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QUIXOTIC ATTEMPT? THE NINTH CIRCUIT, THE BIA, AND THE SEARCH FOR A HUMAN RIGHTS FRAMEWORK TO ASYLUM LAW

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Abstract: The Ninth Circuit and the Board of Immigration Appeals (BIA) historically have disagreed about the application of human rights norms in many areas of asylum law. Although recent decisions by the BIA indicate more receptiveness toward the Ninth Circuit's broader approach, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 seeks to stifle judicial review in many areas of immigration law, including asylum. This Comment analyzes the potential impact of the law on the development of asylum jurisprudence and recommends areas for future dialogue between the Ninth Circuit and the BIA.

> *"In the absence of judicial review, grave injustices could take place for which our government and our people would have to bear the moral responsibility."*[1]
>
> *"[W]e have now joined the United States Court of Appeals for the Ninth Circuit in its quixotic attempt to right the wrongs of the world . . . ."*[2]

Nearly two decades of often vitriolic dialogue between the Ninth Circuit and the Board of Immigration Appeals (BIA) may have finally culminated in cooperation. In the past, the two appeals bodies had exchanged interpretations, and sometimes insults, about the proper approach to asylum law since Congress passed the Refugee Act of 1980.[3] The BIA's narrow interpretation reflected immigration concerns and U.S. foreign policy priorities, while the Ninth Circuit grounded its opinions in the humanitarian purposes of the Refugee Act. In 1996, however, the BIA issued two precedential opinions that adopted many of the Ninth Circuit's propositions the BIA had long resisted.[4] This rapprochement

1. Rodriguez-Roman v. INS, 98 F.3d 416, 433 (9th Cir. 1996) (Reinhardt & Hawkins, JJ., specially concurring).

2. *In re* H-, Int. Dec. 3276, at 20 (B.I.A. 1996) (Heilman, Board Member, dissenting).

3. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C. (Supp. II 1996)). The Refugee Act forms the statutory basis for modern asylum law.

4. *H-*, Int. Dec. 3276; *In re* S-P-, Int. Dec. 3287 (B.I.A. 1996). The BIA must apply Ninth Circuit precedent within the circuit but can reject it elsewhere unless the Board adopts the reasoning as its own. *See* Matter of Anselmo, 20 I. & N. Dec. 25, 31–32 (B.I.A. 1989).

signals a renewed commitment to the human rights underpinnings of asylum law and an opportunity for further development—quixotic or not.

The BIA's transformation also exemplifies the positive influence of judicial review in the field of immigration law. Ironically, the breakthrough developed just as Congress tried to limit judicial influence in this field. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) eliminates or narrows the scope of judicial review in many areas, including asylum.[5] Although the full import of these provisions remains unclear, they could stunt the type of agency-court dialogue that influenced the recent changes within the BIA.

Rather than cabining its review functions in the wake of IIRIRA, the Ninth Circuit should continue efforts to advance asylum law. The usual administrative agency deference[6] is ineffective and even inappropriate in the asylum setting because the BIA lacks specialized expertise to interpret the Refugee Act.[7] Unlike most immigration laws, which reflect evolving policy goals, the Refugee Act requires neutral analysis honoring its humanitarian purpose.[8] Undue deference to the BIA, a political body, risks elevating policy goals above humanitarian concerns, which is exactly what Congress wished to avoid when it passed the Act.[9] Judicial review prevents potential misinterpretation and stagnation.[10]

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5. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306(a)(2), 110 Stat. 3009-546, 3009-607 (amending Immigration and Nationality Act § 242, 8 U.S.C. § 1252 (Supp. II 1996) [hereinafter INA]).

6. The seminal case on deference to administrative agencies is *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The U.S. Supreme Court required deference when Congress left statutes silent or ambiguous and the agency interpretation was not arbitrary or capricious. *Id.* at 843–44. The facts of *Chevron*, however, involved agency rulemaking rather than adjudication. *Id.* at 840–44. *See* Maureen B. Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, 28 Willamette L. Rev. 773, 788 (1992) (urging deference to agency adjudicatory decisions only where warranted under circumstances); Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 San Diego L. Rev. 861, 907 (1994) (arguing that adjudicatory decisions require less deference than policymaking decisions).

7. Asylum cases constitute only 30% of the BIA caseload. Vicente A. Tome, *Administrative Notice of Changed Country Conditions in Asylum Adjudication*, 27 Colum. J.L. & Soc. Probs. 411, 425 n.93 (1994). Tome adds that BIA members lack training on foreign country conditions, key factors in asylum claims. *Id.* at 440.

8. *See* Callahan, *supra* note 6, at 788–89; *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 444–50 (1987) (reaffirming judiciary's role in interpreting Refugee Act).

9. *See* Callahan, *supra* note 6, at 785; Cynthia R.S. Schiesswohl, *Judicial Autonomy in the Immigration Adjudicatory System*, 21 U. Dayton L. Rev. 743, 756 (1996).

10. *See* Deborah E. Anker, *The Law of Asylum in the United States: A Guide to Administrative Practice and Case Law* 23–24 (2d ed. Supp. 1992) (noting deleterious effects of administrative isolation on development of asylum law); T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. Pitt. L. Rev. 237, 258 (1983) (arguing that

The dialogue between the Ninth Circuit and the BIA stands as a successful model of judicial review, albeit a work in progress. Important issues still remain unresolved and require the combined attention of the two appeals bodies. The BIA's shift marks an opportunity to address those issues further and remove political overtones from statutory interpretation.

This Comment examines the evolving relationship between the Ninth Circuit and the BIA. Part I briefly explains the requirements of asylum and the international roots of the Refugee Act. In Part II, this Comment provides examples of past divergence between the BIA and the Ninth Circuit in interpreting the Refugee Act. It explores how effectively the two appeals bodies have complied with international standards. Part III explains how this dialogue has advanced asylum law by influencing the BIA to give effect to the Refugee Act's human rights purposes. That adjustment remains tenuous, however, and Part IV analyzes whether IIRIRA could prevent future constructive dialogue. This Comment concludes in Part V with recommendations on issues the Ninth Circuit and the BIA should address in future discourse.

I. LEGAL REQUIREMENTS AND INTERNATIONAL UNDERPINNINGS OF U.S. ASYLUM LAW

Asylum applicants face two obstacles before receiving protective relief under U.S. law. First, they must meet the statutory definition of "refugee."[11] The definition requires (1) a well-founded fear of (2) persecution (3) on account of (4) race, religion, nationality, membership in a particular social group, or political opinion.[12] Most debates between review bodies turn on the interpretation of these key phrases.

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administrative isolation damages agencies by preventing them from maturing as they would in dialogue with courts).

11. INA § 208(b)(1), 8 U.S.C. § 1158(b)(1) (Supp. II 1996).

12. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (Supp. II 1996). The full text defines refugee as:

> [A]ny 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.

INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

Second, an applicant who meets the definition also must receive a discretionary grant of asylum from the decisionmaker.[13] The decisionmaker may refuse to grant asylum based on negative factors.[14] Early BIA policy allowed almost unfettered negative discretion when adverse factors such as document fraud occurred.[15] The BIA later retreated from that formalistic approach and crafted guidelines that presume positive discretion in most cases.[16] Single negative factors are no longer dispositive, and decisionmakers must weigh all equities.[17]

Restriction on removal, formerly named withholding of deportation, is a companion provision to asylum that eliminates the government's discretionary power and mandates protection if applicants prove their lives "would be threatened because of" the grounds enumerated in the statute.[18] The United States cannot *refoul*, or return, such victims to persecuting countries.[19] Restriction on removal requires applicants to meet a higher burden of proof than the discretionary relief of asylum,[20] but the other terms in the statutes are interpreted identically.[21] Applicants denied either form of relief can appeal to the BIA, which is the administrative appeals body.[22] The statute also provides for review in federal court after an applicant exhausts administrative remedies.[23]

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13. *See Cardoza-Fonseca*, 480 U.S. at 441. INS asylum officers make some initial asylum decisions. 8 C.F.R. § 208.2(a) (1997). Immigration judges, who are part of the Executive Office of Immigration Review, also make asylum decisions during removal hearings. 8 C.F.R. § 208.2(b) (1997).

14. *See Cardoza-Fonseca*, 480 U.S. at 441; Matter of Pula, 19 I. & N. Dec. 467, 473–74 (B.I.A. 1987).

15. *See, e.g.*, Matter of Salim, 18 I. & N. Dec. 311, 315–16 (B.I.A. 1982).

16. *Pula*, 19 I. & N. Dec., at 473–74.

17. *Id.* at 473. Examples of discretionary factors are fraudulent entry, length of time spent in safe third countries, family ties, age, health, and seriousness of risk. *Id.* at 473–74.

18. The enumerated grounds are race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (Supp. II 1996). The provision was renamed "restriction on removal" by IIRIRA. *See* INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A).

19. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A). This protection derives from the international norm of *non-refoulement*, or non-rejection. Although the government cannot deport these victims to the persecuting country, it can deport them to other safe countries. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A).

20. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 430–31 (1987). Restriction/withholding cases use "would be" language that requires persecution to be more likely than not, while asylum requires only a one in ten chance. *Id.*

21. *See, e.g.*, Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988).

