already ordered deportation or exclusion, the alien may raise the claim in a motion to reopen proceedings. Id. § 208.11. If no proceedings have begun, the alien may apply for asylum to a District Director of the Immigration and Naturalization Service ("INS"); if the application is denied, the alien may renew it in exclusion or deportation proceedings. Id. §§ 208.3(a), 208.9. The Department of State's Bureau of Human Rights and Humanitarian Affairs ("BHRHA") issues an advisory opinion on every asylum or withholding application. Id. §§ 208.7, 208.10(b). The alien may appeal an IJ's decision to the Board of Immigration Appeals ("BIA") and subsequently to either a court of appeals, if the decision is related to a final order of deportation, 8 U.S.C. § 1105(a) (1982), or to a district court (often through a writ of habeas corpus) in exclusion or other proceedings not directly related to deportation. Id. §§ 1105(a)(9), 1105(b), 1329 (1982). Most aspects of BIA decisions are deferentially reviewed. Id. § 1105(a)(4) (1982). For overviews of the asylum application process, see T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY 615-744 (1985); A. HELTON, MANUAL ON REPRESENTING ASYLUM APPLICANTS (1984).


4. 8 U.S.C. § 1101(a)(42)(A) (1982). The Attorney General grants asylum status on a discretionary basis. Id. § 1158 (1982). Persons are ineligible for refugee status if they "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of" race, religion, nationality, social group membership or political opinion. Id. § 1101(a)(42)(B) (1982). Applicants "firmly resettled" in another country are also ineligible. 8 C.F.R. § 207.1(b) (1987). The Attorney General may terminate asylum due to changed circumstances in the alien's home country. 8 U.S.C. § 1158 (1982). The Attorney General must withhold deportation to a country where an alien's life or freedom would be threatened on account of race, religion, nationality, social group membership or political opinion. Id. § 1253(h) (1982).

the international protection of human rights, then adopted an identical definition of "refugee" in the Act to codify its obligations under the Protocol and further American human rights and humanitarian traditions. The Act implements an ideologically and geographically neutral policy towards refugees, amending language in the Immigration and Nationality Act that granted refugee status solely to persons fleeing Communist or Middle Eastern regimes.

The legislative history of the Refugee Act demonstrates that Congress desired to create a humanitarian refugee policy with a broad scope that conformed to United States international law obligations. Although choosing to exclude persons displaced by civil or military strife, Congress intended the term "refugee" to include all persecuted, homeless, and defenseless persons who flee harsh, tyrannical, or oppressive regimes. Political detainees and prisoners of conscience are also considered refugees, even if they were permitted to leave their country of origin by their government.

9. Id. at 4507–08 (statement of Rep. Chisolm expressing hope that the Refugee Act as applied would, in fact, be neutral).
13. 126 CONG. REC. 4499 (1980) (statement of Rep. Holtzman mentioning desire to protect those persecuted and still within their own country, such as political prisoners in Cuba and Chile).
B. International Origins and Interpretations of the Definition of “Refugee”

1. The United Nations Protocol and Convention, the International Refugee Organization, and the Inter-Governmental Committee on Political Refugees

The Refugee Act’s definition of “refugee” can be traced directly to the United Nations Protocol\(^\text{15}\) and through it to earlier instruments drafted in response to the refugee flows that culminated in World War Two.\(^\text{16}\) The substance of the Protocol’s definition and protection of refugees is the same as the 1951 United Nations Convention Relating to the Status of Refugees (“Convention”).\(^\text{17}\) However, the Protocol is more broadly applicable than the Convention. While contracting nations applied the Convention only to persons claiming refugee status due to events prior to 1951\(^\text{18}\) and had the option of aiding only European refugees,\(^\text{19}\) the Protocol removed these temporal and geographic limitations on refugee protection.\(^\text{20}\)

The Convention definition of “refugee” originated with the International Refugee Organization (IRO), which was founded in 1946.\(^\text{21}\) The IRO protected victims of Nazi, fascist or collaborator regimes who had valid objections to returning home.\(^\text{22}\) “Valid objections” included persecution or a reasonable fear of persecution because of race, religion, nationality or political opinions.\(^\text{23}\)

The IRO’s refugee definition garnered language from the 1938 mandate of the Inter-Governmental Committee on Political Refugees (“IGCR”).\(^\text{24}\) The IGCR aided Germans and Austrians who had fled their countries or who had not already fled but had to “emigrate on account of their political opinions, religious beliefs, or racial ori-

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15. See supra notes 4–5 and accompanying text.
17. July 28, 1951, 189 U.N.T.S. 137. The Convention does not protect persons who have committed a crime against peace or humanity, a war crime, a serious nonpolitical crime prior to admission to the country of refuge, or acts contrary to the purposes and principles of the United Nations. Convention, art. 1, § F. The United States is not a party to the Convention.
18. Id. art. 1, § A(2).
19. Id. art. 1, § B(1).
22. IRO Constitution, annex I, pt. 1, §§ A, B, C.
23. Id. § C 1.(a)(i).
24. Established by the Inter-Governmental Meeting at Evian, France (July 14, 1938).
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gin . . . .”\textsuperscript{25} In 1943, the IGCR extended its mandate to all persons affected by the European war who had fled “areas where their lives and liberty [were] in danger on account of their race, religion, or political beliefs.”\textsuperscript{26}


