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Abstract

This Comment argues that the standards enunciated by the Supreme Court in Elias-Zacarias should not be applied beyond cases involving persecution on account of political opinion. Part I sets out the relevant statutes, treaties, and international documents that control U.S. asylum law. Part II describes the majority and dissenting opinions in Elias-Zacarias. Part III analyzes the Supreme Court's decision in Elias-Zacarias and argues that the decision was misguided in its approach. This Comment concludes that Elias-Zacarias should be limited in its future application so that the United States can maintain its compliance with international treaty obligations.

IMMIGRATION AND NATURALIZATION SERVICE v. ELIAS-ZACARIAS: A DEPARTURE FROM THE PAST*

INTRODUCTION

In response to its obligations under international law,[1] the United States enacted the Refugee Act of 1980 (the "Act" or "Refugee Act") to consider applications for asylum.[2] Under the Act, the Attorney General has discretion to grant asylum to aliens in the United States who reasonably fear persecution in their homelands on account of race, religion, nationality, membership in a particular social group, or political opinion.[3] Federal courts in the United States have differed as to the asylum status of aliens punished in their homelands for refusal to serve in military combat for reasons of political opinion or religion.[4]

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1. *See* 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention]; United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 [hereinafter 1967 Protocol or U.N. Protocol]; *see also* 8 U.S.C. § 1101(a)(42)(A) (1988) (defining refugee); 8 U.S.C. § 1158(a) (1988) (establishing procedure for alien present in United States to apply for asylum if alien meets definition of refugee).

2. Pub. L. No. 96-212, 94 Stat. 102, (codified at 8 U.S.C. §§ 1101(a)(42)(A), 1158(a) (1988)).

3. 8 U.S.C. § 1101(a)(42)(A) (1988) (defining refugees); 8 U.S.C. § 1158(a) (granting discretion to Attorney General on decisions for refugee asylum). Under the Act, the Attorney General has the discretion to grant asylum to those unable or unwilling to return to their native country because of a "persecution or well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1158(a), 1101(a)(42)(A).

4. *Compare* Zacarias v. United States INS, 921 F.2d 844 (9th Cir. 1990) (holding that forcible recruitment attempts constituted persecution on account of political opinion), *rev'd sub nom* INS v. Elias-Zacarias, 112 S. Ct. 812 (1992); Canas-Segovia v. INS, 902 F.2d 717, 720 (9th Cir. 1990) (holding that punishment against Jehovah's Witnesses who refuse to perform military service because their religion prohibits such service constitutes persecution under Act), *vacated and remanded*, 1992 U.S. LEXIS 1260 (U.S. Feb. 24, 1992), *on remand*, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992) *with* M.A. A26851062 v. INS, 899 F.2d 304, 316 (4th Cir. 1990) (concluding that punishment against political conscientious objector is not persecution on account of political opinion because political opinion of neutrality not connected to fears of persecution); Umanzor-Alvarado v. INS, 896 F.2d 14, 15 (1st Cir. 1990) (finding that punishment for refusal to serve in Army may result in persecution on account of political opinion); Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1299 (11th Cir. 1990) (requiring proof of persecutor's intent). The

In *Immigration and Naturalization Service v. Elias-Zacarias*,[5] the U.S. Supreme Court drastically limited the ability of aliens to obtain asylum in the United States based on political opinion.[6] In *Elias-Zacarias*, the U.S. Immigration and Naturalization Service ("INS") appealed from a decision by the U.S. Court of Appeals for the Ninth Circuit.[7] The Ninth Circuit had held that an alien who desired to remain neutral in a civil war, refusing to obey threats of guerrillas who had political motives, was eligible for asylum based on political opinion.[8] The Supreme Court reversed, holding that the proper inquiry focuses on the victim's political opinions, not the political opinions of the persecutor.[9] Moreover, the Court stated that an asylum applicant must provide some evidence of the persecutor's intent to persecute the alien on account of the alien's political opinion.[10]

This Comment argues that the standards enunciated by the Supreme Court in *Elias-Zacarias* should not be applied beyond cases involving persecution on account of political opinion. Part I sets out the relevant statutes, treaties, and international documents that control U.S. asylum law. Part II describes the majority and dissenting opinions in *Elias-Zacarias*. Part III analyzes the Supreme Court's decision in *Elias-Zacarias* and argues that the decision was misguided in its approach. This Comment concludes that *Elias-Zacarias* should be limited in its future application so that the United States can maintain its compliance with international treaty obligations.

I. *ASYLUM ELIGIBILITY OF ALIENS*

Under several U.N. agreements to which the United States

First Circuit has noted that in view of the conflict between *Perlera-Escobar* and *Canas-Segovia*, the First and Eleventh Circuits "appear divided on the issue" whether "persecution on account of political neutrality requires that the intention of the *persecutor* be the 'linch-pin' of the analysis." Alvarez-Flores v. INS, 909 F.2d 1, 8 n.6 (1st Cir. 1990) (emphasis in original).

5. 112 S. Ct. 812 (1992).

6. *Id.*

7. *See* Zacarias v. United States INS, 921 F.2d 844 (1990), *rev'd sub nom* INS v. Elias-Zacarias, 112 S. Ct. 812 (1992).

8. *Id.*

9. *Elias-Zacarias*, 112 S. Ct. at 816.

10. *Id.* at 817. The Court also held that in order to obtain a judicial reversal of a holding by the Board of Immigration Appeals ("BIA"), the applicant must show that "the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Id.*

is a signatory, the United States has an obligation to provide refuge to aliens who face persecution in their native lands.[11] To comply with U.S. international obligations, the U.S. Congress passed the Refugee Act of 1980 that allows aliens to remain in the United States if they face persecution on account of political opinion or religion upon return to their homeland.[12] U.S. courts have disagreed, however, concerning the statute's application to aliens who oppose military service because of their religion or political opinion.[13]

A. *International Obligations to Asylum Applicants*

After the Second World War, the international community ended the use of *ad hoc* agreements to settle specific refugee issues.[14] As part of this effort, numerous nations ratified the 1946 Constitution of the International Refugee Organization ("IRO"), which defined "refugees" as those people who could not return to their homelands due to a reasonable fear of persecution based on several factors, including political opinion and religion.[15] The IRO manual, used by those determining

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11. *See supra* note 1 (identifying U.N. treaties); *see also infra* notes 14-23 and accompanying text (describing U.N. treaties).

12. Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. §§ 1101(a)(42)(A), 1158(a) (1988)); *see* H.R. CONF. REP. No. 781, 96th Cong., 2d Sess 19 (1980), *reprinted in* 1980 U.S.C.C.A.N. 160; *see also* S. REP. No. 256, 96th Cong., 2d Sess. 4 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 144. In *INS v. Cardoza-Fonseca*, the Supreme Court, explaining Congress' intent, asserted that "[i]f one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol . . . ." 480 U.S. 421, 436 (1987); *see* U.S. CONST. art. VI, § 2, cl. 2 (declaring that treaties are part of "supreme law of the land"); *see also* Murray v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (explaining that statutes "ought never to be construed to violate the law of nations, if any other possible construction remains").

13. *See supra* note 4 (explaining prior split in circuit courts over persecution for failure to serve in military).

14. *See* 1951 Convention, *supra* note 1, art. I (A)(1), 189 U.N.T.S. 150, 152. The agreements include the Arrangements of May 12, 1926 and June 30, 1928; the Conventions of October 28, 1933 and February 10, 1938; the Protocol of September 14, 1939; and the Constitution of the International Refugee Organization. *Id.* *See* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 32 (1979) [hereinafter U.N. HANDBOOK] (describing various international agreements existing prior to 1951 that defined refugees).

15. *See* IRO Constitution, Annex 1, Pt. 1, § C1(a)(i), 62 Stat. 3037. According to the IRO Constitution, a "refugee" is defined as a person who had a "valid objection" to returning to his homeland; the IRO Constitution also specified that "fear based on

asylum eligibility, explained that the applicant need only make a reasonable argument that the applicant fears persecution because of religion or political beliefs; the intent of the persecutor was not described as controlling.[16]

In 1951, the United Nations incorporated the IRO definition of "refugee" into the Convention Relating to the Status of Refugees ("1951 Convention" or the "Convention") so that the international community would have a general definition of "refugee" to follow.[17] The 1951 Convention defined refugees as those who could not return to their homeland "owing to well-founded fear of being persecuted for reasons of [five factors, including religion and political opinion]."[18] The Convention prohibited nations from returning such victims of persecution to their homelands.[19] Despite its broad language, the 1951 Convention limited signatory nations' obligations to refugee situations that were known to exist at that time or that might arise later from events that had already occurred.[20]

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reasonable grounds of persecution because of race, religion, nationality, or political opinions" was a valid objection. *Id*; *see Cardoza-Fonseca*, 480 U.S. at 437.