22. INA § 208(d)(5)(A)(iv), 8 U.S.C. § 1158(d)(5)(A)(iv) (Supp. II 1996) (administrative appeal).

23. INA § 242, 8 U.S.C. § 1252 (Supp. II 1996) (judicial review).

Both asylum and restriction on removal are humanitarian rather than political in nature. Congress passed the Refugee Act to comply with our international obligations under the 1967 Refugee Protocol,[24] a humanitarian measure that incorporates the provisions of the 1951 Refugee Convention.[25] The Refugee Convention mandates *non-refoulement* in some cases and urges asylum in others.[26] Congress modeled the Refugee Act on the Refugee Convention by mirroring its language almost verbatim.[27]

The Refugee Act significantly revised U.S. asylum law, which previously had admitted refugees based on ideological factors rather than neutral, humanitarian standards.[28] Legislative history reveals that Congress expected the Refugee Act to codify "our national commitment to human rights and humanitarian concerns."[29] Congress also wanted a broad law that would provide flexibility during crises.[30] Because the Refugee Act derives from treaties and human rights norms, the U.S. Supreme Court has indicated that decisionmakers should rely on interpretations of the Refugee Protocol for guidance in interpreting the Refugee Act.[31]

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24. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 606 U.N.T.S. 267; *see also Cardoza-Fonseca*, 480 U.S. at 436–37.

25. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. The United States did not become a party to the Refugee Convention, but is bound by provisions incorporated into the Refugee Protocol.

26. *Id.* at 176 (prohibiting expulsion when lives would be threatened), 152–54 (defining refugee).

27. One difference is that the Refugee Act uses the phrase "on account of" rather than the word "for." Refugee Convention, *supra* note 25, at 152. For the text of the Refugee Act definition, see *supra* note 12.

28. Earlier laws granted protection only to those fleeing either Communist countries or the Middle East. *See* Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 Mich. J. Int'l L. 1179, 1184 (1994). The policy of using political factors unfortunately still appeals to some. *See Overheard*, Newsweek, Dec. 23, 1991, at 17, 17 (quoting then-Presidential candidate Patrick Buchanan as saying, "[i]f we had to take a million immigrants in, say, Zulus next year, or Englishmen, and put them in Virginia, what group would be easier to assimilate and would cause less problems . . . ?").

29. S. Rep. No. 96-256, at 24 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 141.

30. *See* Musalo, *supra* note 28, at 1194–95 (citing 126 Cong. Rec. 4499 (1980)).

31. INS v. Cardoza-Fonseca, 480 U.S. 421, 429–31 (1987). "[T]he [U.N.] Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *Id.* at 439 n.22.

II. COMPARISON OF NINTH CIRCUIT AND BIA APPROACHES TO ASYLUM LAW

The international law background framed the context in which courts crafted approaches to asylum cases. The Ninth Circuit took a broad approach to interpreting the Refugee Act, while the BIA interpreted the Act more narrowly. The Ninth Circuit ruled on more asylum cases than any other circuit[32] and deferred less to BIA decisions than most circuits.[33] Because of these two factors, it developed its own thorough body of asylum case law[34] that differed significantly from the BIA standards applied elsewhere.

The Ninth Circuit generally grounded its decisions in the humanitarian purpose of the Refugee Act and cited regularly to interpretations by the United Nations High Commissioner for Refugees.[35] The court also eschewed political and immigration policy concerns, such as border control, when making asylum decisions.[36] This resulted in a broad interpretation of the refugee definition that encompassed the human rights goals Congress hoped to achieve.

The BIA's narrower interpretation often relied on political, "floodgate" concerns when denying asylum claims.[37] Moreover, the BIA's decisions were notorious for their reflection of U.S. foreign policy

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32. *See* Musalo, *supra* note 28, at 1188 n.37 (noting that bulk of cases in 1980s involved Central American asylum applicants detained in California).

33. *See* Mendoza Perez v. INS, 902 F.2d 760, 766–67 (9th Cir. 1990) (Sneed, J., concurring specially). *See generally supra* notes 6–10 and accompanying text (discussing deference in asylum setting).

34. For an analysis of the Ninth Circuit's early role in developing asylum law, see generally Carolyn P. 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).

35. Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/IP/4/Eng. Rev. 2 (1992) [hereinafter *U.N. Handbook*]; *see also, e.g.*, Rodriguez-Roman v. INS, 98 F.3d 416, 425–26 (9th Cir. 1996) (tracing Ninth Circuit's history of following *U.N. Handbook* principles).

36. *Rodriguez-Roman*, 98 F.3d at 433 (Reinhardt & Hawkins, JJ., specially concurring) (noting that partisan politics sometimes taints agency decisions and requires correction through judicial review); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984) ("[T]he significance of a specific threat to an individual's life or freedom is not lessened by the fact that the individual resides in a country where the lives and freedom of a large number of persons are threatened.").

37. *See* Perlera-Escobar v. Executive Office for Immigration Review, 894 F.2d 1292, 1299 n.5 (11th Cir. 1990) (upholding BIA denial of asylum based partly on fears that broad interpretation of Refugee Act would extend protection to everyone in warring countries).

priorities.[38] This policy approach often searched for ways to deny rather than to grant protection[39] and contrasted markedly with the Ninth Circuit's broader approach. The disparity between the two bodies developed into an ongoing dialogue over several key issues.

A. Mixed Motives and the "On Account Of" Requirement for Asylum

Mixed motive cases highlight the contrasting results achieved by the Ninth Circuit's and the BIA's approaches to asylum law. Every asylum applicant must show he or she fears persecution "on account of" one of the grounds enumerated in the statute,[40] which requires a link between the persecution and the stated grounds.[41] This makes sense in the abstract, but in reality it only provides guidance in rare cases where the persecutor has acted solely on an impermissible agenda. Persecutors, just like other human beings, act from a variety of mixed motives. The issue then reduces to whether "on account of" means *solely* "on account of," or whether a lesser link involving mixed motives will suffice.

One striking example of a case turning on the interpretation of "on account of" was *Matter of Juan*, an unpublished BIA opinion.[42] Juan was a fifteen-year-old Guatemalan whose parents were kidnapped and decapitated by government soldiers for allegedly selling corn to guerrillas.[43] The BIA grudgingly applied Ninth Circuit rules and approved Juan's asylum application, because political opinion was one reason for his persecution.[44] The dissent instead claimed the Guatemalan government was only "making examples and intimidating the population" rather than targeting Juan's family on political grounds.[45]

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38. One study in 1987 found a correlation between asylum approval rates and countries with governments supported by the United States. For example, compare Nicaragua, 83.9%, Romania, 59.7%, and Afghanistan, 26.2%, with Guatemala, 3.8%, and El Salvador, 3.6%. National Lawyers Guild, *Immigration Law and Defense* § 13.1(c), at 13-10 n.9 (3d ed. 1997). Another study showed that of applicants fearing torture, only Salvadorans actually were deported. *Id.* at 13-10 to 13-10.1 n.9.

39. *See Perlera-Escobar*, 894 F.2d at 1298 (arguing that broad interpretation would "create a sinkhole that would swallow the rule").

40. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (Supp. II 1996); *see also supra* note 18.

41. INS v. Elias-Zacarias, 502 U.S. 478, 482–84 (1992).

42. *See* Thomas Alexander Aleinikoff et al., *Immigration Process and Policy* 834 (3d ed. 1995) (citing *Refugee Reports*, Nov. 17, 1989, at 13).

43. *Id.*

44. *Id.*

45. *Id.* (citing *Refugee Reports*, Nov. 17, 1989, at 14 (Heilman, Board Member, dissenting)). The *Juan* case also addresses imputed political opinion (IPO), an issue that often accompanies mixed motives. IPO recognizes that persecutors make mistakes and persecute victims who they assume

This mixed motive, the dissent argued, disqualified Juan from asylum eligibility.[46]

An expansive reading of the phrase "on account of" adheres to the humanitarian notions underlying the law by recognizing the difficulties of proof in asylum cases.[47] The *U.N. Handbook* recommends granting applicants the "benefit of the doubt"[48] because establishing clear causal links is impossible in many political opinion cases.[49] A broad approach also recognizes that persecutors often see persecution as a means to an end rather than the end itself. The U.S. government should not deny protection to victims who had the misfortune of suffering under an unfocused persecutor. Instead, the humanitarian purpose of the Refugee Act compels granting relief if persecution has at least partial links to the enumerated grounds.

Despite the humanitarian purpose of asylum law and guidance from the United Nations, the BIA chose a much narrower interpretation of "on account of" that eliminated relief in many cases. The BIA's analysis began with the assumption that punishment had a permissible purpose.[50] Rather than conforming to the humanitarian purposes of the Refugee Act, this logic narrowed the meaning of "on account of" to apply only when the persecutor had no other "rational and strategic purpose" to persecute.[51] This undermined the *U.N. Handbook*'s policy and pre-ordained negative outcomes.[52] One circuit court recognized that this analysis would have the ridiculous effect of denying asylum to

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hold certain political opinions. When someone is persecuted because of an IPO, she should qualify for asylum; her true beliefs are irrelevant. Denying asylum would simply punish victims who have the misfortune of suffering under careless persecutors. *See, e.g.*, Harpinder Singh v. Ilchert, 63 F.3d 1501, 1509 (9th Cir. 1995); Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985).