The refugee flows that continued after the Second World War prompted the 1979 publication of a \textit{Handbook on Procedures and Criteria for Determining Refugee Status} (“Handbook”)\textsuperscript{27} by the Office of the United Nations High Commissioner for Refugees (“UNHCR”).\textsuperscript{28} The \textit{Handbook} offers guidance in determining refugee status to governments that signed the Convention or Protocol.\textsuperscript{29} The \textit{Handbook} bases its analysis of the Protocol refugee definition on the experience of the UNHCR, which includes knowledge of current national practices and literature about refugees.\textsuperscript{30} In acceding to the Protocol, the United States agreed to cooperate with the UNHCR.\textsuperscript{31} United States courts accept the \textit{Handbook} as a persuasive guide, though not binding authority, in determining refugee status.\textsuperscript{32}

\begin{center}
\begin{footnotesize}
25. IGCR Res., para. 8 (July 14, 1938), \textit{reprinted in 1 FOREIGN RELATIONS OF THE UNITED STATES} 756 (1938).
30. \textit{Id.}, para. (v).
31. Protocol, art. II.
\end{footnotesize}
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II. INCONSISTENT JUDICIAL INTERPRETATIONS OF "POLITICAL OPINION" IN ASYLUM REQUESTS

Asylum proceeding outcomes depend, in part, on credibility issues and standards of proof. As applicants' countries of origin may also influence asylum proceedings, studies show significant differences among countries of origin in asylum approval rates. Over ninety percent of final asylum decisions concur with Department of State Bureau of Human Rights and Humanitarian Affairs advisory opinions. These opinions often reflect the ideological and national biases inherent in any national foreign policy.

Inconsistent judicial interpretations of "persecution on account of political opinion" further obscure the real bases for asylum decisions.

33. In asylum hearings, the applicant has the burden of proof. 8 C.F.R. §§ 208.5, 242.17(c) (1987). To meet this burden, the applicant must show a well-founded fear of persecution on account of one of the five stated grounds. 8 U.S.C. § 1158(a) (1982). A "well-founded fear" involves the applicant's subjective beliefs and evidence establishing an objectively reasonable chance of future persecution. Cardoza-Fonseca, 107 S. Ct. at 1213, 1217. Persecution is generally considered to be a threat to life or liberty, as well as other serious violations of human rights. INS v. Stevic, 467 U.S. 407, 428 n.22 (1984). The victim is singled out by a persecutor who may be a government agent or an agent of forces, societal sectors, or the local populace that the government cannot or will not control. McMullen v. INS, 658 F.2d 1312, 1315 n.2 (9th Cir. 1981). See generally, Cox, "Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status, 10 BROOKLYN J. INT'L. L. 333 (1984) (suggesting that adjudicators should adhere to the "benefit of the doubt principle" in judging an applicant's story and asylum claim); Sautman, The Meaning of "Well-Founded Fear of Persecution" in United States Asylum Law and in International Law, 9 FORDHAM INT'L L.J. 483 (1986) (deriving a generous interpretation of the standard from intentions of drafters of international documents).


35. UNITED STATES GENERAL ACCOUNTING OFFICE, BRIEFING REPORT TO THE HONORABLE ARLEN SPECTER, UNITED STATES SENATE, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN—FEW DENIED APPLICANTS DEPORTED, (1987) [hereinafter GAO REPORT]. The GAO Report found significant differences by country in 1984 asylum approval rates. Id. at 15–16. National comparisons revealed that while 66% of the Iranian requests and 49% of the Polish requests for political asylum were granted, only 2% of the asylum requests from El Salvador and 7% of those from Nicaragua were approved during the same time. Id. at 34 (these figures did not include persons claiming to flee generalized civil strife). While the GAO Report could not draw conclusions from these figures because most asylum decisions lack documentation, the Report found no other discrepancy as striking as that of national origin. Id. at 15–16.

36. Id. at 22.

37. The admission that a friendly regime violates international human rights obligations embarrasses the United States and offends the ally. Zavala-Bonilla v. INS, 730 F.2d 562, 567 (9th Cir. 1984); Kasravi v. INS, 400 F.2d 675, 677 n.1 (9th Cir. 1968).
Conflicting interpretations often arise when resolving the following four issues: First, whether persecution during generally oppressive conditions in a country can amount to persecution on account of political opinion; second, what acts or opinions are political; third, what reasons for persecution are political; and fourth, when criminal prosecution is a pretext for persecution of political opinions.

A. Persecution During Generally Oppressive Conditions

Federal courts of appeals agree that, according to the Refugee Act, "persecution" requires the victim to be singled out by the persecutor. Nonetheless, not all decisions have concurred on the issue of whether the singling out must occur as a result of the victim's political opinion.

The Fifth Circuit, in Coriolan v. INS, held that the asylum applicants were refugees even though the connection between their persecution and "political opinion" was tenuous. The applicants were victims of a Haitian government so exceptionally oppressive that it singled out victims who did not hold minority political opinions and were inactive in politics. Other Fifth Circuit decisions have differed with, or narrowly distinguished, the Coriolan holding, denying refugee status when persecutors single out a victim for nonpolitical reasons. The Ninth Circuit follows this latter view.

B. Political Activities or Opinions

Adjudicators differ over what activities or opinions are properly defined as political. Most asylum adjudicators have accepted as "political" such activities as membership in a political organization, or expression of a political opinion through party membership, political

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38. See, e.g., Martinez-Romero v. INS, 692 F.2d 595 (9th Cir. 1982) (rejecting the claim that no alien should be sent back to a country where violent conditions prevailed, and requiring some special individualized circumstances before withholding deportation).
39. 559 F.2d 993 (5th Cir. 1977).
40. Id. at 1004. The BIA denied several Haitians' appeals for withholding of deportation based on persecution on account of political opinion because their political opinions were the same as those of the vast majority of Haitians Id. at 998. The court of appeals reversed and remanded to reconsider the claims in light of an Amnesty International report on human rights violations in Haiti. Id. at 1004. The court noted: "[W]e cannot believe . . . that Congress would have refused sanctuary to people whose misfortune it was to be the victims of a government which did not require political activity or opinion to trigger its oppression." Id.
41. See, e.g., Campos-Guardado v. INS, 809 F.2d 285, 289-90 (5th Cir.), cert. denied, 108 S. Ct. 92 (1987). The Board denied asylum, concluding that the evidence was insufficient to establish that the harm Campos-Guardado feared was based on political opinion. The Board distinguished Coriolan as involving the extreme circumstances of the Haitian Duvalier regime.
42. See, e.g., Espinoza-Martinez v. INS, 754 F.2d 1536, 1540 (9th Cir. 1985) (no objective evidence to show that petitioner's alleged confinement was due to his political opinion).
demonstrations, and propaganda distribution. However, decisionmakers disagree over whether to broaden interpretations of "political opinion" to include the victim's conscious choice of neutrality, or the victim's silence or noncommitment.