16. International Refugee Organization, MANUAL FOR ELIGIBILITY OFFICERS 24, ch. IV, ¶ 19 (undated, circulated in 1950) [hereinafter IRO MANUAL, *quoted in* INS v. Cardoza-Fonseca, 480 U.S. 421, 438 n.20 (1987). The *IRO Manual* explains that

> fear of persecution is to be regarded as a valid objection whenever an applicant can make plausible that owing to his religious or political convictions or to his race, he is afraid of discrimination, or persecution, on returning home. Reasonable grounds are to be understood as meaning that the applicant can give a plausible and coherent account of why he fears persecution. Since fear is a subjective feeling, the Eligibility Officer cannot refuse to consider the objection as valid when it is plausible.

Id.; *see* Theodore N. Cox, *"Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status*, 10 BROOK. J. INT'L L. 333, 340 (1984).

17. 1951 Convention, *supra* note 1, July 28, 1951, 189 U.N.T.S. 150, 152. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 437-38 (1987) (explaining how 1951 Convention adopted IRO definition of refugee).

18. 1951 Convention, *supra* note 1, art. 1, ¶ (A)(2), 189 U.N.T.S. at 152. The 1951 Convention explained that refugees are those "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." *Id.*

19. *See, e.g.*, 1967 Protocol, *supra* note 1, art. 33, 19 U.S.T. at 6276, T.I.A.S. No. 6577. Article 33 sets forth the obligations of nations not to a return a refugee to a country in which the refugee's "life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *Id.*

20. *See* U.N. HANDBOOK, *supra* note 14, ¶ 7.

As additional refugee situations arose, however, the United Nations expanded the rules promulgated by the 1951 Convention so that the grounds for asylum would also include future events.[21] Therefore, the U.N. created the 1967 Protocol Relating to the Status of Refugees ("1967 Protocol" or "U.N. Protocol"), utilizing the "well-founded fear" test from the 1951 Convention.[22] As a result, both the 1951 Convention and the 1967 Protocol are the definitive multilateral treaties that provide the internationally accepted definition of refugee and set forth the rights of persons who meet the definition.[23]

The 1951 Convention and the 1967 Protocol do not specifically address the refugee status of those who face punishment for their refusal to serve in the military for reasons of religion or political opinion. The U.N. High Commissioner for Refugees, however, provides guidance through its *Handbook on Procedures and Criteria for Determining Refugee Status* ("*U.N. Handbook*" or "*Handbook*").[24] The *U.N. Handbook* acknowledges that nations are free to punish draft resisters and evaders.[25] The *U.N. Handbook* recognizes, however, that "disproportionately severe punishment" on account of race, religion, nationality, membership in a particular social group, or political opinion

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21. *Id.* ¶ 9.

22. 1967 Protocol, *supra* note 1, 19 U.S.T. 6224, 6225, T.I.A.S. No. 6577; *see* INS v. Cardoza-Fonseca, 480 U.S. 421, 438 (1987) (stating that 1967 Protocol incorporated 1951 Convention definition of refugee without modification).

23. *See* J. HATHAWAY, THE LAW OF REFUGEE STATUS V (1991). The United States acceded to the Protocol in 1968.

24. U.N. HANDBOOK, *supra* note 14, ¶¶ 164-74; *see* Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), U.N. GAOR, 5th Sess., Supp. No. 20 Annex 46, at 46, ¶ 1, U.N. Doc. A/428 (1950). The Statute of the Office of the U.N. High Commissioner explains that the High Commissioner shall provide protection for refugees by "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." *Id.* ¶ 8(a).

25. U.N. HANDBOOK, *supra* note 14, ¶ 167. The *U.N. Handbook* explains that

> [i]n countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The penalties may vary from country to country, and are not normally regarded as persecution. Fear of persecution and punishment for desertion does not in itself constitute well-founded fear of persecution under the definition.

Id.; *see id.* ¶ 168 (explaining that "[a] person is clearly not a refugee if his only reason for desertion of draft-evasion is his dislike of military service or fear of combat").

may qualify an individual as a "refugee."[26]

In addition, the *U.N. Handbook* contains provisions regarding people who object to military service on the basis of political convictions, religious or moral convictions, or "valid reasons of conscience."[27] First, the *U.N. Handbook* grants individual nations the discretion to grant asylum to political conscientious objectors who oppose all military service.[28] Although not defined in the *U.N. Handbook*, conscientious objectors are generally considered to be those who oppose participation in war due to a sincerely held belief.[29] Second, the *U.N. Handbook* requires nations to grant asylum to aliens who disagree with their homeland's government on political grounds regarding a particular military action only if the international community considers that military action to be contrary to the basic rules of human conduct.[30] Finally, the *U.N. Handbook* mandates that governments must grant asylum to aliens who refuse to serve in the military due to religious beliefs if the applicants are able to show that their beliefs are genuine and that the native country fails to take these beliefs into account when requiring military service.[31] Several nations, in-

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26. *Id.* ¶ 169.

27. *Id.* ¶ 170.

28. *Id.* ¶ 171. The *U.N. Handbook* explains that "[n]ot every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action." *Id.*; *see id.* ¶ 173 (explaining that "an increasing number" of countries have legislation or administrative policies that allow such alternative service for conscientious objectors).

29. *See* Karen Musalo, *Swords into Ploughshares: Why the United States Should Provide Refuge to Young Men who Refuse to Bear Arms for Reasons of Conscience*, 26 SAN DIEGO L. REV. 849, 850 n.9 (1989); *see also* BLACK'S LAW DICTIONARY 304 (6th ed. 1990).

30. U.N. HANDBOOK, *supra* note 14, ¶ 171. The *U.N. Handbook* explains that

> [i]t is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could . . . in itself be regarded as persecution.

Id.

31. *Id.* at 40, ¶ 172 (explaining that "[i]f an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform his military service, he may be able to establish a claim to refugee status").

cluding Germany,[32] the Netherlands,[33] Canada,[34] and Aus-

32. *See* Brief of Lawyers Committee for Human Rights & American Jewish Committee as *Amici Curiae* at 12, INS v. Elias-Zacarias, 112 S. Ct. 812 (1992) (No. 90-1342) (Arthur C. Helton, Attorney of Record) (citing Decision of the German Federal Administrative Court, Berlin, BVerwGE IC 41.60 (June 29, 1962)). The German administrative court granted refugee status to a member of a Nazarene sect who had been sentenced to a long term of forced labor for refusal to perform military service because the punishment amounted to persecution on account of religion. *Id.* The court explained that

> [the applicant] was involved in a conflict between two duties: on the one hand, the State required him to perform military service; on the other hand, his religion required him to refrain from such service for reasons of conscience. If the State takes action against the person involved in such a conflict, the effect as far as he is concerned is persecution because of his religion.

Id. The Bavarian Administrative Court, Ansbach, has also recognized that a refusal to serve in the military can support an asylum claim when evidence indicates that the government will punish the applicant for suspicion of political opposition. *See* Brief of Lawyers Committee for Human Rights & American Jewish Committee as *Amici Curiae* at 18, INS v. Elias-Zacarias, 112 S. Ct. 812 (1992) (No. 90-1342) (Arthur C. Helton, Attorney of Record) (citing BVerwG (An 19 K 87.35820) (June 23, 1988).

33. *See* Respondents' Brief in Opposition to a Petition for a Writ of Certiorari at 13, INS v. Canas-Segovia, 1992 U.S. LEXIS 1260 (U.S. Feb. 24, 1992) (No. 90-1246) (Karen Musalo, Attorney of Record) (citing Decision of the Netherlands Council of State, Ref. LP 80/68 - EG/GRE, 14.3.1980 (granting asylum because of persecution on account of religion to pacifist who faced prison term of over two years for refusal to serve in military)), *on remand*, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992).