46. Aleinikoff et al., *supra* note 42, at 834 (citing *Refugee Reports*, Nov. 17, 1989, at 14 (Heilman, Board Member, dissenting)).

47. "Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution." Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1985).

48. *U.N. Handbook*, *supra* note 35, ¶ 196.

49. *Id.* ¶ 81.

50. *See, e.g.*, Matter of Maldonado-Cruz, 19 I. & N. Dec. 509, 517 (B.I.A. 1988).

51. Montecino v. INS, 915 F.2d 518, 520 (9th Cir. 1990).

52. The BIA tried to buttress its approach with *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), which raised questions about mixed motives reasoning. *See* Anker, *supra* note 10, at 17–19; *see also* Matter of R-, 20 I. & N. Dec. 621 (B.I.A. 1992) (stating that Ninth Circuit's rationale was overruled by U.S. Supreme Court). However, that reliance was misplaced because *Elias-Zacarias* did not reject mixed motives analysis. *See* Anker, *supra* note 10, at 18 (noting that opinion is narrowly grounded in facts of case and provides little guidance to legal issues in asylum law). Therefore, the Board's theories remained unjustified by either international or U.S. Supreme Court interpretations.

Alexander Solzhenitsyn because his dispute with the Soviet Union was literary rather than political.[53]

A majority of the circuits deferred to the BIA's narrow decisions on mixed motive cases,[54] but the Ninth Circuit conducted its own analysis and aligned itself with the *U.N. Handbook*.[55] It recognized that the "motive underlying any political choice may, if examined closely, prove to be, in whole or in part, non-political."[56] With such distinctly different justifications for their analyses, the Ninth Circuit and the BIA remained at an impasse.

B. Persecution During a Time of Civil Strife

Mixed motives cases often occur during times of civil strife because warring parties always have the overriding, impersonal motive of gaining power. Yet the courts and the BIA have struggled over whether civil strife itself precludes relief. Authorities agree that asylum does not protect those fleeing the general dangers of war alone.[57] Refugee status requires an individualized fear of persecution on account of the enumerated grounds;[58] widespread violence alone fails to prove individualized risk.[59] In such situations, as with natural disasters,[60] temporary measures often provide more appropriate responses.[61]

A per se approach to interpreting civil strife cases could produce the anomalous result of rejecting all asylum claims from war-torn countries. For example, a woman fearing the continued bombing of Sarajevo would not fit the refugee definition. A woman fearing rape and forced

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53. Osorio v. INS, 18 F.3d 1017, 1028–29 (2d Cir. 1994).

54. *See* Sachin D. Adarkar, Comment, *Political Asylum and Political Freedom: Moving Towards a Just Definition of "Persecution on Account of Political Opinion" Under the Refugee Act*, 42 UCLA L. Rev. 181, 189 (1994).

55. *See, e.g.*, Surinder Singh v. Ilchert, 69 F.3d 375, 379 n.1 (9th Cir. 1995); Harpinder Singh v. Ilchert, 63 F.3d 1501, 1509 (9th Cir. 1995); Desir v. Ilchert, 840 F.2d 723, 728 (9th Cir. 1988).

56. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1985). The court also rejected the claim that *Elias-Zacarias* precluded mixed motives analysis. *Harpinder Singh*, 63 F.3d at 1509.

57. *See U.N. Handbook*, *supra* note 35, ¶ 164; *see also* Prasad v. INS, 83 F.3d 315, 318 (9th Cir. 1996); Matter of Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985).

58. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (Supp. II 1996); *see also supra* note 12.

59. *Prasad*, 83 F.3d at 318.

60. *U.N. Handbook*, *supra* note 35, ¶ 39.

61. *See generally* Deborah Perluss & Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 Va. J. Int'l L. 551 (1986) (describing growth in international efforts to provide temporary protection). *But see* Joan Fitzpatrick, *Flight from Asylum: Trends Toward Temporary "Refuge" and Local Responses to Forced Migrations*, 35 Va. J. Int'l L. 13 (1994) (arguing that nations now abuse temporary protection by using it instead of granting asylum to genuine refugees).

pregnancy by Bosnian Serbs in her village who have threatened her personally also would not qualify under such a cramped reading. The provisions of the Refugee Protocol[62] and the Refugee Act[63] encourage a different result.[64] The *U.N. Handbook* urges a case by case assessment of all claims[65] because "foreign invasion or occupation of all or part of a country can result—and occasionally has resulted—in persecution."[66]

Blanket rejections also make little sense under other sources of international law. Even war is governed by humanitarian standards. The Geneva Conventions of 1949[67] and Protocol II of 1977[68] require warring parties to attack only legitimate military targets. Civilians must receive protection from these attacks and from cruel treatment such as torture or rape.[69] The Geneva Conventions may not provide an independent right to protection in U.S. courts,[70] but a person fearing violations of humanitarian law arguably meets the refugee definition.[71]

Although the BIA had said persecution can exist in civil war,[72] it rarely accepted claims of well-founded fear in such settings. Rather, the BIA narrowly reasoned that harm targeted at individuals failed to qualify as persecutory if "directly related" to war.[73] This reading, like the

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62. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

63. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C. (Supp. II 1996)).

64. Guy S. Goodwin-Gill, *The Refugee in International Law* 75 (2d ed. 1996) (arguing that war and asylum are not incompatible).

65. *U.N. Handbook*, *supra* note 35, ¶ 166.

66. *Id.* ¶ 165.

67. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 3; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

68. Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 (1977).

69. *Id.* at 612.

70. Matter of Medina, 19 I. & N. Dec. 734 (B.I.A. 1988).

71. *See* Matter of S-P-, Int. Dec. 3287 (B.I.A. 1996); Northwest Immigrant Rights Project, *Winning Asylum Cases: A Manual for Pro Bono Attorneys* 3-12 (1995) [hereinafter *Pro Bono Manual*].

72. Matter of Villalta, 20 I. & N. Dec. 142 (B.I.A. 1990).

73. Matter of Rodriguez-Majano, 19 I. & N. Dec. 811, 815 (B.I.A. 1988). *But see U.N. Handbook*, *supra* note 35, ¶¶ 164–66.

requirement of a single invidious motive, narrowed the refugee definition so tightly that few obtained relief. The BIA justified torture of innocents when the government was "driven to revenge" by terrorists,[74] which essentially suspended the protections of the Geneva Conventions. The BIA used similar reasoning with victims of guerrilla kidnapping.[75] This odd argument assumed that guerrillas could legitimately conscript soldiers, something usually reserved for sovereigns.[76]

Conversely, the Ninth Circuit often pointed to violent conditions to support the weight and credibility of an applicant's persecution claims.[77] The Ninth Circuit consistently overturned cases when the BIA justified violence in contravention of humanitarian law.[78] The court rejected the BIA rationale that would justify even the most extreme responses to rebellion,[79] and it refused to recognize the legitimacy of guerrilla conscription.[80] Yet the BIA's narrow reading continued to adversely affect asylum applicants outside the Ninth Circuit.

C. *Allocating the Burden of Proof in Past Persecution Cases*

Past persecution represented a third area of continual disagreement between the Ninth Circuit and the BIA. Evidence of past persecution alone fulfills the statutory requirements for asylum, even without a well-founded fear of future persecution.[81] However, asylum may be denied at the decisionmaker's discretion if the persecuting country has become safe.[82] This usually happens when conditions have changed[83] or when

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74. *See* Matter of R-, 20 I. & N. Dec. 621, 636 (B.I.A. 1992) (Heilman, Board Member, concurring) ("We know from our own history that policemen who consider themselves targets of extremists understandably react in ways that have little to do with constitutional theory, or conventional police procedures."); Matter of T-, 20 I. & N. Dec. 571 (B.I.A. 1992).

75. *See* Matter of R-O-, 20 I. & N. Dec. 455 (B.I.A. 1992).

76. *See* 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, 29 (1989).

77. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1284–85 (9th Cir. 1985).

78. *See, e.g.*, Prasad v. INS, 83 F.3d 315 (9th Cir. 1996); Montecino v. INS, 915 F.2d 518 (9th Cir. 1990); Maldonado-Cruz v. INS, 883 F.2d 788 (9th Cir. 1989).

79. *See* Harpinder Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995) (finding persecution when government exceeded bounds of legitimate investigation); Ramirez Rivas v. INS, 899 F.2d 864, 868 (9th Cir. 1990) (finding persecution when government swept in innocents with guerrillas).

80. Zacarias v. INS, 921 F.2d 844 (9th Cir. 1990), *rev'd sub nom. on other grounds*, INS v. Elias-Zacarias, 502 U.S. 478 (1992).

81. *See* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (Supp. II 1996); Desir v. Ilchert, 840 F.2d 723, 729 (9th Cir. 1988); Matter of Chen, 20 I. & N. Dec. 16, 18 (B.I.A. 1988).

82. 8 C.F.R. § 208.13(b)(1)(ii) (1997); *Chen*, 20 I. & N. Dec. at 18.