The Ninth Circuit has progressively broadened its definition of "political opinion." In 1985, the court recognized the victim's conscious choice of neutrality as a "political opinion" in Bolanos-Hernandez v. INS. A recent Ninth Circuit decision extended the interpretation of "political opinion" still further to include a silent neutrality expressed in a victim's noncommitment to the persecutor's opinions. In Lazo-Majano v. INS, the court reasoned that a victim's silence constituted "political opinion" if the persecutor perceived political opposition in it. The Lazo-Majano court also held that a

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43. See, e.g., Garcia-Ramos v. INS, 775 F.2d 1370, 1374 (9th Cir. 1985) (evidence of membership and extensive activities in persecuted political organization); Saballo-Cortez v. INS, 761 F.2d 1259, 1264 (9th Cir. 1984) (applicant failed to show credible fear of persecution or that he "belonged to any political organization or had taken any political position"); Zavala-Bonilla v. INS, 730 F.2d 562 (9th Cir. 1984) (membership in anti-government union is "political opinion").

44. See Arteaga v. INS, No. 86-7124, slip op. at 345 (9th Cir. Jan. 13, 1988) (choosing not to support guerrillas and to remain neutral in Salvadoran civil war constitutes a political opinion); Turcios v. INS, 821 F.2d 1396, 1401 (9th Cir. 1987) (neutrality, manifested as lack of support for the Salvadoran government, is a political opinion); Hernandez-Ortiz v. INS, 777 F.2d 509, 516-17 (9th Cir. 1985) (establishes presumption that government action is politically motivated); Del Valle v. INS, 776 F.2d 1407, 1413-14 (9th Cir. 1985) (refusal to join one particular side is political opinion); Argueta v. INS, 759 F.2d 1395, 1397 (9th Cir. 1985) (asylum granted despite lack of overt manifestation of neutrality, such as refusal to join a side). See generally Blum, The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980, 23 SAN DIEGO L. REV. 327 (1986).

45. 767 F.2d 1277 (9th Cir. 1984). Bolanos attempted to remain neutral in El Salvador by ending his association with a rightwing party and resisting pressure to join guerrillas. When friends and relatives in similar situations were killed by guerrillas, Bolanos fled to the United States and applied for asylum. The court noted that the United States accession to the Protocol, the Act's legislative intent, and a desire not to limit asylum grants to extremists directed its decision to grant asylum to "moderates who choose to sit out a battle." Id. at 1286. Bolanos-Hernandez may have overruled the earlier case of Zepeda-Melendez v. INS, 741 F.2d 285 (9th Cir. 1984). In Zepeda-Melendez, a Salvadoran man lived in a house that guerrillas used by day and government forces used by night. Zepeda was pressured by the guerrillas to join them but he maintained his neutrality and then fled the country. Id. at 287. The court held that Zepeda-Melendez faced the same danger for his noncommitment as other Salvadorans, and that the danger did not amount to persecution on account of political opinion. Id. at 290.

46. Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987).

47. Id.

48. Id. at 1435. In Lazo-Majano, a Salvadoran woman, whose husband had fled the country for political reasons, was repeatedly raped and beaten by a sergeant who threatened to label her a political subversive and have her killed if she refused to submit to him. Id. at 1433. The court of appeals granted asylum because it found four political opinions held by or imputed to Lazo-Majano: A subversive opinion "cynically imputed" to her; the imputed opinion that a man should not dominate a woman which she expressed when she fled; her opinion that lawless conditions in her country gave her no choice but to submit to persecution; and the political
woman's imputed opposition to domination by a man, and her opinion that lawlessness pervades a country, are "political opinions."\textsuperscript{49}

\textbf{C. Political Reasons for Persecution}

Decisionmakers have reached unpredictable conclusions regarding what reasons for persecution are political, not personal.\textsuperscript{50} In \textit{Campos-Guardado v. INS},\textsuperscript{51} the Fifth Circuit held that the petitioner had been raped for personal reasons, not for imputed political opinions. The court denied asylum even though Campos-Guardado's rapists shouted political slogans, opposed the agricultural cooperative that her uncle administered, and murdered her uncle just before raping her.\textsuperscript{52} Campos-Guardado later discovered the identity of one of her rapists, who threatened to kill her if she exposed him. The court held that this threat of future persecution did not warrant political asylum because the threat was not due to the victim's political opinions, but to the persecutor's desire for personal safety.\textsuperscript{53} In contrast to \textit{Campos-Guardado}'s high threshold for determining political persecution, the Ninth Circuit, in \textit{Lazo-Majano},\textsuperscript{54} held that a sergeant who persecuted a woman because she opposed his domination persecuted her for political reasons.\textsuperscript{55}

\textbf{D. Criminal Prosecution as a Pretext for Persecution of Political Opinions}

Decisionmakers have held that some criminal prosecutions are pretexts for persecuting political beliefs. In \textit{Kovac v. INS},\textsuperscript{56} the Ninth Circuit held that a "police state" with sanctions for defection persecutes citizens for their political opinions under the pretext of prosecution.\textsuperscript{57} The Board of Immigration Appeals ("BIA") reasoned opposition imputed to her because of her silence and noncommitment to her persecutor's ideas. \textit{Id.} at 1435–36.