34. *See* Brief of Lawyers Committee for Human Rights & American Jewish Committee as *Amici Curiae* at 9, INS v. Elias-Zacarias, 112 S. Ct. 812 (1992) (No. 90-1342) (Arthur C. Helton, Attorney of Record) (citing Ramirez, Louis Alberto Mena v. Minister of Employment and Immigration, IAB No. 86-6161 at 4 (May 5, 1987) (granting refugee status after finding persecution on account of religion when Jehovah's Witness feared forced induction and death for refusal to comply)). The court explained that

> [i]t matters little that [the applicant] is subjected to the same conscription law or practices as other young men of military age who are without such [beliefs]; the issue is not equal treatment, but fear of persecution .... Were [the applicant] required to enter the military and undertake military duties which would deeply offend his sensibilities, he would, in the Board's opinion, be suffering persecution .... It is the failure of the recruiting system to make allowances for the convictions of the conscientious objector that forms the basis of the fear.

Id.; *see* Brief of *Amici Curiae* at 14, *Elias-Zacarias* (No. 90-1342) (citing Jorge Ardon Abarca v. Ministry of Employment and Immigration, IAB No. W86-4030-W (Mar. 21, 1986)). In *Ardon Abarca*, the Canadian Board of Immigration Appeals held that an asylum applicant who refused to report for military duty due to human rights violations by the El Salvadoran army was eligible for asylum. *Id.* The court explained that the applicant's refusal to serve in the military was "perceived as a serious or threatening act of political opposition to the system as a whole." *Id.*; *see* R.G.L. Fairweather, *Temporary Sanctuary Tends to Get Permanent; Political Persecution*, Mar. 7, 1992, Letter to the Editor, N.Y. TIMES, at A24 (explaining that Canadian courts and immigration

tria,[35] follow the *U.N. Handbook*'s approach for asylum applicants who refuse to serve in the military because of political opinion or religion.

B. *U.S. Statutory Approach to Asylum*

Congress passed the Refugee Act of 1980 to bring the United States into compliance with the 1951 Convention and the 1967 Protocol.[36] Under the Refugee Act, the Attorney General has discretion to grant asylum to aliens who satisfy the statutory definition of a refugee.[37] The Act protects aliens who are unable or unwilling to return to their native countries due to "persecution or well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion."[38] This definition of refugee mirrors the definition of refugee used in the 1951 Convention and the U.N. Protocol.[39] Therefore, when U.S. courts examine

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officials have followed majority of nations that hold that refusal to join guerrilla organizations is expression of political opinion).

35. *See* Brief of *Amici Curiae* at 14, *Elias-Zacarias* (No. 90-1342) (citing Federal Ministry of the Interior Regulation No. 22.501/4/-II/C/75 (June 4, 1975) (interpreting Austrian Asylum Law of 1968 to hold that individual is eligible for asylum when refusing to serve in military for one of reasons in 1951 Convention if there is no alternative military service permitted)); *see also* Respondents' Brief in Opposition to a Petition for a Writ of Certiorari at 13, INS v. Canas-Segovia, 1992 U.S. LEXIS 1260 (U.S. Feb. 24, 1992) (No. 90-1246) (Karen Musalo, Attorney of Record) (citing Ministerial Directive ("Erlas") of Austria of June 4, 1975, No. 22.01/4-II/0/75 (recognizing asylum for conscientious objectors)), *on remand*, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992)).

36. Pub. L. No. 96-212, 94 Stat. 102, (codified at 8 U.S.C. §§ 1101(a)(42)(A), 1158(a) (1988); *see supra* notes 1-2 and accompanying text (explaining that Congress passed Refugee Act to comply with international obligations).

37. 8 U.S.C. § 1158(a) (1988); *see supra* note 3 and accompanying text (explaining U.S. requirements for asylum under Refugee Act of 1980).

38. 8 U.S.C. §§ 1101(a)(42)(A), 1158(a) (1988). At the beginning of 1992, more than 100,000 petitions for political asylum were pending with the INS. Tamar Lewin, *Supreme Court Case May Determine Fate of Thousands Seeking Asylum*, N.Y. TIMES, Jan. 3, 1992, at A28.

39. *Compare* 1951 Convention, *supra* note 1, art. I(A)(2), 189 U.N.T.S 150, 152 (defining refugee as person who "owing to a well-founded fear of being persecuted for reasons of . . . religion . . . or political opinion" is unable to return to homeland) *with* 8 U.S.C. § 1101(a)(42)(A) (1988) (defining refugee as one outside native country who is unable or unwilling to return because of "persecution or a well-founded fear of persecution on account of . . . religion . . . or political opinion"). The 1967 Protocol incorporated the 1951 definition, but expanded its use by removing previous limits on its application. 1967 Protocol, *supra* note 1, at 6225; *see* HATHAWAY, *supra* note 23, at 10.

the Refugee Act, they utilize the U.N. Protocol as the international source of U.S. asylum law.[40] When courts interpret the Refugee Act and need more guidance than the 1967 Protocol provides, Congress most likely intended that they use the U.N. High Commissioner's *Handbook*.[41] U.S. courts have generally followed congressional intent and used the *U.N. Handbook* for guidance in interpreting the proper meaning of the U.N. Protocol.[42]

The Supreme Court, after interpreting the 1951 Convention, the 1967 Protocol, and the *U.N. Handbook*, set out the standard for a "well-founded fear of persecution" in *Immigration and Naturalization Service v. Cardoza-Fonseca*.[43] In *Cardoza-Fonseca*, the Court stated that applicants must demonstrate that they have both a subjective fear of persecution and that their fear is objectively reasonable.[44] A showing that the fear is "genuine" satisfies the subjective component.[45] To satisfy the

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40. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987) (explaining that Congress intended U.S. asylum law to conform to Protocol).

41. *See U.S. Refugee Program: Oversight Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 24, 26 (1981) (Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to David Crossland, General Counsel, INS) (explaining that "[w]e assume that Congress was aware of the criteria articulated in the *Handbook* when it passed the Refugee Act of 1980, and that it is appropriate to consider the guidelines in the Handbook as an aid to construction of the Act"); *see, e.g.*, Damaize-Job v. INS, 787 F.2d 1332, 1336 n.5 (9th Cir. 1986) (citing S. REP. No. 256, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S.C.C.A.N. 141, 144; H.R. CONF. REP. No. 781, 96th Cong., 2d Sess. 19-20, *reprinted in* 1980 U.S.C.C.A.N. 160, 161); *see also* U.N. HANDBOOK, *supra* note 14, ¶¶ 169-74.

42. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987). The Court has stated that "the 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.* (citing McCullen v. INS, 658 F.2d 1312, 1319 (9th Cir. 1981)); *see, e.g.*, Balazoski v. INS, 932 F.2d 638, 642 n.1 (7th Cir. 1991); Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985). *But see* United States v. Aguilar, 883 F.2d 662, 680 (9th Cir. 1989) (explaining that *U.N. Handbook* does not serve as binding law).

43. *See Cardoza-Fonseca*, 480 U.S. at 440 (citing INS v. Stevic, 467 U.S. 407, 424-25 (1984)); Rodriguez-Rivera v. U.S. Dep't of Immigration & Naturalization, 848 F.2d 998, 1001 (9th Cir. 1988).

44. *Cardoza-Fonseca*, 480 U.S. at 434. In *Cardoza-Fonseca*, the Court examined the asylum eligibility of a Nicaraguan native whose brother had been tortured and imprisoned because of his political activities in Nicaragua. *Id.* at 424. After the alien and her brother fled together, the alien feared that she would be held responsible for her brother's activities even though she was not politically active. *Id.* at 424-25.