83. *See, e.g.*, *Chen*, 20 I. & N. Dec. at 20.

danger exists in only one region.[84] The United States also may grant asylum at its discretion if the applicant has suffered such traumatic past harm that there are "compelling reasons" not to return him or her, even though the danger has passed.[85] Historically, controversy has arisen over who bears the burden of proving the persecuting country's current conditions: the applicant or the government.[86]

The *U.N. Handbook* presumes an applicant will face future persecution if she has proven past persecution.[87] If the government wishes to rebut this presumption, it bears the burden of proof.[88] The approach is logical, because there is no reason to presume the persecutor has reformed. It is pragmatic because most asylum applicants do not come armed with sheaves of data about the persecuting countries.[89] The U.S. government, on the other hand, does possess the resources necessary to gauge current country conditions.

The BIA often marred its past persecution opinions with misinterpretation. Although a case in the late 1980s, *Matter of Chen*,[90] agreed with the *U.N. Handbook*'s rebuttable presumption interpretation,[91] the BIA often failed to apply the standard properly.[92] The *Chen* opinion agreed that if the government carried its burden of rebuttal proof, the applicant still could obtain protection by showing compelling reasons to receive asylum.[93] However, immigration judges and the BIA twisted this

84. *See, e.g.*, Surinder Singh v. Ilchert, 69 F.3d 375, 379 (9th Cir. 1995); Matter of R-, 20 I. & N. Dec. 621, 625 (B.I.A. 1992). Country-wide danger in future persecution claims is discussed further *infra* Part V.

85. 8 C.F.R. § 208.13(b)(1)(ii); *see also U.N. Handbook*, *supra* note 35, ¶ 136; *Chen*, 20 I. & N. Dec. at 21.

86. *See, e.g.*, Osorio v. INS, 99 F.3d 928, 932 (9th Cir. 1996); Harpinder Singh v. Ilchert, 63 F.3d 1501, 1510 (9th Cir. 1995).

87. "It may be assumed that a person has a well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention." *U.N. Handbook*, *supra* note 35, ¶ 45.

88. *See* Goodwin-Gill, *supra* note 64, at 86–87. Goodwin-Gill distinguishes between cases where applicants try to prove future persecution despite changed conditions and cases where applicants have already proven persecution, but the government wants to deny protection because of changed conditions. He argues that applicants carry the burden of proof in the first instance, while the government carries the burden in the second. *Id.*

89. *See U.N. Handbook*, *supra* note 35, ¶¶ 196–97 (noting proof problems and urging governments to elicit information).

90. 20 I. & N. Dec. 16.

91. *Id.* at 18.

92. *See, e.g.*, Osorio v. INS, 99 F.3d 928, 932 (9th Cir. 1996); Damaize-Job v. INS, 787 F.2d 1332, 1335 (9th Cir. 1986).

93. *Chen*, 20 I. & N. Dec. at 19.

analysis, often requiring an applicant to prove compelling need first without requiring the government to rebut the presumption of continued, country-wide persecution.[94]

New asylum regulations adopted in 1990 included the presumption of future persecution.[95] The rules provided that in past persecution cases the applicant "shall be presumed also to have a well-founded fear of persecution unless a preponderance of the evidence" proves otherwise.[96] However, the BIA read this command narrowly. It declined to apply the presumption in country-wide persecution cases[97] and took administrative "notice" of changed conditions in other cases,[98] thereby establishing the government's rebuttal proof and reverting the burden to the applicant.[99] Despite the regulation's command, applicants still risked denial unless they acted preemptively by proving both past and future persecution.

Once again, the Ninth Circuit chose a different route. Like the BIA, it recognized that past persecution provided a self-sufficient ground for asylum, so the applicant's burden of proof ended at that point.[100] Unlike the BIA, the Ninth Circuit consistently applied that interpretation under both *Chen*[101] and the regulations.[102] The court also restricted the BIA's use of administrative notice unless the applicant had an opportunity to rebut the noticed facts.[103]

These strategies, unlike those employed by the BIA, imbued past persecution analysis with the remedial and protective spirit of the Refugee Act. The court and the BIA appeared unlikely to meet common ground until the Board recognized its policy violated international

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94. *See, e.g.*, *Osorio*, 99 F.3d at 932; *Damaize-Job*, 787 F.2d at 1335.

95. 8 C.F.R. § 208.13(b)(1)(i) (1997).

96. 8 C.F.R. § 208.13(b)(1)(i).

97. *See, e.g.*, Matter of K-S-, 20 I. & N. Dec. 715 (B.I.A. 1993); Matter of R-, 20 I. & N. Dec. 621 (B.I.A. 1992).

98. *See, e.g.*, Matter of H-M-, 20 I. & N. Dec. 683 (B.I.A. 1993); Matter of R-R-, 20 I. & N. Dec. 547 (B.I.A. 1992).

99. *See, e.g.*, *H-M-*, 20 I. & N. Dec. at 688–89; *R-*, 20 I. & N. Dec. at 627; *R-R-*, 20 I. & N. Dec. at 551.

100. Desir v. Ilchert, 840 F.2d 723, 729 (9th Cir. 1988) ("[N]o further showing that he or she 'would be' persecuted is required."). The court used "would be" language because it was referring to withholding of deportation (restriction on removal) rather than asylum.

101. *See, e.g.*, Osorio v. INS, 99 F.3d 928, 932 (9th Cir. 1996).

102. *See, e.g.*, Prasad v. INS, 83 F.3d 315, 318 (9th Cir. 1996); Surinder Singh v. Ilchert, 69 F.3d 375 (9th Cir. 1995); Harpinder Singh v. Ilchert, 63 F.3d 1501, 1510 (9th Cir. 1995).

103. *See, e.g.*, Gonzalez v. INS, 82 F.3d 903 (9th Cir. 1996); Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir. 1992).

norms, congressional intent, and the Justice Department's own regulations.

III. RECENT BIA DECISIONS AND A NEW DIRECTION FOR ASYLUM LAW

Dialogue with the Ninth Circuit gradually altered the BIA's analysis and culminated in a profound shift. The Board issued two precedential decisions in 1996[104] that reversed much of its existing law and instead espoused the broader approach of the Ninth Circuit. The decisions themselves did not break any new legal ground. However, by recognizing theories already accepted in the Ninth Circuit and in international law, the cases did signal a significant change in analytic approach that will benefit future asylum applicants.[105]

A. The Facts of In re H- *and* In re S-P-

The two landmark decisions were factually similar to hundreds of claims previously denied by the BIA. H- was a Somali member of the Darood clan and Marehan subclan who had suffered past persecution based on clan membership.[106] The Marehans had ties to the regime of Mohammed Siad Barre, which was toppled in 1991. The country was left with no true government, and in the ensuing power struggle members of other clans targeted the Marehans for their privileged positions.[107] An opposing clan murdered H-'s father and brother, attacked his town, detained him without charges, and brutally beat him.[108] H- fled Somalia for the United States.[109] The Immigration Judge (IJ) denied asylum because he believed that the Refugee Act did not provide relief from "clan warfare" or "civil warfare."[110]

Similarly, S-P- was an ethnic Tamil who fled persecution by the Sri Lankan army.[111] The Liberation Tigers of Tamil Eelam ("Tigers"), a rebel group, had kidnapped him from a refugee camp and pressed him

104. *In re* S-P-, Int. Dec. 3287 (B.I.A. 1996); *In re* H-, Int. Dec. 3276 (B.I.A. 1996).

105. *See* Deborah Anker et al., *The BIA's New Asylum Jurisprudence and Its Relevance for Women's Claims*, 73 Interpreter Releases 1173 (1996).

106. *H-*, Int. Dec. 3276, at 6.

107. *Id.*

108. *Id.* at 6–7.

109. *Id.* at 7.

110. *Id.* at 2.

111. *In re* S-P-, Int. Dec. 3287, at 2–3 (B.I.A. 1996).

into forced labor.[112] The Sri Lankan army raided the Tigers' camp and captured S-P-.[113] He was beaten, interrogated, tortured, and threatened with death while the soldiers tried to extract information about the Tigers. The soldiers also accused him of being a Tiger.[114] S-P- was released after relatives bribed the army, and he then fled the country.[115] The IJ denied asylum for two reasons. First, she held that the soldiers did not inflict harm with the motive of persecuting him "on account of" one of the five grounds.[116] Second, she concluded that the abuse was part of ongoing civil war not covered by asylum law.[117]

Both H- and S-P- appealed to the BIA. The claims appeared destined for failure. The fact patterns involved mixed motives, civil strife, past persecution, and several other controversial issues such as imputed political opinion, non-governmental persecutors, and previously unrecognized social groups. Equally important, both claims arose in countries on relatively cordial terms with the United States. These cases were more likely to go the way of applications from El Salvador and Guatemala than claims from Afghanistan or Nicaragua.[118]

1. The BIA's Holding in In re H-

The BIA defied expectations and its own history in civil strife cases by reversing both IJs. In *H-*, it directly stated that civil war and individual persecution can co-exist.[119] The BIA cited approvingly an earlier decision that allowed claims from war zones[120] and rejected fears that the floodgates would open to all citizens of warring countries.[121] The BIA emphasized that an applicant must show individualized harm, but that civil war would not undermine that showing.[122]

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112. *Id.*

113. *Id.* at 3.

114. *Id.*

115. *Id.* at 4.

116. *Id.* at 4–5; *see also supra* note 12 and accompanying text.

117. *Id.* at 5.

118. *See supra* note 38 and accompanying text; *see also* Matter of R-, 20 I. & N. Dec. 621 (B.I.A. 1992).