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} \textit{Id.}

\textsuperscript{51} \textit{See}, e.g., Florez-De Solis v. INS, 796 F.2d 330 (9th Cir. 1986) (one issue was whether the persecutors were creditors or guerrillas); Zayas-Marini v. INS, 785 F.2d 801 (9th Cir. 1986) (despite applicant's status as an important political figure in Paraguay and disagreement with his opponents' political opinions, applicant was threatened only when a personal dispute arose); Fleurinor v. INS, 585 F.2d 129 (5th Cir. 1978) (asylum denied in part because the motive behind the Haitian secret police persecution might have been extortion, not political opinion).

\textsuperscript{52} \textit{Id. at} 289–90.

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} \textit{Lazo-Majano v. INS}, 813 F.2d 1432 (9th Cir. 1987).

\textsuperscript{55} \textit{Id.; see supra} notes 46–49 and accompanying text.

\textsuperscript{56} 407 F.2d 102 (9th Cir. 1969).

\textsuperscript{57} \textit{Id. at} 104. Kovac was a citizen of Yugoslavia.
similarly, in In re Janus and Janek, holding that both a citizen’s flight from a country with closed borders and criminal sanctions for defection are politically motivated.

Adjudicators differ on when to hold that military induction and sanctions for draft evasion amount to persecution for political opinion. Some decisionmakers have refused to evaluate the political actions of foreign governments, while others have evaluated governments’ military purposes. For example, in In re Salim, the BIA affirmed that the forcible impression of Afghan men and boys by the Soviet-dominated government amounted to persecution on account of political opinion. However, in Kaveh-Haghigy v. INS, the Ninth Circuit refused to scrutinize the Iranian government’s draft during its war with Iraq, absent exceptional circumstances.

III. INTERNATIONAL COMMENTARY ON THE INTERPRETATION OF “POLITICAL OPINION”

Study of the international sources of the Refugee Act’s definition of “refugee” assists asylum adjudicators to determine refugee status appropriately. The following discussion focuses on commentary provided by the drafters of international refugee relief instruments, such as the IGCR mandate, the IRO Constitution, and the Convention and Protocol. This commentary emphasizes that the concept of “persecution on account of political opinion” has been flexible. Authorities faced with sudden refugee crises have interpreted the phrase to include all persons in genuine need of protection from a range of persecutions involving political policies and doctrines. The UNHCR Handbook provides further persuasive authority for a broad interpretation of “persecution on account of political opinion.”

58. Int. Dec. No. 1900 (BIA, July 25, 1968). The applicants were from Czechoslovakia.
59. Id. at 876-77.
61. Id. at 313.
62. 783 F.2d 1321 (9th Cir. 1986).
63. Id. at 1322.
64. The Protocol, an international treaty, became part of the supreme law of the land when the United States acceded to it in 1968. U.S. Const. art. VI, cl. 2. Interpretation of international treaties may be facilitated by referring to preparatory work in order to more clearly understand the final treaty. Restatement (Second) of Foreign Relations Law of the United States § 147 (1965) takes into account the following: purpose and scope; circumstances surrounding the negotiation; drafts and other documents and official records of deliberations; subsequent practice of the parties; and a comparison of texts in different languages.
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A. Inter-Governmental Committee on Political Refugees and the International Refugee Organization

The members of the IGCR and the IRO commented sparsely on the term “refugee.” Perhaps they shared a perception of refugees, inspired by circumstances during the Second World War. The members assumed that most persons who fled their homes had valid reasons for flight that were broadly categorized as either racial, religious, or political.\(^6\) The French member of the IGCR indicated that “political opinion” applied to people fleeing a range of situations with political overtones, including people who “weren’t acceptable any more to the prevailing race or creed or political school.”\(^6\) This member believed that refugees who feared persecution on account of political opinion included not only persons persecuted by the government, but also those who disagreed with the government’s policy of persecution, even though the persecution was not aimed at them.\(^6\) In discussions during the drafting of the IRO definition of “refugee,” the Belgian United Nations delegate indicated that refugees included political dissidents who, for reasons of “political conscientious objection,” did not wish to return home.\(^6\) The Dutch delegation emphasized that refugees comprised all uprooted persons who objected to returning to their country of origin.\(^6\) The American delegation agreed with this description.\(^6\)


The Convention definition of “refugee” synthesized previous definitions in the IGCR mandate and the IRO Constitution. The Convention, drafted after the Second World War, was one more in the series of instruments designed to legally identify persons commonly recognized as refugees at that time. Acknowledging that refugee problems were widespread, the Convention delegates chose to omit refugee categories based on a specific nationality and to adopt a single refugee

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\(^6\) See infra notes 66–70 and accompanying text.


\(^67\) The refugees from Germany and Austria fleeing to France were not only Jews, but also Catholics and Protestants “who disagreed with the political doctrines of the German Government.” Id. at 40.


definition that reflected the contemporary understanding of the refugee problem.

The delegates agreed that, although the Convention should not be a legally binding "blank cheque" with regard to future refugee responsibilities, protection should be generously extended to all contemporary refugees. While not all-encompassing, the Convention was broadly humanitarian in extending protection and included a recommendation that the Convention be applied beyond its strict contractual scope. In practice, nations applied the Convention to refugee situations arising after 1951, as well as to the earlier situations it was intended to address.

Crises compelling people to flee their homes continued after 1951, and frequently arose outside of Europe. The ongoing and changing nature of refugee situations accounted for a growing discrepancy between Convention refugees and persons who deserved refugee status in the eyes of United Nations delegates. In 1967, this discrepancy, and the desire to bring the letter of refugee law in line with its generous spirit, prompted the United Nations to draft a Protocol that

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75. In a speech to the United Nations General Assembly, the UN High Commissioner for Refugees stated that the Convention's dateline, see supra note 18 and accompanying text, discriminated among groups of refugees. 3 U.N. GAOR C.3 (1447th mtg.) at 415, U.N. Doc. A/C.3/SR.1447 (1966). Many UN delegates supported this observation, particularly as it applied to the African continent where refugees were fleeing the political upheavals of collapsing colonial regimes. See e.g., id. at 420 (China); id. at 421 (France); 3 U.N. GAOR C.3 (1448th mtg.) at 426. U.N. Doc. A/C.3/SR.1448 (Yugoslavia); id. at 427 (Cuba); 3 U.N. GAOR C.3 (1449th mtg.) at 431, U.N. Doc. A/C.3/SR.1449 (Iran); id. at 432 (Tanzania).
removed the Convention's temporal and geographic limits to the definition of "refugee." 76