45. Barraza Rivera v. INS, 913 F.2d 1443, 1449 (9th Cir. 1990) (citing Diaz-Escobar v. INS, 782 F.2d 1488, 1492 (9th Cir. 1986)).

objective component, the applicant must demonstrate an objectively reasonable possibility of persecution.[46] The applicant can demonstrate this objective element of the "well-founded fear" standard even if the chances are slight that the persecution will actually occur.[47]

C. *U.S. Judicial Approach to Asylum*

Due to *Cardoza-Fonseca*'s requirement that asylum applicants demonstrate the subjective and objective nature of their fear, applicants who face punishment for refusing to serve in the military for reasons of political opinion or religion may have difficulty proving that they are entitled to asylum. Under the *U.N. Handbook*, aliens claiming persecution on account of religion must demonstrate that they have genuine religious beliefs that the persecutor fails to consider when requiring military service.[48] Aliens who claim persecution because they are political conscientious objectors are entitled to asylum only at the discretion of individual nations.[49] Aliens who claim persecution because they possess a political opinion of neutrality must show that they oppose conduct which the international community has condemned.[50] Moreover, most courts do not grant asylum based on neutrality unless the applicant can prove that the political opinion of neutrality has been affirmatively expressed.[51]

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46. *Cardoza-Fonseca*, 480 U.S. at 440.

47. INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987). The Court indicated that even a 10% chance of persecution would create a well-founded fear. *Id.* at 431 (quoting 1 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966)). The standard of proof required in asylum cases is less stringent than that required in other contexts under U.S. immigration law. *Compare* INS v. Stevic, 467 U.S. 407, 429-30 (1984) (explaining that aliens seeking withholding of deportation must prove it is "more likely than not" that they will face persecution if returned) *with Cardoza-Fonseca*, 480 U.S. at 449-50 (1987) (rejecting "more likely than not" standard of proof for asylum cases as contrary to congressional intent).

48. *See infra* notes 52-71 and accompanying text (explaining approach to cases of asylum applicant claiming persecution on account of religion).

49. *See infra* notes 78-87 and accompanying text (explaining approach to cases involving persecution involving conscientious objection).

50. *See infra* notes 88-104 and accompanying text (describing proof requirements for refugees claiming persecution for political opinion of neutrality).

51. *See infra* notes 88-104 and accompanying text (describing proof requirements for refugees claiming persecution for political opinion of neutrality).

1. Persecution on Account of Religion

Aliens may seek asylum in the United States when their religion prohibits them from engaging in violence yet their country threatens to punish them if they refuse to serve in the military.[52] These asylum applicants satisfy the Act's definition of "persecution on account of . . . religion" if attempts to conscript them continue despite awareness of their religiously-based opposition to military service.[53] As the *U.N. Handbook* explains, these applicants need only show that their beliefs were not taken into account by the persecutor when the persecutor required the military service.[54]

Only one U.S. Court of Appeals case has involved persecution on account of religion in the context of forced military recruitment.[55] In *Canas-Segovia v. Immigration and Naturalization Service*,[56] two brothers illegally entered the United States from El Salvador because their native country mandated military service.[57] The brothers argued that, as Jehovah's Witnesses, the tenets of their religion prohibited them from participating in any kind of military service.[58] The brothers submitted extensive evidence of the various extrajudicial penalties, such as torture and murder, that they expected to face if they refused to serve in the military.[59]

Prior to *Elias-Zacarias*, the U.S. Court of Appeals for the

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52. *See, e.g.*, Canas-Segovia v. INS, 902 F.2d 717, 720 (9th Cir. 1990), *vacated and remanded*, 1992 U.S. LEXIS 1260 (U.S. Feb. 24, 1992), *on remand*, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992).

53. *See, e.g.*, Alonzo v. INS, 915 F.2d 546, 548 (9th Cir. 1990).

54. U.N. HANDBOOK, *supra* note 14, ¶ 172 ; *see supra* note 34 (explaining *U.N. Handbook*'s approach to refusal to serve in military for religious reasons).

55. *See* Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990), *vacated and remanded*, 1992 U.S. LEXIS 1260 (U.S. Feb. 24, 1992), *on remand*, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992). The Supreme Court vacated and remanded the Ninth Circuit's decision in *Canas-Segovia* for reconsideration in light of *Elias-Zacarias*. *Id.*

56. *Id.*

57. *Id.* at 720. In El Salvador, military service is required for all males between the ages of 18 and 30; there are no exemptions for any conscientious grounds and no alternatives to military service. *Id.* The penalty for resisting conscription is imprisonment for a period ranging from six months to 15 years. *Id.*

58. *Id.*

59. *Id.* One brother testified that a friend was taken away and never seen again for refusing to serve in the military. *Id.* An affidavit submitted at trial described how army officials chopped off the arms of a deserter. *Id.* Other affidavits explained how "[t]hose who refuse to join the armed forces for reasons of conscience are tortured and killed." *Id.*

Ninth Circuit had held that aliens who face punishment for refusal to perform military service, based on religious grounds, have met the prima facie requirement of a "well-founded fear of persecution."[60] The court explained that punishment for a refusal to perform military service is persecution "if the refusal is based upon genuine political, religious, or moral convictions, or other genuine reasons of conscience."[61] The court rejected claims that a facially neutral conscription policy is not *per se* persecution.[62] The court, analogizing to U.S. constitutional law on freedom of religion, explained that facially neutral laws may impermissibly infringe upon individuals' First Amendment rights.[63]

The court in *Canas-Segovia* analyzed the asylum statute itself and looked to the *U.N. Handbook* and congressional intent for guidance.[64] The court found evidence to support the claim that conscientious objectors have met the "well-founded fear of persecution" test.[65] The Ninth Circuit focused on the *U.N. Handbook* and quoted the language requiring countries to "take[ ] into account" the religious convictions of its citizens when setting military conscription policy.[66] Moreover, the court found that the asylum applicants in this case had suffered "disproportionately greater punishment" because service in

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60. Canas-Segovia v. INS, 902 F.2d 717, 728-29 (9th Cir. 1990), *vacated and remanded*, 1992 U.S. LEXIS 1260 (U.S. Feb. 24, 1992), *on remand*, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992).

61. *Id.* at 726.

62. *Id.* at 723.

63. *Id.* at 723-24. The court relied on several cases: Thomas v. Review Bd., 450 U.S. 707 (1981) (finding that Jehovah's Witness who left weapons factory was entitled to employment benefits when after leaving job for religious reasons); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (explaining that "a regulation neutral upon its face may, in its application, nonetheless offend the constitutional requirement of government neutrality if it unduly burdens the free exercise of religion"); Sherbert v. Verner, 374 U.S. 965 (1963) (holding that Seventh Day Adventist whose religion prevented work on Saturday cannot be barred from receiving employment benefits). *But see* Employment Division v. Smith, 494 U.S. 872 (holding that generally applicable criminal law against peyote use which incidentally burdens free exercise of religion by Native Americans using ceremonial peyote is acceptable), *reh'g denied*, 496 U.S. 913 (1990); H.R. 2797, 102d Cong., 1st Sess. (1991) (proposing legislation to overturn the decision in *Smith*); *see also* 137 CONG. REC. 101 (1991).

64. Canas-Segovia v. INS, 902 F.2d 717, 724 & n.13 (9th Cir. 1990), *vacated and remanded*, 1992 U.S. LEXIS 1260 (U.S. Feb. 24, 1992), *on remand*, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992).

65. *Id.* at 725.

66. *Canas-Segovia*, 902 F.2d 717, 725; *see* U.N. HANDBOOK, *supra* note 14, ¶ 171.

the military causes such people to choose between sacrificing their religious beliefs or facing punishment for failure to serve in the military.[67] The court rejected arguments that the Refugee Act requires applicants for asylum to demonstrate the persecutor's motive or intent to persecute.[68] It explained that the relevant standard examines only the asylum applicant's fear of persecution and the reasonableness of that fear.[69] The Ninth Circuit concluded that the applicants were eligible for asylum because it was reasonable for aliens to believe that punishment for refusal to serve in the military was on account of their religious beliefs.[70] The court also rested its decision on the alternative theory that the guerillas had mistakenly believed that the Canas-Segovias possessed a political opinion opposed to the anti-government forces and punished the brothers because of this imputed political opinion.[71]

The Supreme Court later vacated the decision in *Canas-Segovia* and remanded the case to the Ninth Circuit for reconsideration in light of *Elias-Zacarias*.[72] On remand, the Ninth Circuit found that it could not grant asylum on the basis of religious persecution because the applicant had not provided evidence of the persecutors' intent as *Elias-Zacarias* required.[73]

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67. *Canas-Segovia*, 902 F.2d at 728.

68. *Id.* at 726-27.