119. *In re* H-, Int. Dec. 3276, at 11 (B.I.A. 1996).

120. Matter of Villalta, 20 I. & N. Dec. 142 (B.I.A. 1990).

121. *H-*, Int. Dec. 3276, at 11.

122. *Id.* at 14.

The majority also clarified ambiguities in its past persecution standard. The BIA reaffirmed the *Chen*[123] holding that past persecution alone satisfies the applicant's statutory burden.[124] The BIA then provided detailed instructions on applying the regulations on past persecution. It noted that IJs cannot require applicants to prove anything more unless the government first rebuts the presumption of continued persecution.[125]

The decision prompted a short but angry dissent from board member Heilman. He suggested that the majority's civil strife holding would entitle anyone from a war zone to asylum.[126] He also criticized the BIA for following the Ninth Circuit's lead, calling the court's jurisprudence a "quixotic attempt" to change the world.[127] Heilman's dissent, however, ignored that asylum remains an individualized, discretionary decision. The government is not powerless in the face of an unlikely mass influx. It retains the right to deny asylum based on discretion or to eliminate asylum altogether.[128] The Ninth Circuit and the new BIA are simply recognizing that the Refugee Act's language and purpose require individualized assessments rather than blanket rejections.

2. *The BIA's Holdings in* In re S-P-

S-P- reiterated the holding of *H-* and expanded it to encompass civil war. The opinion cited to Ninth Circuit precedent approvingly, labeling extra-judicial government punishment during war as persecutory.[129] The BIA used this precedent to reject implicitly its earlier acceptance of uncontrolled government response to rebel threats.[130] It also recognized that violations of the Geneva Conventions can support asylum claims,[131] an important step toward maintaining a focus on human rights rather than immigration policy.

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123. Matter of Chen, 20 I. & N. Dec. 16 (B.I.A. 1989).

124. *H-*, Int. Dec. 3276, at 3–6.

125. *Id.* at 14–16.

126. *Id.* at 20 (Heilman, Board Member, dissenting).

127. *Id.* (Heilman, Board Member, dissenting).

128. The Refugee Protocol does not mandate asylum. *See supra* notes 25–26 and accompanying text.

129. *In re* S-P-, Int. Dec. 3287, at 8–9 (B.I.A. 1996) (citing Singh v. Ilchert, 63 F.3d 1501 (9th Cir. 1995)).

130. *Id.* at 9.

131. *Id.* at 12 n.3.

S-P- also tackled the controversy of mixed motives. It returned to BIA precedent recognizing that persecutors may act for several reasons.[132] The BIA acknowledged that proving exact motives is often impossible, leaving many valid asylum applicants without recourse.[133] The Board held that the applicant must only produce evidence from which "it is reasonable to believe that the harm was motivated by a protected ground."[134] This reasonable person standard reverses the BIA's former presumption that authorities ordinarily act for legitimate reasons.[135]

The BIA paid homage to both the Ninth Circuit and the international roots of asylum law in crafting its holding. It analyzed the Ninth Circuit's mixed motives reasoning in detail, including cases reversing BIA decisions.[136] It also referred to the "fundamental humanitarian concerns of asylum law" and the legislative history of the Refugee Act.[137] Finally, the BIA urged a generous approach in times of doubt,[138] which reflects the *U.N. Handbook*'s suggestion.[139]

S-P- reached farther than *H-* and created greater division within the Board. Several members concurred because the case arose in the Ninth Circuit, and the BIA must apply circuit standards.[140] However, they opposed adopting those standards for nationwide use.[141] The holdings of *S-P-* lack the full support that *H-* engendered.

B. Significance of the Opinions

The opinions of *H-* and *S-P-* signal great changes at the BIA. The BIA could have rested on Ninth Circuit precedent and thereby confined its holdings, but instead chose to adopt new nationwide standards.[142] The opinions also laid the groundwork for more change by alluding to international law and by emphasizing the humanitarian purposes of

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132. *Id.* at 6 (citing Matter of Fuentes, 19 I. & N. Dec. 658 (B.I.A. 1988)). The court noted that the mixed motives comments were only dicta in *Fuentes*. *Id.*

133. *Id.*

134. *Id.*

135. *See supra* notes 50–53 and accompanying text.

136. *S-P-*, Int. Dec. 3287, at 7–9.

137. *Id.* at 10.

138. *Id.*

139. *U.N. Handbook*, *supra* note 35, ¶ 204.

140. *S-P-*, Int. Dec. 3287, at 18 (Filppu, Board Member, concurring).

141. *Id.* One member also dissented because he doubted the applicant's credibility. *Id.* at 19 (Vacca, Board Member, dissenting).

142. *Id.* at 18 (Filppu, Board Member, concurring).

asylum. This groundwork will allow the BIA to read the Refugee Act more expansively on other issues as well.

The two cases illustrate the positive results achieved through dialogue between the courts and the BIA. The opinions credited Ninth Circuit influence with shaping the new BIA approach.[143] This active judicial role undermines the typical criticism of review in the administrative setting: that a court will simply substitute its judgment for that of the agency.[144] To the contrary, judicial review was necessary because the BIA had strayed into an area where it lacked expertise. *H-* and *S-P-* rectified that problem by creating an analytic framework complying with the Refugee Act's purpose. More uniform decisions encompassing the Act's purpose should result.

Despite the advancements in *H-* and *S-P-*, the Ninth Circuit must maintain its active role. Both opinions created dissension on the Board, and the concurring and dissenting opinions clearly opposed adopting Ninth Circuit standards.[145] The majority also failed to overrule earlier, misleading BIA precedents. Those precedents, combined with Board dissension, leave the new framework vulnerable to future erosion.

The BIA may be retreating from its new mixed motives analysis already. It published *In re T-M-B-*[146] in early 1997. The majority cited approvingly to *S-P-*,[147] yet undercut that precedent's holding. The case involved a Philippine woman who feared violent extortion attempts by a rebel group.[148] The majority focused on the non-political nature of extortion and held that the "reasonable inference" pointed to a nonpersecutory motive.[149] It failed to recognize and draw inferences from the political aims underlying the extortion. This sleight of hand defeats the purpose of *S-P-*'s mixed motives analysis.[150]

T-M-B- highlights the tenuous position of the new BIA approach. Continued Ninth Circuit influence through judicial review is vital to

143. *Id.* at 7–9 (majority opinion), 18–19 (Filppu, Board Member, concurring); *In re* H-, Int. Dec. 3276, at 20 (B.I.A. 1996) (Heilman, Board Member, dissenting).

144. *See supra* notes 6–10 and accompanying text.

145. *See supra* notes 126–28, 140–41 and accompanying text.

146. Int. Dec. 3307 (B.I.A. 1997).

147. *Id.* at 4.

148. *Id.*

149. *Id.* at 5.

150. The opinion generated two dissents. Chairman Schmidt criticized the majority for misapplying recent precedent. *Id.* at 7–8 (Schmidt, Chairman, dissenting). Board Member Rosenberg went much further, calling the majority's analysis "puzzling, if not myopic." *Id.* at 9 (Rosenberg, Board Member, dissenting).

prevent a return to the rigid standards of the past. Even if the BIA does not retreat further, it still differs with the court on significant issues. The court must use the BIA's new receptiveness to effect more change.

IV. IIRIRA'S POTENTIAL EFFECT ON THE VITALITY OF THE NINTH CIRCUIT–BIA DIALOGUE

Although the BIA presently appears more receptive to dialogue with the Ninth Circuit, at this crucial moment Congress is trying to thwart that exchange. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996[151] (IIRIRA) overhauls much of the current immigration system. IIRIRA has received heavy criticism from scholars for its drastic approach.[152] The law significantly changes asylum procedures[153] and also strips or narrows judicial review in asylum and other areas.[154]

A. The Meaning of New INA § 242(b)(4)(D)

One portion of the law in particular could choke the dialogue between the Ninth Circuit and the BIA. New INA § 242(b)(4)(D) heightens the standard of review in asylum cases by mandating that a "discretionary judgment whether to grant relief under section 208(a) [asylum] shall be conclusive unless manifestly contrary to the law and an abuse of discretion."[155] The Ninth Circuit already uses the "abuse of discretion"

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151. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C. (Supp. II 1996)).

152. "[The new law] is a remarkable act of chutzpah on behalf of an agency, the INS, that has probably been found by the courts to have violated the law more than any other federal agency." Patrick J. McDonnell, *New Law Could End Immigrants' Amnesty Hopes*, L.A. Times, Oct. 9, 1996, at A1 (quoting Prof. David Cole); *see also* 142 Cong. Rec. S11,906 (daily ed. Sept. 30, 1996) (letter signed by 90 professors opposing law).

153. *E.g.*, INA § 208(a)(2)(A), 8 U.S.C. § 1158(a)(2)(A) (denying asylum if applicant could move to safe third country); INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (requiring asylum applicants to file within one year of arriving in United States); INA § 208(b)(2)(B), 8 U.S.C. § 1158(b)(2)(B) (expanding scope of crimes that bar asylum eligibility); INA § 235(b)(1)(B), 8 U.S.C. § 1225(b)(1)(B) (requiring summary exclusion of arriving asylum applicants unless they show credible fear of persecution).