Modern refugees who meet the Convention and Protocol definition nevertheless find it increasingly difficult to establish their status and receive asylum in foreign countries. 77 The circumstances of the adoption and application of the Convention and Protocol suggest that the difficulties the definition presents to current refugees do not stem from restrictions intended by the drafters of the United Nations instruments. 78 The commentary accompanying the adoption of international instruments concerning refugees, as well as the consistent broadening of refugee definitions over time, imply that the current definition of "refugee" should be interpreted generously and flexibly to conform to its sources. Those who drafted the IGCR and IRO mandates intended the term "refugee" to include persons who disagreed with government policies or doctrines, and political dissidents with conscientious political objections, as well as persons mistreated because of their political beliefs. 79 The Convention's drafters believed that their definition applied to the majority of the involuntary European migrants who lacked government protection after World War Two; 80 the Protocol furthered this generous spirit by extending protection to refugees from all regions without temporal restrictions. Regardless of how twentieth century instruments have defined "refugee," the term has been construed consistently to protect people

77. Many nations today have retreated from humanitarian ideals towards xenophobic and nationalistic ones hostile to people who would be "Convention refugees" under a broad interpretation of the term. The conception of refugees as a threat to social order, rather than as victims of social disorder, is reflected in countries' decreased willingness to accept refugees from first countries of asylum and in long-term detention measures applied to people with well-founded fears of persecution. Winter, The Year in Review, in WORLD REFUGEE SURVEY, 1986 IN REVIEW 2 (1986) [hereinafter WORLD REFUGEE SURVEY]; see also Rudge, Fortress Europe, in WORLD REFUGEE SURVEY, supra, at 5 (1986) (suggesting that statistical overrepresentation of the number of refugees in Europe destabilizes public opinion).
78. See supra notes 71–76 and accompanying text. A Convention participant wrote:

As one who has participated in the drafting of the convention, I can say that the drafters did not have specific restrictions in mind when they used this terminology. Theirs was an effort to express in legal terms what is generally considered as a political refugee. The Convention was drafted at a time when the cold war was at its height. The drafters thought mainly of the refugees from Eastern Europe and they had no doubt that these refugees fulfilled the definition they had drafted.

79. See supra notes 65–70 and accompanying text.
80. See supra notes 73–74, 78 and accompanying text.
commonly considered refugees by contemporary government representatives.\textsuperscript{81}

C. \textit{Handbook of the United Nations High Commissioner for Refugees}

The \textit{Handbook} interprets "persecution on account of political opinion" by drawing on the considerable experience of the United Nations High Commissioner's Office.\textsuperscript{82} The \textit{Handbook} notes that persecution, and even a persecutor's awareness of a potential victim, may have occurred in the past or be a future threat.\textsuperscript{83} To determine whether a person is fleeing past or potential persecution for political opinion, the \textit{Handbook} focuses on the general situation in the victim's country of origin,\textsuperscript{84} the persecutor's perception of the victim's opinion,\textsuperscript{85} and whether there is a causal link between past, or threats of future, persecution and the perceived political opinion.\textsuperscript{86}

The \textit{Handbook} distinguishes between persecution for political opinion and prosecution for politically-motivated crimes.\textsuperscript{87} The latter is recognized as persecution for political opinion only if the criminal can show that the prosecution is a pretext for punishing a political opinion, or that the punishment is excessive or arbitrary.\textsuperscript{88}

IV. PROPOSAL FOR AN APPROPRIATE INTERPRETATION OF "PERSECUTION ON ACCOUNT OF POLITICAL OPINION"

Discordant perceptions of the term "refugee" have resulted in inconsistent asylum decisions in different eras and among different courts. Decisionmakers in the United States now frequently apply the Act's "refugee" definition to non-Europeans\textsuperscript{89} from countries in the throes of post-colonial turmoil\textsuperscript{90} and internal armed conflict.\textsuperscript{91} The

\textsuperscript{81}. See supra notes 66-70, 73-76 and accompanying text.
\textsuperscript{82}. The experience includes the practice of states, exchange of views between the Office and various national authorities, and recent refugee literature. \textit{Handbook, supra} note 27, para. (v).
\textsuperscript{83}. \textit{Id.} paras. 82-83. The \textit{Handbook} recommends careful scrutiny of refugees "sur place." persons who have become refugees while outside their country due to political events within the country or their own activities once outside. \textit{Id.} paras. 94-96.
\textsuperscript{84}. \textit{Id.} para. 42.
\textsuperscript{85}. \textit{Id.} paras. 80, 82-83.
\textsuperscript{86}. \textit{Id.} para. 81.
\textsuperscript{87}. \textit{Id.} paras. 56-57, 59, 84-86, 167-71, 174.
\textsuperscript{88}. \textit{Id.}
\textsuperscript{90}. See Khan, \textit{supra} note 16, at 293.
cultural, social, economic, and political structures that refugees flee today are less familiar to adjudicators than the European situations that refugees fled when the Convention was adopted. This may explain why people who would have been recognized as “Convention refugees” a few decades ago are denied asylum status by some courts today.\(^9\)

Asylum adjudicators could harmonize discordant perceptions of refugee identity by interpreting “persecution on account of political opinion” in a manner consistent with the congressional intent behind the Refugee Act,\(^9\) and with the flexible interpretations of international instruments, as revealed in pertinent commentaries.\(^9\) Adjudicators could examine four factors derived from the UNHCR *Handbook*\(^9\) to begin an appropriate interpretation. First, adjudicators could examine relevant conditions in the country of origin in order to consider subsequent factors in this context. Second, adjudicators could discover whether the persecutor noticed, or may notice, an expression of opinion by the victim; or whether the persecutor attributed, or may attribute, the opinion to the victim. Third, asylum adjudicators could consider whether the opinion at issue is “political” within the context of the country of origin. Finally, adjudicators could decide whether the persecutor was or may be intolerant of the political opinion and persecute the victim because of it. If these criteria are carefully and explicitly applied to individual asylum cases, a more consistent and appropriate interpretation of “persecution on account of political opinion” will result.