69. *Id.* at 726. The court explained that

> [n]either of these standards requires an asylum applicant to establish the persecutor's intent or motive. Intent or motive to persecute is merely one relevant consideration in the analysis of an asylum claim. . . . Bona fide refugees already face logistical problems in gathering evidence due to their being outside the country where the alleged persecution occurred. . . . Evidence of proof of intent and motive would be particularly hard to provide because both involve proof of a persecutor's state of mind.

Id. at 726, 727 (citations omitted).

70. *Id.* at 727; *see* Musalo, *supra* note 28 (explaining arguments that attorney for asylum applicants in *Canas-Segovia* made to Ninth Circuit). The Ninth Circuit adopted much of Musalo's analysis. *See* Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990), *vacated and remanded*, 1992 U.S. LEXIS 1260 (U.S. Feb. 24, 1992), *on remand*, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992).

71. *Canas-Segovia*, 902 F.2d at 728-29.

72. Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990), *vacated and remanded*, 1992 U.S. LEXIS 1260 (U.S. Feb. 24, 1992), *on remand*, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992).

73. Canas-Segovia v. INS, 1992 U.S. App. LEXIS 15505, at *2 (9th Cir. July 10, 1992). The Ninth Circuit found that "[b]ecause the key 'on account of' language applies equally to religious and political persecution, *Elias-Zacarias* dictates that Canas-Segovia must show some evidence of his persecutor's intent, which he is un-

The court granted asylum, however, on the alternative theory that Mr. Canas-Segovia faced intentional persecution based on a political opinion falsely attributed to him.[74]

2. Persecution on Account of Political Opinion

The Refugee Act also provides asylum for those who are persecuted on account of a political opinion.[75] In cases that clearly fall under the statute, asylum applicants will claim that someone, usually the government, is intentionally punishing them for having a particular political opinion.[76] The alien may be eligible for asylum if the alien has expressed an opinion, if the persecutor has imputed an opinion to the alien, or if it is likely that the alien will express an opinion in the future.[77]

Aliens have two grounds under political opinion on which to seek asylum based on their refusal to perform military service. First, asylum applicants may be conscientious objectors who claim persecution when forced to perform military service despite their political opinion of opposition to all warfare. Second, asylum applicants may possess a political opinion of neutrality in a particular military action so that they face persecution for refusal to serve in the military during a particular civil war.

a. Political Conscientious Objection

Applicants who oppose all military activity for reasons of conscience are entitled to asylum under the *U.N. Handbook*

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able to do." *Id.* The court did not consider the application of Oscar Canas-Segovia because he had married a U.S. citizen, thus rendering his asylum application moot. *Id.* at *1.

74. *Id.* at *4-5. The Ninth Circuit stated that:

> [i]mputed political opinion is still a valid basis for relief after *Elias-Zacarias*. The Court made clear that evidence of motive is required, but imputed political opinion, by definition, includes an element of motive. A persecutor falsely attributes an opinion to the victim, and then persecutes the victim because of that mistaken belief about the victim's views.

Id. at *5.

75. 8 U.S.C. §§ 1101(a)(42)(A), 1158(a) (1988).

76. *See In re* Acosta, 19 I & N Dec. 211, 222 (BIA 1985); *In re* Diaz, 10 I & N 199, 204 (BIA 1963).

77. *See* Aguilera-Cota v. INS, 914 F.2d 1375, 1379-80 (9th Cir. 1990); Lazo-Manjano v. INS, 813 F.2d 1432, 1435 (9th Cir. 1987).

only at the individual discretion of each nation.[78] Most courts have held that aliens who fear punishment due to a refusal to serve in the military on the basis of political conscientious objection are not entitled to asylum.[79] Courts are hesitant to grant asylum to such conscientious objectors for two reasons. First, under the *U.N. Handbook* political conscientious objectors opposed to military service are entitled to asylum only at the discretion of individual nations while those aliens opposing all military service on religious grounds need only show that their religious beliefs were not taken into account.[80] Second, in such situations there is a strong underlying policy of international law that nations have the right to enforce conscription laws.[81] For example, in *M.A. A26851062 v. United States Immigration and Naturalization Service*,[82] the U.S. Court of Appeals for the Fourth Circuit held that an El Salvadoran alien failed to make a *prima facie* case for asylum eligibility based on his refusal to serve in the El Salvadoran military.[83] The applicant for asylum claimed that he objected to service in the military because of the various atrocities perpetrated by the El Salvadoran army.[84]

The Fourth Circuit rejected the applicant's claim that his political objection to atrocities by the military should be grounds for asylum eligibility.[85] The court found that the asy-

78. *See* U.N. HANDBOOK, *supra* note 14, ¶ 173; *see also supra* text accompanying note 29 (defining "conscientious objection").

79. *See, e.g.*, Khalaf v. INS, 909 F.2d 589, 591-92 (1st Cir. 1990); Kaveh-Haghigy v. INS, 783 F.2d 1321, 1323 (9th Cir. 1986); *see also* INS Basic Law Manual: Asylum Summary and Overview (March 1991), at 43.

80. *See* U.N. HANDBOOK, *supra* note 14, ¶¶ 167-74.

81. *See supra* note 25 and accompanying text (describing right of nations to form military and punish draft-evaders); *see also* M.A. A26851062 v. INS, 899 F.2d 305, 312 (4th Cir. 1990).

82. M.A. A26851062 v. United States INS, 899 F.2d 304 (4th Cir. 1990)

83. 899 F.2d at 304.

84. *Id.* at 306. The applicant requested asylum after he first agreed to leave voluntarily; the day before return to El Salvador he sought to reopen the deportation proceedings. *Id.* The applicant witnessed "systematic and widespread" human rights violations; he saw violence throughout his neighborhood and visited a morgue where he saw "mutilated, decapitated, bruised, and gunned bodies." *Id.* In addition, he felt that if he were to return to El Salvador and refuse to fight, he would be tortured and killed as an opposition sympathizer. *Id.*

85. *Id.* at 306. The court reviewed the BIA decision to deny reopening of the proceedings with "extreme deference" because the Refugee Act does not contemplate reopening and because the Attorney General's regulations disfavor motions to reopen. *Id.* at 308; *see id.* at 307 (explaining that Attorney General established proce-

lum applicant in this case was merely a "draft resister."[86] The court emphasized that the *U.N. Handbook*, international law and Board of Immigration Appeals ("BIA") precedent clearly state that sovereign nations have the right to enforce their laws of conscription and that penalties for failure to serve are not persecution.[87]

b. Political Neutrality

In addition to persecution based on opposition to a particular military action for reasons of political conscience, aliens may also claim persecution on account of political opinion when they remain neutral in a civil conflict.[88] In such cases, the opinion is not necessarily stated but the persecutors punish the alien because they perceive the applicant's neutrality as a political opinion in opposition to the persecutor's cause.[89] When such aliens attempt to gain asylum under the Refugee Act for their opinion of neutrality in a particular military action, they face two obstacles. First, under the *U.N. Handbook*, aliens objecting to a particular military action on political grounds must show that the action is condemned by the international community as contrary to the basic rules of human conduct.[90] Second, aliens often must demonstrate that they actually articulated their opinion of neutrality in their homeland.[91]

Only the Ninth Circuit has granted asylum to those who

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dures for reopening of asylum cases under discretion granted by Refugee Act) (citing INS v. Rios-Pineda, 471 U.S. 444, 446 (1985)).

86. *Id.* at 312.

87. M.A. A26851062 v. United States INS, 899 F.2d 304 (4th Cir. 1990) (citing *U.N. Handbook*, *supra* note 14, ¶ 167). Although the court recognized that some aliens claiming persecution on the basis of political opinion may be eligible for asylum, the court applied the *U.N. Handbook*'s standards for aliens who oppose a particular military action, rather than those who oppose warfare in general. *Id.* The court in *M.A.* found that the alien did not meet the specific requirements of the *U.N. Handbook* because the type of military action was not "condemned by the international community as contrary to basic rules of human conduct." *Id.* (finding that applicant did not meet exceptions set out in paragraph 169 or paragraph 171 of *U.N. Handbook*).

88. *See, e.g.*, Rodriguez-Rivera v. INS, 848 F.2d 998 (9th Cir. 1988).