154. *E.g.*, INA § 242(b)(4)(D), 8 U.S.C. § 1252(b)(4)(D) (narrowing judicial review in asylum cases); INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (eliminating judicial review of most discretionary relief); INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (eliminating judicial review of removal orders for criminal aliens); INA § 242(e), 8 U.S.C. § 1252(e) (limiting judicial review of summary exclusion).

155. INA § 242(b)(4)(D), 8 U.S.C. § 1252(b)(4)(D). The law also says all factual findings are conclusive unless the court is "compelled" to conclude otherwise. INA § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B). This codifies a standard set by the U.S. Supreme Court in *INS v. Elias-Zacarias*, 502 U.S. 478, 483–84 (1992).

standard for reviewing the discretionary portion of an asylum decision.[156] Yet it often uses a lower "de novo" standard when reviewing interpretations of the Refugee Act and other questions of law.[157] Disagreement between the Ninth Circuit and the BIA typically involves issues of law, such as the burden of proof or the meaning of "on account of."[158] Many of the Ninth Circuit's key reversals relied on the "de novo" standard.[159] A higher standard could diminish the Ninth Circuit's ability to shape developing asylum law issues.

However, it remains unclear whether the new provision prevents this type of review. The language specifically uses the word "discretionary."[160] Every asylum decision involves two steps, one objective and one discretionary.[161] One could interpret the new law as applying only to the discretionary step and leaving review of legal issues unmodified. Yet every asylum decision is ultimately discretionary, so the word remains ambiguous.[162]

The legislative history of the bill provides little, if any, interpretive help. The asylum deadlines and summary exclusion procedures in the bill received the most attention in floor debates[163] and in commentaries[164]

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156. *See, e.g.*, Lopez-Galarza v. INS, 99 F.3d 954, 960 (9th Cir. 1996); Padilla-Agustin v. INS, 21 F.3d 970, 973 (9th Cir. 1994).

157. *See, e.g.*, Sharma v. INS, 89 F.3d 545, 547 (9th Cir. 1996); Surinder Singh v. Ilchert, 69 F.3d 375, 378 (9th Cir. 1995); Kotasz v. INS, 31 F.3d 847, 851 (9th Cir. 1994); Canas-Segovia v. INS, 902 F.2d 717, 721 n.6 (9th Cir. 1989), *vacated*, 502 U.S. 1086 (1992), *reaffirmed and remanded*, 970 F.2d 599 (1992).

158. *See supra* notes 40–56 and accompanying text.

159. *See, e.g.*, Harpinder Singh v. Ilchert, 63 F.3d 1501, 1506 (9th Cir. 1995) (mixed motives); Maldonado-Cruz v. INS, 883 F.2d 788, 791 (9th Cir. 1989) (civil strife, neutrality); Desir v. Ilchert, 840 F.2d 723, 726 (9th Cir. 1988) (past persecution).

160. INA § 242(b)(4)(D), 8 U.S.C. § 1252(b)(4)(D).

161. INA § 208, 8 U.S.C. § 1158; *see also supra* notes 11–17 and accompanying text.

162. One scholar has noted that established doctrine requires courts to read ambiguities in favor of the immigrant. *See* Lucas Guttentag, *The 1996 Immigration Act: Federal Court Jurisdiction—Statutory Restrictions and Constitutional Rights*, 74 Interpreter Releases 245, 246 (1997). Guttentag also argues that the new asylum provision codifies standards from *Elias-Zacarias*. *Id.* at 251. That, however, is itself an ambiguous assessment because other scholars have read *Elias-Zacarias* as a factual decision that did not alter review standards. *See* Anker, *supra* note 10, at 23.

163. *See, e.g.*, 142 Cong. Rec. S11,906 (daily ed. Sept. 30, 1996) (letter to Sen. Leahy from Lawyers Committee for Human Rights) ("Blanket summary exclusion and strict time deadlines for filing asylum applications are hurdles that many of the most deserving refugees simply will not be able to cross."); 142 Cong. Rec. S11,904 (daily ed. Sept. 30, 1996) (statement of Sen. Leahy) ("We need not gut our asylum law by allowing low-level bureaucrats to make life-and-death decisions through summary exclusion at the border."); 142 Cong. Rec. S11,491 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch) (urging support for time deadlines and summary exclusion provisions).

because those are the most obviously onerous provisions. The few commentators who did mention the review provision did not assess its scope.[165] The final House conference report on IIRIRA simply restates the language of the provision and sheds no light on its meaning.[166]

The provision originated in the Senate, but the Senate committee report is nearly as oblique as the conference report.[167] It says the bill "narrows review in asylum cases," but does not specify how.[168] The statement would be true whether or not the provision applied to legal issues, because the previous law contained no codified standard for either step in the asylum decision. The dissenting committee views do mention judicial review, but they appear to address it in the summary exclusion context.[169]

The structure of the final law raises even more questions. The Senate version contained a parallel provision that eliminated judicial review of discretionary decisions other than asylum.[170] The House conference committee's final version, which became law, deleted the word "discretionary" in the jurisdiction-stripping provision[171] but retained it in the asylum provision.[172] The conference report does not explain this change. The change does clarify that the stripping provisions bar any appeal on any grounds. Retaining the word "discretionary" in the asylum provision implies that some flexibility remains and that the standard only applies to the discretionary portion of the asylum decision. This reading

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164. *See, e.g.*, Michele R. Pistone, *Asylum and Exclusion Provisions in New and Pending Legislation: A Summary and Practice Guide*, 73 Interpreter Releases 993 (1996); Philip G. Schrag, *Don't Gut Political Asylum*, 10 Geo. Immigr. L.J. 93 (1996).

165. Schiesswohl, *supra* note 9, at 756 n.56 (noting that change could affect judicial review); Gary E. Endelman, *Congress Tightens Its Controls*, N.J. L.J., Dec. 2, 1996, at 32, 32 (noting change and questioning its meaning); *New Rules Making It Harder on U.S. Immigrants*, Phoenix Gazette, Jan. 17, 1997, at A23 (noting that change could affect judicial review).

166. "A discretionary judgment of the Attorney General whether to grant asylum under section 208 is conclusive unless manifestly contrary to law . . . ." H.R. Conf. Rep. No. 104-828, at 219–20 (1996).

167. S. Rep. No. 104-249, at 14 (1996).

168. *Id.*

169. *Id.* at 54–55 (minority views of Sens. Kennedy, Simon, and Leahy); *id.* at 65 (minority view of Sen. Leahy).

170. "The Attorney General's discretionary judgment whether to grant relief . . . shall be conclusive and shall not be subject to review." S. 1664, 104th Cong. § 142(b)(4)(B) (1996).

171. "[N]o court shall have jurisdiction to review *any judgment* regarding the granting of relief . . . ." INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i) (Supp. II 1996) (emphasis added).

172. INA § 242(b)(4)(D), 8 U.S.C. § 1252(b)(4)(D) (referring to "the Attorney General's *discretionary judgment* whether to grant relief under section 1158(a)" (emphasis added)).

would allow courts to continue to thoroughly review legal interpretations by the BIA while deferring to the BIA's discretion.

2. *Other Avenues for Continued Ninth Circuit Influence*

Even if the Ninth Circuit reads INA § 242(b)(4)(D) as a restraint on its review of legal issues in asylum cases, the law does not contain a similar provision for restriction on removal cases.[173] Judicial review in this area remains unchanged.[174] Most applicants file jointly for asylum and restriction on removal, and both forms of relief include similar statutory requirements.[175] Identical legal issues therefore arise in both settings, and the same interpretation of statutory terms usually is applicable to both forms of relief.[176] The court potentially could continue shaping refugee legal standards through review of restriction on removal cases, if not through review of asylum cases.

The Ninth Circuit can remain effective in yet another way. Although it usually states a baseline "de novo" standard in its review of legal issues in asylum cases, in reality the court sometimes varies from the pure de novo standard.[177] It often qualifies the standard with varying degrees of deference.[178] A recent group of cases even used the "manifestly contrary to law" standard.[179] Interestingly, this more deferential standard has not caused the court to automatically uphold BIA decisions. In fact, the court used this standard in *Rodriguez-Roman v. INS*[180] to reverse the BIA in the controversial area of illegal departure.[181]

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173. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (Supp. II 1996); INA § 242, 8 U.S.C. § 1252.

174. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3); INA § 242, 8 U.S.C. § 1252.

175. The standards are the same except the burden of proof. *See supra* notes 18–23 and accompanying text.

176. *See, e.g.*, Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988). However, the new law slightly changes the definition of restriction on removal. The new law uses "because of" language rather than "on account of." INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). It is unclear if this will affect the future interpretation of the provision.

177. *See generally* Callahan, *supra* note 6 (noting that Ninth Circuit often applies more deferential standard).

178. *See, e.g.*, Urbina-Mauricio v. INS, 989 F.2d 1085, 1087 (9th Cir. 1993) (using de novo standard with deference); Montecino v. INS, 915 F.2d 518, 520 (9th Cir. 1990) (acknowledging deference).

179. *See, e.g.*, Rodriguez-Roman v. INS, 98 F.3d 416, 425 (9th Cir. 1996); Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996) (en banc).

180. 98 F.3d 416.

181. *Id.* at 424–25. The court held that the manifestly contrary to the law standard required the BIA to follow applicable case law *and* the *U.N. Handbook*. *Id.* at 425.