### A. Examine Relevant Conditions in the Country of Origin

Asylum applicants’ situations can best be understood in the context of the relevant conditions in the country of origin. These conditions set the stage for victims of persecution to lose or forsake the protection of their own governments and to apply for refugee status in foreign countries. Circumstances relevant to asylum adjudications include political, economic, and social factors, such as the structure of the

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\(^9\) “Internal armed conflict” includes wars of independence, civil wars, and revolutions which may become “internationalized” with foreign power involvement. Perluss & Hartman, *supra* note 11, at 551–53.

\(^9\) See *supra* note 77.

\(^9\) United States refugee law has moved away from explicit ideological biases toward the more neutral and flexible approach set out in the 1980 Refugee Act. See *supra* notes 9–10 and accompanying text.

\(^9\) The United States agreed to incorporate the international interpretation of “refugee” into domestic law when it acceded to the Protocol. See *supra* notes 7–8 and accompanying text.

\(^9\) See *supra* notes 27, 82–88 and accompanying text.
nation's government, army, police, and judiciary, as well as how family, friends, work, religion, and school interact in this particular culture.\textsuperscript{96} Reports by neutral, well-respected sources, such as Amnesty International, on conditions in the country of origin may help the court determine the relevant circumstances of the case.\textsuperscript{97}

Exploring general conditions in the country of origin is a necessary preliminary step but insufficient to determine an asylum case; refugee status is contingent on whether an individual has been, or may be, singled out for persecution for political opinion.\textsuperscript{98} However, conditions of civil or military unrest lend credence to evidence of the victim's past or potential persecution and loss of government protection. Evidence of strife should not undermine an asylum applicant's case.\textsuperscript{99}

Flight from random violence during conditions of strife usually does not render an applicant eligible for refugee status.\textsuperscript{100} However, violence that at first appears random may, on closer inspection, be directed at particular persons suspected of harboring political opinions that threaten the persecutor.\textsuperscript{101} These persons have a legitimate claim to refugee status.

Thus, an adjudicator could begin by focusing on the relevant general conditions in an asylum applicant's country of origin in developing an appropriate analysis of whether the applicant was persecuted on

\textsuperscript{96} Handbook, supra note 27, paras. 41-42, 53. In Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977), the plaintiffs fled persecution by the Haitian secret police. The court placed proper emphasis on the entire oppressive political situation of the country, including the persecutors' political status and power, in order to determine whether the persecution was on account of political opinion. See supra note 40 and accompanying text.

\textsuperscript{97} G. Goodwin-Gill, supra note 16, at 25 n.22. Department of State BHRHA advisory opinions may violate the legislative intent to remove ideological discrimination from United States refugee policy. The United States contracted through the Protocol to apply the Convention provisions without discrimination on the basis of race, religion, or country of origin. Convention, supra note 17, art. 3. To the extent that advisory opinions discriminate on the basis of country of origin as a matter of foreign policy, their influence on asylum proceedings violates United States obligations under international law. See supra notes 34-37 and accompanying text.

\textsuperscript{98} Handbook, supra note 27, paras. 44-45.

\textsuperscript{99} Id. paras. 39, 42. For instance, the Salvadoran conditions of civil strife in which factions vied for popular support enhanced the credibility of the applicant's claim in Zepeda-Melendez v. INS, 741 F.2d 285 (9th Cir. 1984), that he was persecuted for his neutrality. See supra note 45.

\textsuperscript{100} The Handbook requires that there be persecution. Handbook, supra note 27, para. 45 Congress specifically excluded victims displaced by civil strife from the Refugee Act's definition. See supra note 11.

\textsuperscript{101} During Haitian civil strife in 1987, uncontrolled, anti-election forces terrorized the Carrefour Feuille neighborhood where civilian groups had organized to protect voters. The forces sought to punish the inhabitants for supporting the election process. Victims within this neighborhood could legitimately claim that they were persecuted on account of their political opinions, despite the superficial appearance that they were subjected to random violence. See N.Y. Times, Dec. 2, 1987, at 6, col. 1.
account of political opinion. This point of departure not only clarifies whether apparently random violence may actually have been a singling out of individuals for persecution, but also helps the adjudicator decide whether the victim’s opinion was political within the context of the country of origin.102

B. Persecutor Notices in or Attributes to the Victim an Expression of Opinion

After establishing the relevant context for an asylum claim, the adjudicator could appropriately examine whether the persecutor noticed in, or attributed to, the applicant an expression of opinion, or whether this may occur in the future.103 Only the holder of an opinion knows what the opinion is until it is somehow expressed to others; moreover, the perception of the expression may inaccurately reflect the real opinion. Opinions can be expressed through acts, failures to act, spoken or written views, or through association with family, friends, acquaintances, strangers, or organizations.