89. *Id.* at 1000 (describing alien's fear that guerrillas would kill him due to his neutrality).

90. U.N. HANDBOOK, *supra* note 14, ¶ 171.

91. *See* Perlera-Escobar v. INS, 894 F.2d 1292, 1298 (11th Cir. 1990) (explaining that allowing such applicants to gain asylum would "create a sinkhole that would swallow the rule").

claim that their neutrality is a political opinion for which they are being persecuted.[92] Beyond the Ninth Circuit, some circuits have found that neutrality can be a political opinion, but have not granted asylum in those cases.[93] Moreover, even the Ninth Circuit has recently limited its acceptance of neutrality as political opinion.[94]

For example, in *Arriaga-Barrientos v. United States Immigration and Naturalization Service*,[95] an alien sought asylum when discharged from the Guatemalan military after serving for 12 years.[96] He believed that his discharge, although admittedly in the normal course of service, would be construed as an act sympathetic to the opposition.[97] On the other hand, he feared that his long military tenure would be construed by the guerrillas as a sign of political support for the government.[98] Although he suggested that others had been killed by the opposition after serving in the government's military, the alien had not been threatened by the guerrillas or the government.[99] Two of the alien's brothers, however, had been kidnapped by unknown gunmen.[100]

The U.S. Court of Appeals for the Ninth Circuit rejected arguments that the alien faced persecution on account of a political opinion of neutrality.[101] The court acknowledged that the Ninth Circuit, unlike most others, considers political neutrality to be a political opinion even if the asylum applicant has not articulated an opinion of neutrality.[102] However, the court found that the asylum applicant had not proven the existence

92. *See* Maldonado-Cruz v. INS, 883 F.2d 788, 791 (9th Cir. 1989); Turcios v. INS, 821 F.2d 1396, 1401 (9th Cir. 1987); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1985).

93. *See* Novoà-Umania v. INS, 896 F.2d 1, 3 (1st Cir. 1990); M.A. A26851062 v. INS, 899 F.2d 304, 315 (4th Cir. 1990).

94. *See, e.g.*, Estrada-Posadas v. INS, 924 F.2d 916, 919-20 (9th Cir. 1991); Alonzo v. INS, 915 F.2d 546, 548-49 (9th Cir. 1990).

95. 937 F.2d 411 (9th Cir. 1991).

96. *Id.* at 412.

97. *Id.*

98. *Id.*

99. *Id.* Although the applicant suggested that the opposition had killed others upon the completion of their military service for the government, he could not recall specific instances of such persecution. *Id.*

100. Arriaga-Barrientos v. United States INS, 937 F.2d 411 (9th Cir. 1991). The opinion does not explain whether the brothers were killed or later found. *Id.*

101. *Id.* at 414.

102. *Id.* at 413.

of any political opinion because the applicant failed to show that the military or the guerrillas would impute an opinion of neutrality to him.[103] Because the applicant did not prove that he had possessed an opinion or that others would impute an opinion to him, the court found that the applicant had not satisfied the requirements of the Refugee Act.[104]

II. IMMIGRATION AND NATURALIZATION SERVICE v. ELIAS-ZACARIAS

Faced with a variety of political conscientious objection cases based on different situations and the religious conscientious objection case of *Canas-Segovia*, the U.S. Supreme Court chose to address the application of the Refugee Act to an asylum applicant's objection to military service first in *Immigration and Naturalization Service v. Elias-Zacarias*.[105] In *Elias-Zacarias*, the U.S. Supreme Court addressed the issue of whether a guerilla organization's attempts to coerce a person into performing military service constituted persecution "on account of . . . political opinion" under the Refugee Act of 1980.[106] The Court held that resisting recruitment efforts of a guerilla organization does not necessarily qualify an alien as a "refugee."[107] The Court stated that it is not enough to remain neutral by resisting the conscription efforts of military persecutors with political motivations.[108] Rather, the persecution must be on account of the victim's expressed political opinion, not the persecutor's.[109] Moreover, an asylum applicant must provide some evidence of the persecutor's motives.[110]

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103. *Id.* at 414. The court explained that

> [h]e has not publicly articulated his political neutrality. He has not even engaged in activities whose content is arguably political; in a country with mandatory conscription, of course his mere accedence to military service is not a political statement. Because he has not shown the existence of a political opinion, we need not consider whether he has demonstrated a reasonable fear of persecution because of his opinion.

Id. (citations omitted).

104. *Id.*

105. 112 S. Ct. 812 (1992).

106. *Id.*

107. *Id.*

108. *Id.* at 816.

109. *Id.*

110. INS v. Elias-Zacarias, 112 S. Ct. 812, 817 (1992).

A. *Procedural History*

In *Elias-Zacarias*, the asylum applicant fled Guatemala because he feared reprisal for his refusal to join armed anti-government guerrillas.[111] Mr. Elias-Zacarias did not want to align himself against the government, but he feared the guerrillas would kidnap or kill him if he refused them.[112] Two months later, Mr. Elias-Zacarias fled Guatemala and entered the United States, where he was apprehended by the INS.[113] Mr. Elias-Zacarias applied for asylum, but an Immigration Judge denied the application.[114] The BIA summarily dismissed his appeal on procedural grounds and denied a subsequent motion for reconsideration.[115] Although the BIA also dismissed a motion to reopen the case based on new evidence, it simultaneously addressed the merits of the appeal.[116] The court concluded that there was no proof of persecution and denied the petition for asylum.[117]

The Ninth Circuit reversed, holding that the Guatemalan guerrillas' forcible recruitment attempts constituted persecu-

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111. *See* Zacarias v. United States INS, 921 F.2d 844, 852 (9th Cir. 1990) (holding that forcible recruitment attempts constituted persecution on account of political opinion), *rev'd sub nom* INS v. Elias-Zacarias, 112 S. Ct. 812 (1992). Elias-Zacarias testified that two uniformed guerrillas, carrying machine guns and wearing handkerchiefs to conceal their faces, approached Elias-Zacarias' home. *Id.* at 847. They attempted to persuade Elias-Zacarias to join their forces. *Id.* When he refused, they told him to "think it [over] well" and said that they would be back. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* At the deportation hearing, the INS argued that Elias-Zacarias had failed to show a "well-founded fear of persecution" because the guerrillas did not specifically threaten him and because the guerrillas did not return to his home. *See* Respondent's Brief in Opposition to the Petition for Writ of Certiorari, at 13a, INS v. Elias-Zacarias, 112 S. Ct. 812 (1992). However, the immigration judge found that Zacarias' experience was not different than that of other Guatemalans and that he failed to show the guerrillas would seek him out. *See* Petition for Writ of Certiorari, at 41a-42a, INS v. Elias-Zacarias, 112 S. Ct. 812 (1992).

115. *See* Zacarias v. United States INS, 921 F.2d 844, 847 (9th Cir. 1990) (describing BIA decision); *see also In re* Zacarias, BIA unpublished dec. File No. A27 926 183 (Nov. 18, 1988) (explaining that BIA dismissed applicant's appeal because counsel failed to file brief or statement on applicant's behalf specifying reasons for appeal).

116. *See In re* Zacarias, No. A27 926 183 (BIA Nov. 18, 1988) (explaining that new evidence consisted of letter from applicant's father, affidavit from counsel, and affidavit from another attorney).

117. *See id.* (explaining that applicant's fear was "speculative" because guerrillas did not threaten applicant).

tion on account of political opinion.[118] The court found that it was reasonable for Mr. Elias-Zacarias to believe that he had been threatened on account of his expression of a political opinion because he was hostile to the persecutor and the persecutor's motives in kidnapping him were political.[119]

B. *The Supreme Court's Holding*

In *Elias-Zacarias*, the Supreme Court succinctly held that the guerilla group's attempts to force Mr. Elias-Zacarias into military service did not constitute persecution under the Refugee Act.[120] The Court focused on the plain meaning of the Refugee Act.[121] Although the Ninth Circuit had found "persecution on account of . . . political opinion" because the asylum applicant had resisted the recruitment efforts of those with political motives,[122] the Supreme Court explained that the proper inquiry under the "ordinary meaning" of the statute was to focus on the victim's political opinion, not that of the persecutor.[123] After a cursory examination of the statutory language, the Court reached a number of conclusions.[124]

First, the Court found that punishment for refusal to serve in the military on account of a political opinion of neutrality would not necessarily be grounds for asylum if the applicant

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118. Zacarias v. United States INS, 921 F.2d 844, 850 (9th Cir. 1990), *rev'd sub nom* INS v. Elias-Zacarias, 112 S. Ct. 812 (1992). The court explained that "the person resisting forced recruitment is expressing a political opinion hostile to the persecutor." *Id.* The court added that "the persecutor's motive in carrying out the kidnapping is political." *Id.*

119. *Id.* at 852. The court explained that "[th]e fact that the guerrillas engaged in forced recruitment is proof that they had the will to persecute [Zacarias]." *Id.* The court added that "the threat to [Zacarias] was for political as opposed to personal reasons . . . . There was no evidence to rebut the common sense inference that the guerrillas were interested in recruiting [Zacarias] to further the *group's* political goals." *Id.* (emphasis in original).