The panel also used *Rodriguez-Roman* to make unusually explicit statements supporting judicial review. The concurrences drew from opposite ends of the judicial spectrum, yet they agreed on the importance of the Ninth Circuit's role and the danger inherent in eliminating review.[182] Coming just days after IIRIRA passed, the *Rodriguez-Roman* opinions also serve as implicit attacks on the new law's provisions.

Judge Kozinski, a conservative, recalled his own immigrant experience.[183] Although he expressed respect for the INS, he also described its behavior as "chilling" and stated that judicial review can mean the difference between "freedom and oppression and, quite possibly, life and death."[184] Judge Reinhardt, a strong liberal, reiterated the point by targeting the political underpinnings of agency decisions and the BIA's overwhelming caseload.[185] The judge stated that we need review to catch "the most egregious of the inevitable human errors."[186] It appears the Ninth Circuit can, and will, continue to maintain an active review role despite IIRIRA.

V. RECOMMENDATIONS FOR FUTURE NINTH CIRCUIT–BIA DISCOURSE

Concurrences like those in *Rodriguez-Roman* show that the court is well aware of the vital role it plays in guiding the BIA's interpretation of the Refugee Act. The Ninth Circuit must continue actively reviewing the BIA, whether it does so through a limited reading of IIRIRA, or through a broad reading of the "manifestly contrary to law" standard. There remain important, unclear aspects of asylum law, and the recent BIA shift provides an opportunity to align U.S. asylum law closer to international human rights standards.

A. The Prosecution/Persecution Controversy in the Context of Illegal Departure

Identifying when legitimate prosecution ends and persecution begins poses great difficulties in asylum law. Governments have the right to

182. *Id.* at 432 (Kozinski, J., concurring); *id.* at 433 (Reinhardt & Hawkins, JJ., specially concurring).

183. *Id.* at 432 (Kozinski, J., concurring).

184. *Id.* (Kozinski, J., concurring).

185. *Id.* at 433 (Reinhardt & Hawkins, JJ., specially concurring).

186. *Id.* (Reinhardt & Hawkins, JJ., specially concurring).

prosecute criminals for common crimes,[187] but even this prosecution can become grounds for asylum if it is excessive[188] or conducted without judicial process.[189] The issue is an umbrella for a number of complicated sub-issues ranging from whether coup plotters can seek asylum[190] to whether a country's conscription laws are legitimate.[191] Adding to these complications, an applicant can face a well-founded fear of both legitimate prosecution and persecution.[192] The prosecution/persecution debate is an area susceptible to political manipulation, and the decisionmaker often risks drawing conclusions based on her view of the persecuting country rather than the harm to the applicant.

Illegal departure is one subcategory that captures the difficulties of the prosecution/persecution conflict. These claims involve persons who left their home countries without permission and sought asylum because they would face severe punishment for their departures if returned. Two contrasting principles are at stake. First, each person has a basic right to leave her country of origin.[193] Second, each country has the right to control its borders.[194] The key, as with any prosecution/persecution case, is to balance these interests rather than choose one or the other. The *U.N. Handbook* strikes this balance by recommending asylum when the person left the country because of one of the enumerated grounds and would face "severe" penalties if the individual were returned.[195]

The Ninth Circuit and the BIA wrangled over this issue recently in *Rodriguez-Roman v. INS*.[196] The applicant had fled Cuba without

187. *See* Mabugat v. INS, 937 F.2d 426, 429 (9th Cir. 1991); *U.N. Handbook*, *supra* note 35, ¶ 56.

188. *See* Ramirez Rivas v. INS, 899 F.2d 864, 867–68 (9th Cir. 1990); *U.N. Handbook*, *supra* note 35, ¶¶ 57, 85.

189. *See* Blanco-Lopez v. INS, 858 F.2d 531, 534 (9th Cir. 1988).

190. *See* Matter of Izatula, 20 I. & N. Dec. 149 (B.I.A. 1990).

191. Matter of Vigil, 19 I. & N. Dec. 572 (B.I.A. 1988); *U.N. Handbook*, *supra* note 35, ¶¶ 167–74.

192. *U.N. Handbook*, *supra* note 35, ¶¶ 56–60. Courts must determine whether the crime is severe enough to bar asylum eligibility. INA § 208(b)(2)(ii), 8 U.S.C. § 1158(b)(2)(ii) (Supp. II 1996).

193. Universal Declaration of Human Rights, art. 13(2), G.A. Res. 217 A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, art. 12(2), *opened for signature* Dec. 19, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 ("Everyone shall be free to leave any country, including his own.").

194. *See In re* Janus & Janek, 12 I. & N. Dec. 866, 873 (B.I.A. 1968); Goodwin-Gill, *supra* note 64, at 53 (noting that governments are hesitant to grant asylum on this ground for fear of attracting economic migrants simply dissatisfied with their home countries).

195. *U.N. Handbook*, *supra* note 35, ¶ 61.

196. 98 F.3d 416 (9th Cir. 1996).

permission because he opposed the Communist regime, and he sought asylum in the United States.[197] The Immigration Judge (IJ) denied his application, although the IJ acknowledged that Rodriguez-Roman could face death upon repatriation.[198] He justified the decision by saying the applicant "would not be punished for his beliefs, but for committing crimes against the socialist state of Cuba."[199] The BIA affirmed the denial because this was prosecution, not persecution.[200]

The Ninth Circuit reversed in a scathing opinion. The panel cited extensively to the *U.N. Handbook* and instructed the BIA to follow those guidelines.[201] It also noted that even if this were prosecution for a common crime, Rodriguez-Roman should still receive asylum because excessive punishment is persecution.[202] The BIA's result shows the danger of approving all government actions just because they arise within a criminal context.

The Ninth Circuit must watch this issue vigilantly because of BIA hostility and regulation changes. Until recently, a regulation instructed IJs to consider a country's illegal departure laws when ruling on asylum applications.[203] However, the Justice Department repealed that regulation, although it still recommends case-by-case assessments.[204] This repeal could imply that illegal departure applicants must prove unusual equities to receive relief. The Ninth Circuit must use *Rodriguez-Roman* to prevent such interpretations. In doing so, it can preserve a humanitarian balance in illegal departure cases and in all prosecution/ persecution cases.

B. Neutrality as Political Opinion

One of the more troublesome issues in asylum law arises when an applicant has chosen not to hold a political opinion. Neutrality defies easy categorization under the statutory standards. On its face, neutrality

197. *Id.* at 419.

198. *Id.* at 420.

199. *Id.*

200. *Id.* at 421.

201. *Id.* at 425–26. The court also cited to pre-Refugee Act precedents from the circuit and the BIA, noting that the Refugee Act would not have overruled those decisions because its purpose was to comply with international law rather than defy it. *Id.* at 427 n.17.

202. *Id.* at 431 n.27.

203. 8 C.F.R. § 208.13(b)(2)(ii) (1996).

204. 62 Fed. Reg. 10,317 (Mar. 6, 1997) (clarifying that government does not condone blanket denials).

seems to fall outside the scope of "political opinion." Yet voicing neutrality in a war zone can place one at just as much risk as becoming a political activist. Those who choose neither side often breed contempt from both sides.

Recognition of neutrality as political opinion advances the Refugee Act's objective of granting relief irrespective of a victim's ideology.[205] Any other rule would limit asylum to persecution victims with views recognized in their countries' civil wars. Those who refused to join ranks because their political views differed from *both* warring parties would find no recourse despite severe persecution.[206] Therefore, denying asylum to neutrals is not merely a narrow reading the Refugee Act, but actually undermines the purposes of the Act.

The Ninth Circuit was the first court to establish neutrality as a valid ground for asylum based on political opinion[207] and remains the only court to grant asylum specifically on neutrality grounds.[208] The landmark *Bolanos-Hernandez* case rejected arguments that neutrality lacks political elements.[209] The court ruled instead that "[w]hen a person is aware of contending political forces and affirmatively chooses not to join any faction, that choice *is* a political one."[210] No court has held that passive neutrality alone suffices to justify an asylum grant.[211] The applicant must express her neutral views[212] or take some action based on her neutrality that places her at risk.[213] Otherwise, she does not face persecution "on account of" political opinion. Rather, she faces the generalized dangers of civil war.

The BIA has refused to accept neutrality claims outside the Ninth Circuit.[214] It even stopped applying the doctrine within the circuit[215] after

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205. *See supra* note 28 and accompanying text. Although the *U.N. Handbook* does not discuss neutrality, it does address mixed motives and imputed political opinion, both of which often intersect with neutrality claims. *U.N. Handbook*, *supra* note 35, ¶¶ 80–83.

206. *See* von Sternberg, *supra* note 76, at 32.

207. Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1985).

208. *Pro Bono Manual*, *supra* note 71, at 4-13.

209. *Bolanos-Hernandez*, 767 F.2d at 1286.

210. *Id.*

211. Deborah E. Anker, *The Law of Asylum in the United States: A Guide to Administrative Practice and Case Law* 128–31 (2d ed. 1991).

212. *Id.*

213. *Compare* Ramos-Vasquez v. INS, 57 F.3d 857, 863 (9th Cir. 1995) (granting asylum when applicant deserted rather than participate in illegal killing), *with* Alonzo v. INS, 915 F.2d 546, 548 (9th Cir. 1990) (denying asylum because applicant had never revealed his neutrality).