In an inquiry into whether a persecutor noticed a victim’s opinion, it is relevant to consider the victim’s social position and whether the opinion was important or tenaciously held.104 It is especially important to inquire whether the opinion has or will come to the notice of past or potential persecutors if the victim expressed the opinion after leaving the country of origin.105 It is irrelevant, however, to inquire into the motives a person has for expressing an opinion, unless inquiring into the motivation behind the commission of a criminalized act.106 The requirement that the persecutor notice the opinion should not be interpreted to mean that political refugees must be well-known political figures; neither the Convention and Protocol nor the Refugee Act support this narrow interpretation.107

102. See infra notes 112–13 and accompanying text.
104. Id. para. 80.
105. Id. paras. 82, 96.
106. Compare id. paras. 80, 82–83 (no mention of motives for expressing an opinion) with id. para. 86 (relevant to examine motive pertaining to crime to determine if prosecution is persecution).
107. The Refugee Act was not intended only to apply to public figures; Congress intended the Refugee Act to extend human rights protection to persecuted, defenseless persons fleeing oppressive regimes. See supra note 12 and accompanying text. The Convention definition of “refugee” evolved to meet the needs of ordinary, often apolitical citizens either in fear of Nazi and Fascist persecution or in disagreement with their policies. See supra notes 65–70, 73–74 and accompanying text. While the Handbook notes that the publicity surrounding a victim’s political opinion may help establish that the fear of persecution is well-founded, the absence of fame or
Opinions can be attributed to persons who do not actually hold them. In asylum cases, expressions of opinion by the victim can be directly misunderstood by the persecutor or the persecutor may be misled by a third party who imputes an unheld opinion to a victim. If a political opinion is sincerely or cynically imputed to a victim, the victim may have a well-founded fear that members of the political apparatus, or groups that the government cannot or will not control, will persecute the victim on account of the imputed political opinion.

C. The Opinion Is Political Within the Context of the Country of Origin

An appropriate interpretation of “political” in American asylum law would take into account the varied cultural settings in which “persecution on account of political opinion” occurs. The definition of “political” should be broad and flexible enough to accommodate all of its reasonable interpretations; the Refugee Act and the Protocol embody the goal of protecting all persons who have a wide, though not unlimited, range of political reasons for fleeing and not wishing to return home. An adjudicator could appropriately explore whether the victim’s actual or imputed opinion is “political” within both the context of the country of origin and the perceptions of the persecutor.

While “politics” and “political” are sometimes exclusively used to describe civil government, these words are also generally recognized to describe patterns of human relationships that involve control, influ-

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108. For example, the victim in Campos-Guardado v. INS, 809 F.2d 285 (5th Cir.), cert. denied, 108 S. Ct. (1987), was raped by opponents of Salvadoran land reform probably because they believed that she had expressed her support for land reform by her family association with her uncle, the leader of an agricultural cooperative. Whether or not Campos-Guardado actually supported land reform, her persecutors attributed support to her. Thus, the court could have legitimately held that Campos-Guardado was persecuted on account of her political opinion.

109. Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987), the political opinion of subversiveness was cynically and publicly imputed as a threat to make Lazo-Majano submit to her persecutor. While her actual persecutor knew that she was not a subversive and therefore cannot be said to have persecuted her for her political beliefs, Lazo-Majano may have had a well-founded fear that others would persecute her because they believed the sergeant’s imputations of subversiveness to her. The Lazo-Majano court could have appropriately applied the criteria of persecution on account of political opinion by basing its political asylum grant on this reasoning.

110. See supra note 1.

111. See supra note 5.

112. See supra notes 12–14, 66–76 and accompanying text.

ence, or power over allocations of spiritual values or material goods.\textsuperscript{114} “Political” relationships and opinions can be found in trade unions, churches, universities, agricultural cooperatives, businesses, and other types of organizations.\textsuperscript{115}

A difference of political opinion between the persecutor and victim exists if the persecutor perceives, in the victim’s actual or attributed expression, a difference of opinion about aims or methods surrounding distributive issues.\textsuperscript{116} Common activities with political overtones that are likely to be persecuted by either governments or uncontrollable forces include: union activities,\textsuperscript{117} strike participation,\textsuperscript{118} agricultural land reform,\textsuperscript{119} human rights documentation, and many activities at the grass roots level.\textsuperscript{120}

Persecution of a person for neutrality can appropriately be defined as “political” persecution because persecutors may perceive refusal to participate in political activities as threats to their power to control outcomes.\textsuperscript{121} The neutrality of a victim, manifested by silence and noncommitment to a persecutor’s views, as well as by stated neutral-

\textsuperscript{114} R. Dahl, Modern Political Analysis 3 (3d ed. 1976). See also Blackwell Encyclopaedia of Political Thought 391 (1987) [hereinafter Blackwell Encyclopaedia] (“politics” is “a process whereby a group of people whose opinions [about ultimate aims or how best to achieve them] or interests are initially divergent, reach collective decisions which are generally regarded as binding”).

\textsuperscript{115} Blackwell Encyclopaedia, supra note 114, at 391. The Handbook notes that agents of persecution include not only government forces but societal sectors that the government cannot or will not control. Handbook, supra note 27, para. 65. This suggests that political opinions liable to be persecuted may occur in sectors of society other than civil government.

\textsuperscript{116} These are issues concerned with allocations of spiritual values or material goods. See supra note 114 and accompanying text.

\textsuperscript{117} See, e.g., Zavala-Bonilla v. INS, 730 F.2d 562 (9th Cir. 1984); see supra note 43.

\textsuperscript{118} Strikes are acts to influence or achieve change and strikers, whether voluntary or forced participants, have political opinions attributed to them by opponents of the strike.

\textsuperscript{119} See, e.g., Campos-Guardado v. INS, 809 F.2d 285 (5th Cir.), cert. denied, 108 S. Ct. 92 (1987); see supra notes 51–53 and accompanying text.

\textsuperscript{120} Human rights abuses have significant effects on the distribution of both material goods and spiritual values within a country. Foreign investors and agencies may withdraw financial aid from governments with documented human rights abuses. See, e.g., 22 U.S.C. § 2151n. (Supp. 1987) (prohibits development assistance to governments engaging in gross violations of internationally recognized human rights). Similarly, grass roots activities such as aiding and organizing the poor may rechannel resources from urban to rural areas. See generally R. Chambers, Rural Development, Putting the Last First (1983) (describing accumulation of resources and power in urban area and the difficulties of sharing wealth and technology with rural areas). Thus, the opinions that human rights should not be abused and that absolute poverty should be alleviated are “political” opinions to which there may be substantial opposition from the government or uncontrollable forces within a country.