120. INS v. Elias-Zacarias, 112 S. Ct. 812 (1992).

121. *Id.* at 816 (opining that "[i]n construing statutes, 'we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used' ") (quoting Richards v. United States, 369 U.S. 1, 9 (1962)). Justice Antonin Scalia wrote the 6-3 majority opinion. *Id.* at 814.

122. Zacarias v. U.S. INS, 921 F.2d 844, 850 (9th Cir. 1990), *rev'd sub nom* INS v. Elias-Zacarias, 112 S. Ct. 812 (1992).

123. *Elias-Zacarias*, 112 S. Ct. at 816 (providing example that "if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion").

124. *Id.* at 816-17. The majority's opinion covered less than three pages.

had not affirmatively expressed an opinion back in his homeland.[125] The Court rejected arguments that Mr. Elias-Zacarias' decision to remain neutral in the fight between the government and the guerrillas was in itself necessarily the affirmative expression of a political opinion.[126]

Second, the Court explained that even assuming that Mr. Elias-Zacarias possessed a political opinion, he would have to prove that the guerillas' persecution was due to that political opinion of neutrality, not due to Mr. Elias-Zacarias' refusal to fight with the guerrillas.[127] The Court concluded that Mr. Elias-Zacarias had not established the connection between the persecution and the political opinion of neutrality.[128]

Third, the Court set out the burdens of proof required for asylum applicants to gain eligibility for asylum and to overturn a decision of the BIA. The Court held that Mr. Elias-Zacarias need not provide direct proof of the persecutors' motives, but that he must provide some evidence of it, either direct or circumstantial.[129] The Court also explained that an asylum applicant may obtain reversal of a BIA decision only if the applicant is able to show that the evidence presented was so compelling that no reasonable factfinder could fail to find the necessary fear of persecution.[130] The Court held that Mr. Elias-Zacarias had not met that standard.[131] Therefore, the Court reversed the Ninth Circuit's decision, explaining that the BIA's decision should have been upheld.[132]

C. *The Dissent*

Justice Stevens, in a dissent joined by Justices Blackmun

125. INS v. Elias-Zacarias, 112 S. Ct. 812, 816 (1992). The Court's comments indicate that if Mr. Elias-Zacarias had affirmatively expressed his opinion of neutrality, he would have established the existence of a political opinion as required by the Refugee Act. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 817. The Court explained that "Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial." *Id.* (emphasis in original). The Court did not provide any further description as to the amount or type of evidence necessary to obtain asylum.

130. INS v. Elias-Zacarias, 112 S. Ct. 812, 817 (1992).

131. *Id.*

132. *Id.*

and O'Connor, described Justice Scalia's majority opinion as a "narrow, grudging construction" of the Act.[133] The dissenters argued that Mr. Elias-Zacarias' decision to remain neutral was a political statement.[134] The dissent further argued that the persecutors' threat against the applicant was on account of that political opinion.[135]

The dissent conceded that the asylum applicant's expression of his opinion may not have been "elegant[ ]," but argued that the Refugee Act does not require such an explicit and well-developed expression of the opinion.[136] The dissent cited the Court's decision in *Cardoza-Fonseca* to show that the language of the Act, the legislative history, and the U.N. Protocol place a more relaxed burden of proof on asylum-seekers than the majority required in its opinion.[137] The dissent, moreover,

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133. *Id.* at 818 (arguing that majority opinion "is inconsistent with the basic approach to this statute that the Court endorsed in *INS v. Cardoza-Fonseca*") (Stevens, J., dissenting).

134. *Id.*. The dissent stated that

> [a] political opinion can be expressed negatively as well as affirmatively. A refusal to support a cause—by staying home on election day, by refusing to take an oath of allegiance, or by refusing to step forward at an induction center—can express a political opinion as effectively as an affirmative statement or affirmative conduct. Even if the refusal is motivated by nothing more than a simple desire to continue living an ordinary life with one's family, it is the kind of political expression that the asylum provisions of the statute were intended to protect.

Id. The dissenters quote from Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1985), to support their assertion that refusal was a political opinion. *Id.* In *Bolanos-Hernandez*, the Ninth Circuit cited several Supreme Court cases in which conduct was opinion. *Bolanos-Hernandez*, 767 F.2d at 1287 & n.18; *see, e.g.*, Spence v. Washington, 418 U.S. 405 (1974) (peace symbol on flag); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (civil rights march); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (arm band to protest Vietnam war); Edwards v. South Carolina, 372 U.S. 229 (1963) (assembly in front of state legislature); Thornhill v. Alabama, 310 U.S. 88 (1940) (picketing).

135. INS v. Elias-Zacarias, 112 S. Ct. 812, 819 (1992) (Stevens, J., dissenting). The dissent, explaining that the guerrillas' reaction to the applicant's opinion was persecution, asserted that

> [i]t does not matter to the persecutors what the individual's motivation is. The guerrillas in El Salvador do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause. They are concerned only with an act that constitutes an overt manifestation of a political opinion. Persecution because of that overt manifestation is persecution because of a political opinion.

Id. (quoting *Bolanos-Hernandez*, 767 F.2d at 1287).

136. *Id.* at 819 n.5.

137. *Id.* at 818-19.

explained that Congress intended asylum applicants to have some flexibility in presenting their claims for asylum because of the persecution they face if forced to return to their native country.[138]

The dissenters also emphasized that a finding of asylum eligibility under the Act would not automatically entitle a refugee to asylum because the Attorney General retains discretion to deny asylum even to aliens who qualify as refugees.[139] In conclusion, the dissent argued that the evidence supported a finding by the Court of Appeals that the applicant faced persecution on account of his political beliefs.[140]

III. ELIAS-ZACARIAS: *A DEPARTURE FROM THE PAST*

In *Elias-Zacarias*, the Supreme Court for the first time addressed the issue of asylum eligibility for those who object to military service on the basis of political opinion.[141] The Court dramatically increased the burden of proof provided under the Refugee Act, the *U.N. Handbook*, and previous Supreme Court precedent by requiring that aliens who seek asylum based upon their refusal to perform military service provide proof of their persecutors' intent.[142] This unwarranted increase in the burden of proof will have a devastating impact if applied to other cases as indicated by the Supreme Court's vacating and remanding of the Ninth Circuit's decision in *Immigration and Naturalization Service v. Canas-Segovia*.[143] The *Elias-Zacarias* standard should not extend beyond the realm of political asylum because such an extension would be inconsistent with U.S. obligations under international agreements such as the 1951

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138. *Id.* at 819.

139. *Id.* at 818-19. The dissent explained that

> [t]he [House] Committee carefully considered arguments that the new definition might expand the numbers of refugees eligible to come to the United States and force substantially greater refugee admissions than the country could absorb. However, merely because an individual or group comes within the definition will not guarantee resettlement in the United States.

Id. at 817-818 n.4 (quoting INS v. Cardoza-Fonseca 480 U.S. 421, 444-45 (1987)).

140. INS v. Elias-Zacarias, 112 S. Ct. 812, 820 (1992) (Stevens, J., dissenting).

141. *Id.*

142. *Id. See* Arthur C. Helton, *Justices Seem to Give INS The Benefit of the Doubt*, NAT'L L.J., Apr. 20, 1992, at 38.