214. Matter of Vigil, 19 I. & N. Dec. 572 (B.I.A. 1988).

215. *See Ramos-Vasquez*, 57 F.3d at 863.

the U.S. Supreme Court decision in *INS v. Elias-Zacarias*, which questioned neutrality as a ground for asylum without explicitly rejecting it.[216] The Ninth Circuit agrees that neutrality is not ordinarily a ground for asylum. The applicant must have placed herself at risk by asserting neutrality.[217] Since *Elias-Zacarias*, the Ninth Circuit has reiterated that active neutrality remains a viable ground for asylum,[218] but the BIA and other circuits remain opposed.

The new BIA may be more receptive to the Ninth Circuit's neutrality jurisprudence. It now clearly recognizes that persecution can exist during civil war[219] and that persecutors act from mixed motives.[220] Neutrality is the next logical step in this line of analysis. The Ninth Circuit should use this opportunity to encourage BIA conformity with the Refugee Act's goals.

C. *The Requirement of Country-Wide Persecution*

The BIA and the Ninth Circuit should work to clarify and broaden their standards on country-wide persecution. Both fail to comply with international interpretations, but the Ninth Circuit's approach comes closer to the appropriate model. The issue arises when an applicant has suffered persecution or fears persecution in one part of her home country but not in other regions. Decisionmakers split over whether a refugee should have sought out safe places rather than having fled the country as a whole.[221]

The issue is likely to become more important now that the BIA has signaled its receptivity to gender-based claims.[222] Women and children comprise eighty percent of the world's potential refugee population, but

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216. INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992) ("Elias-Zacarias appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion. That seems to us not ordinarily so . . . ."); *see also* Sangha v. INS, 103 F.3d 1482, 1488 (9th Cir. 1997) (noting that U.S. Supreme Court did not overrule neutrality analysis).

217. If the U.S. Supreme Court's comment intended to question *any* use of neutrality as a ground for asylum, then it fails to recognize the reality that people, including persecutors, often target those they know refuse to take their sides.

218. *Sangha*, 103 F.3d at 1488; *Ramos-Vasquez*, 57 F.3d at 863.

219. *See supra* notes 119–22 and accompanying text.

220. *See supra* notes 132–35 and accompanying text.

221. *Compare* Singh v. Moschorak, 53 F.3d 1031 (9th Cir. 1995), *with* Matter of R-, 20 I. & N. Dec. 621 (B.I.A. 1992).

222. *See In re* Kasinga, Int. Dec. 3278 (B.I.A. 1996) (holding that female genital mutilation can constitute persecution).

they are also the least mobile.[223] The social structure of many cultures might make life in another region of the country nearly impossible for women even if it is safe.[224] The refugees simply would become internally displaced, which is itself a human rights concern.[225] A flat rule requiring country-wide persecution would prove both onerous on potential asylum seekers and counterproductive from a human rights standpoint.

The language of the Refugee Act and the accompanying regulations do not require proof of country-wide persecution.[226] The *U.N. Handbook* and commentators also argue against any requirement. They prefer a "reasonable person" standard, in which resettlement becomes relevant only if reasonable for the individual applicant.[227] This standard provides flexibility appropriate for the humanitarian purposes of the Refugee Convention.

The Ninth Circuit and BIA have struggled to create workable standards for evaluating country-wide persecution. Some of the struggle has arisen in the past persecution debate, in which the Ninth Circuit does not require the applicant to prove country-wide persecution.[228] In future persecution cases, the Ninth Circuit originally required proof[229] but has retreated from that stance when the persecutor has the *ability* to persecute anywhere, whether or not it does so.[230] The court presumes country-wide

223. Anker et al., *supra* note 105, at 1174.

224. An IJ recently vocalized this point when granting asylum to a Bangladeshi domestic violence victim. The IJ found it "highly unrealistic and almost fanciful" that the applicant could have started an independent life elsewhere in the country. *IJ Grants Asylum to Battered Bangladeshi Woman*, 74 Interpreter Releases 174, 176 (1997); *see also* Goodwin-Gill, *supra* note 64, at 74 (noting that some jurisdictions consider ability to maintain social and economic existence in another region when making asylum decisions).

225. *See generally* Fitzpatrick, *supra* note 61 (discussing rise of "safe zones" within countries).

226. *See* INA §§ 101(a)(42)(A), 208, 8 U.S.C. §§ 1101(a)(42)(A), 1158 (Supp. II 1996); 8 C.F.R. § 208 (1997).

227. *See U.N. Handbook*, *supra* note 35, ¶ 91 ("[A] person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."); *see also* Goodwin-Gill, *supra* note 64, at 74 ("[F]or various reasons, it may be unreasonable to expect the asylum seeker to move internally, rather than to cross an international frontier."); Sarah Ignatius, *Asylum: Country-Wide Persecution*, Immigr. Newsl. 1 (Feb. 1993).

228. *See supra* notes 100–03 and accompanying text; *see also* Harpinder Singh v. Ilchert, 63 F.3d 1501, 1511 (9th Cir. 1995).

229. *See* Quintanilla-Ticas v. INS, 783 F.2d 955 (9th Cir. 1986) (denying asylum because applicant could have moved to another city).

230. *See* Beltran-Zavala v. INS, 912 F.2d 1027, 1030 (9th Cir. 1990) (noting that death squads have power to enforce their will whether they do so or not).

danger when the government is the persecutor[231] and also uses country-wide danger as a discretionary factor rather than a statutory requirement in the asylum decision.[232] These changes approach the *U.N. Handbook*'s reasonableness standard, but the court still must clarify its position on cases of fear of future persecution by non-governmental actors.[233]

The BIA usually reverses the *U.N. Handbook*'s reasonable person standard. In *Matter of R-*, it held that reasonable refugees would usually seek internal protection.[234] From that assumption, the BIA then decided it would require proof of country-wide persecution in all but exceptional cases.[235] This applies even if the government is the persecutor.[236] The BIA not only misreads the *U.N. Handbook*, but also ignores the protective nature of the Refugee Act. The Act intends to provide broad protection, not to create standards that narrow asylum based on a blanket assumption of "unreasonableness."[237]

The BIA retreated from this presumption slightly in a footnote to *In re H-*.[238] It noted that the inquiry in non-governmental persecution cases should focus on the "ability" to persecute country-wide.[239] This mirrors the Ninth Circuit's policy for non-governmental persecutors. However, the BIA did not address governmental persecution. Also, despite the footnote's apparent liberal approach, it cited to *R-*, which raises questions about whether the BIA really is making any changes.[240]

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231. Singh v. Moschorak, 53 F.3d 1031, 1034 (9th Cir. 1995) ("It has never been thought that there are safe places within a nation when it is the nation's government that has engaged in the acts . . . .").

232. *Harpinder Singh*, 63 F.3d at 1511.

233. For example, gender-based violence, such as female genital mutilation and rape, often involves non-governmental persecutors. *See* Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 Harv. Hum. Rts. J. 229, 239–41 (1996).

234. Matter of R-, 20 I. & N. Dec. 621, 627 (B.I.A. 1992).

235. *Id.* at 626.

236. *Id.* at 626–27.

237. This blanket assumption is similar to ones applied in the illegal departure and civil war contexts.

238. Int. Dec. 3276, at 19 n.7 (B.I.A. 1996). The BIA also clarified that country-wide persecution is a discretionary factor in past persecution cases. *Id.* See *supra* notes 123–25 and accompanying text for a discussion of the BIA's new approach to past persecution.

239. *H-*, Int. Dec. 3276, at 19 n.7.

240. *Id.* (citing *R-*, 20 I & N Dec. 621). Only two board members have embraced the reasonableness approach. *See In re* T-M-B-, Int. Dec. 3307, at 16–17 (B.I.A. 1997) (Rosenberg, Board Member, dissenting); *In re* C-A-L-, Int. Dec. 3305, at 7–9 (B.I.A. 1997) (Schmidt, Chairman, dissenting), 13–16 (Rosenberg, Board Member, dissenting). Chairman Schmidt even suggests partially shifting the burden of proof to the government. *Id.* at 7–8 (Schmidt, Chairman, dissenting).

The Ninth Circuit should encourage the BIA to recognize the inherent pervasiveness of government persecution and also should work to set a clear standard for future persecution cases involving non-governmental actors. The Refugee Act's humanitarian goals[241] require the flexibility of a reasonableness standard. The current lack of clarity could prove destructive as more female asylum applicants seek refuge in this country.

VI. CONCLUSION

The dialogue between the Ninth Circuit and the BIA illustrates the necessity and the benefit of judicial review in asylum law. Abdication to a political agency can prove disastrous when the statute derives from neutral principles rather than political policy norms. The Ninth Circuit wisely pursued an active role and pressured the BIA to interpret the Refugee Act according to its purpose rather than current executive policy. The successful dialogue ensures adherence to the statute's human rights foundations in many areas.

The BIA's new analytic approach also presents an opportunity to develop the human rights aspects of asylum law even further. The Ninth Circuit must continue its active role despite congressional attempts to curtail review. With the Ninth Circuit and the BIA working from the same analytic framework, they can integrate more human rights norms into other areas of asylum law jurisprudence.

241. *See supra* notes 24–31 and accompanying text.