\textsuperscript{121} Thus, the holding in Zepeda-Melendez v. INS, 741 F.2d 285 (9th Cir. 1984), that persecution for political neutrality was not persecution on account of political opinion, is not supported by accurate interpretations of “political opinion.” However, adjudicators in Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984), and Turcios v. INS, 821 F.2d 1396 (9th Cir. 413
ity, may be perceived by the persecutor as a "political" opinion threatening the methods, aims, or policies of the persecutor. However, in this case, the adjudicator may wish to consider whether the persecutor believed that the victim's silence was a political threat or whether, instead, the persecutor took advantage of perceived passivity to persecute a victim for reasons other than political opinion.122

Countries criminalize such acts as defection and evasion or desertion from military or police service, as well as more common crimes. If the government prosecutes an offender for a punishable act under the laws of the country, and if the punishment conforms to the country's laws and to accepted human rights standards, the offender cannot claim refugee status.123 However, if either the application of the law to the particular crime committed or the punishment itself is a pretext for persecuting the victim's political opinion and is arbitrary, excessive, or discriminatory, then the victim is a refugee.124 An asylum applicant who fears combat or dislikes military service is not eligible for refugee status125 unless the applicant can show that participating in a type of military activity is contrary to his or her genuine political convictions, and that the type of military activity is condemned by the international community as contrary to basic rules of human conduct.126 The Handbook notes that the adjudicator can investigate the sincerity of opinions through exploring the applicant's personality, background, and previous expression of opinions. The adjudicator can

1987), correctly interpreted the victims' choice of neutrality as a political opinion because their persecutors perceived neutrality as threatening their political control. See supra notes 44, 45.
122. See, e.g., Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987); see supra notes 46-49.
126. Handbook, supra note 27, paras. 170-71, 174. For example, a South African who flees prosecution for refusing to serve in the armed forces on the grounds that such service enforces apartheid is a refugee. Accord G.A. Res. 33/165, 33 U.N. GAOR Supp. (No. 45) at 154, U.N. Doc. A/33/509 (1978). Some commentators suggest that, considered separately, conscription of a conscientious objector or conscription for a type of military action condemned by the international community might each be grounds upon which to claim refugee status. Frellick, Conscientious Objectors as Refugees, in WORLD REFUGEE SURVEY, supra note 77, at 29.
also take into account whether the applicant had volunteered for military service, had been drafted, or had had previous difficulties with the authorities because of these opinions.\footnote{Handbook, supra note 27, para. 174.}

An appropriate interpretation of "political opinion" in asylum adjudications encompasses opinions about significant distributive issues. Framing their inquiries with an awareness of the cultural context, adjudicators could examine the victim's expressions of opinion and the persecutor's perceptions of the expressions, before attempting to determine whether the victim's opinion might have been considered politically threatening by the persecutor.

D. Persecution Occurs on Account of the Persecutor's Perception of the Political Opinion

Finally, an asylum adjudicator could appropriately decide that an applicant had been or may be persecuted "on account of political opinion" if the persecution occurred, or the victim has a well-founded fear that it will occur, because of what the persecutor perceives as the victim's political opinion.\footnote{Id. para. 80.} However, causation is difficult to show for refugees who arrive with few belongings and little evidence of persecution; the \textit{Handbook} recommends that adjudicators give the benefit of the doubt to plausible refugee accounts of persecutors' motives for persecution.\footnote{Handbook, supra note 27, paras. 196, 203-04.}

Persecution occurs when a person is intolerant of an aspect of another.\footnote{WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 962 (2d ed. 1983).} Intolerance is the refusal to allow, permit, recognize or respect another's beliefs or practices.\footnote{Id. para. 80.} Absent evidence to the contrary, a causal link between persecution and political opinion can be established if a persecutor is intolerant of a political opinion attributed to the victim, and subsequently persecutes the victim, or persons similarly situated, or threatens to do so.\footnote{Handbook, supra note 27, para. 81.}

The fact that a persecuting government allows the victim to leave the country, or that uncontrollable forces allow departure from a region, does not undermine the applicant's claim that the persecutor was or may be intolerant of the victim because of a political opinion.

\footnote{Some asylum cases, such as Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987), have confused the cause of the persecution with the result. Lazo-Majano's opinion that the generally lawless conditions in El Salvador afforded her no protection from her sergeant rapist may have been a political opinion that persuaded her to submit to the sergeant. But her opinion of general lawlessness was not the cause of her persecution. See supra note 48.}

\footnote{WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 962 (2d ed. 1983).}
Persecutors may allow political dissidents to leave in order to rid the region of political threats. Governments or other forces may feel especially threatened by, and eager to persecute, dissidents who have the courage and commitment to return to a dangerous political situation. If the victim's fear that the persecutor does not tolerate the victim's political opinions is well-founded, then the court may appropriately conclude that subsequent persecution, whether actual or threatened, occurs on account of political opinion.

V. CONCLUSION

Asylum adjudicators interpret "persecution on account of political opinion" inconsistently, often to the detriment of legitimate refugees. This definition of a "refugee" is found in the 1980 Refugee Act and derived from the 1967 Protocol and previous international instruments relating to refugee relief. These sources confirm that the definition should be interpreted flexibly. The United Nations High Commissioner for Refugees Handbook distills substantial experience with refugees and provides an appropriately flexible construction of "persecution on account of political opinion." Such an interpretation would include: framing the asylum inquiry with knowledge of conditions in the country of origin, as revealed by neutral sources; establishing whether the persecutor notices or attributes to the victim an expression of opinion; deciding whether the opinion is "political" within its cultural context; and determining whether the persecution occurs, or may occur, on account of the political opinion perceived by the persecutor. An appropriate and generous interpretation of the definition of "refugee" upholds global ideals of human rights and adherence to international law. This flexible construction grants to refugees what most Americans take for granted: A government's protection from persecution.

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133. Id. paras. 47-48.