143. Canas-Segovia v. INS, 902 F.2d 717 (9th Cir. 1990), *vacated and remanded*, 1992 U.S. LEXIS 1260 (U.S. Feb. 24, 1992), *on remand*, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992).

Convention and the 1967 Protocol.[144]

A. *The Supreme Court's Approach in* Elias-Zacarias *Was Misguided*

The Court's approach in *Elias-Zacarias* was misguided for two reasons. First, the decision ignored the lower burden of proof previously endorsed by the Supreme Court five years earlier in *Cardoza-Fonseca* when the Court had stated that the Refugee Act required asylum applicants only to show that they reasonably and genuinely feared persecution.[145] Second, the Court failed to utilize the *U.N. Handbook* which Congress and the Court previously had determined to be crucial when interpreting the Refugee Act.[146]

1. The Court Failed to Follow *Cardoza-Fonseca*

The Court's requirement in *Elias-Zacarias* that an asylum applicant prove that his persecutor possessed an intent to persecute contradicts its earlier approach to asylum eligibility as declared in *Cardoza-Fonseca*.[147] In *Cardoza-Fonseca*, the Court had examined the "well-founded fear" standard, rejecting the government's claim that the Refugee Act required an applicant for asylum to prove it was "more likely than not" that persecution on account of political opinion would result; the Court reached this conclusion because a lower burden of proof was "more in keeping with Congress' intent."[148] In *Cardoza-Fonseca*, the Court had held that an asylum applicant need only prove a fear of persecution that is subjectively genuine and ob-

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144. *See infra* notes 197-202 and accompanying text (explaining that *Elias-Zacarias* cannot be applied to other asylum categories besides political opinion without violating international agreements).

145. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); *see infra* notes 147-157 and accompanying text (explaining that Court should continue to follow approach set out in *Cardoza-Fonseca*).

146. U.N. HANDBOOK, *supra* note 14, ¶¶ 167-174; *see infra* notes 158-175 and accompanying text (explaining importance of *U.N. Handbook*).

147. INS v. Elias-Zacarias, 112 S. Ct. 812 (1992); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); *see supra* notes 40-47 and accompanying text (explaining *Cardoza-Fonseca* and congressional intent).

148. 480 U.S. at 443-45; *see In re* Said-Barre, No. A24 798 187 (BIA Apr. 15, 1988) (explaining that "an applicant does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor' where different reasons for actions are possible"); *accord In re* Ahmed, No. A24 798 181 (BIA June 10, 1988). The BIA has also stated this rule in a published decision, although the Board rejected the applicant's claim in that case. *In re* Fuentes, 19 I. & N. Dec. 658, 662 (BIA 1988).

jectively reasonable.[149] The Court elaborated on the "reasonable" prong of the "well-founded fear" standard and stated that reasonable fears may result from persecution that has even a slight chance of occurring.[150] The Court stated that a low standard of proof for asylum eligibility is necessary because a more restrictive standard of proof would remove the broad discretion granted to the Attorney General to decide asylum cases on an individual and flexible basis.[151]

In *Elias-Zacarias*, however, the Court decided that the asylum applicant failed to provide any proof of his persecutor's motive and failed to show he had a "well-founded fear" that the guerrillas would persecute him due to his political opinion of neutrality rather than due to a refusal to fight.[152] The Court's requirement in *Elias-Zacarias* that an applicant prove the persecutor's intent goes beyond *Cardoza-Fonseca*'s requirement of an objectively reasonable and subjectively genuine fear. Under *Elias-Zacarias*, an alien facing persecution that has only a slight chance of occurring would not be entitled to asylum, a different result than the Court would have reached under *Cardoza-Fonseca*. Under *Elias-Zacarias*, the alien faces the additional and unwarranted obstacle of proving intentional persecution.

As the dissent in *Elias-Zacarias* indicated, the Refugee Act requires only that an applicant show a "well-founded" fear of persecution.[153] If there exists even a "reasonable possibility" that an asylum applicant will be prosecuted, the applicant has met this burden.[154] Therefore, the Supreme Court should not pose the additional obstacle of requiring the applicant to pro-

149. INS v. Cardoza-Fonseca, 480 U.S. 421, 434 (1987); *see* U.N. HANDBOOK, *supra* note 14, ¶ 42 (explaining that "the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there"); Arthur C. Helton, Immigration and Naturalization Service v. Stevic: *Standards of Proof in Refugee Cases Involving Political Asylum and Withholding of Deportation*, 87 W. VA. L. REV. 787, 800-08 (1985) (explaining that "well-founded fear" standard requires only that applicant's fear be genuine and reasonable under circumstances). *See supra* notes 10-13 and accompanying text.

150. *Cardoza-Fonseca*, 480 U.S. at 431.

151. *Cardoza-Fonseca*, 480 U.S. at 444-45.

152. INS v. Elias-Zacarias, 112 S. Ct. 812, 816 (1992).

153. *Elias-Zacarias*, 112 S. Ct. at 819.

154. INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987); *see also* Cardoza-Fon-

vide proof of the persecutor's intent.[155] By requiring an asylum applicant to provide proof of a persecutor's intent, the Court has altered the flexible approach to asylum law that it set out in *Cardoza-Fonseca*.[156] Forcing asylum applicants to provide proof of motive unnecessarily departs from *Cardoza-Fonseca*'s less stringent requirements.[157]

2. The Court Failed to Utilize the *U.N. Handbook* and the IRO Manual

In the *Elias-Zacarias* decision, the Supreme Court failed to abide by, or even consider, the *U.N. Handbook*, despite congressional intent and the importance of the document in prior Supreme Court precedent.[158] By passing the Refugee Act of 1980, Congress intended to place the United States in compliance with the U.N. Protocol.[159] Because the U.N. High Commissioner for Refugees relies on its *Handbook* to measure adherence to the U.N. Protocol,[160] Congress also intended U.S. courts to utilize the *U.N. Handbook* to interpret the Refugee Act.[161] The Supreme Court had previously found the *U.N. Handbook* to provide significant guidance, but in *Elias-Zacarias* the Court did not refer to it at all.[162] If *Elias-Zacarias* signals a

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seca v. INS, 767 F.2d 1448, 1453 (9th Cir.), *aff'd*, 480 U.S. 421 (1987). The Ninth Circuit said that

> if documentary evidence is not available, the applicant's testimony will suffice if it is credible, persuasive, and refers to "specific facts that give rise to an inference that the applicant has been or has good reason to fear that he or she will be singled out for persecution on one of the specified grounds."

Id. (quoting Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984)).

155. INS v. Elias-Zacarias, 112 S. Ct. 812, 817 (1992).

156. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); *see supra* notes 43-47 and accompanying text (describing approach in *Cardoza-Fonseca*).

157. *See supra* note 151 (explaining low standard of proof required of asylum applicants).

158. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987).

159. 1967 Protocol, *supra* note 1, 19 U.S.T. 6223, TIAS No. 6577. In *Cardoza-Fonseca*, the Supreme Court described Congress' intent by asserting that

> [i]f one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol . . . .

Cardoza-Fonseca, 480 U.S. at 436-37.

160. *See* U.N. HANDBOOK, *supra* note 14, ¶¶ 169-174.

161. *See supra* note 41 and accompanying text (explaining that Congress intended that courts use *U.N. Handbook* when interpreting Act).

162. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987). The

departure from use of the *U.N. Handbook*, the Court has abandoned a valuable resource that it has used in the past to interpret the Refugee Act.[163]

Under the *U.N. Handbook*, *Elias-Zacarias* would be analyzed under the provisions for aliens who refuse to serve in the military because of a political opinion.[164] Those provisions permit the asylum applicant to present evidence that the military action which the applicant opposes was contrary to the basic rules of human conduct.[165] In disregarding the *U.N. Handbook*, the Supreme Court did not consider that Mr. Elias-Zacarias desired to remain neutral in a civil battle that the international community might condemn.[166] Moreover, the *U.N. Handbook* recognizes that aliens should be granted latitude when they present asylum claims because of the overwhelming difficulties they face.[167] In fact, the *U.N. Handbook* specifically says that asylum applicants should be given the "benefit of the doubt."[168] Thus, the Court deprived Mr. Elias-Zacarias an opportunity to present a compelling case of fear of persecution and subsequent right to asylum because of its stricter proof requirements.[169]

Court has stated that "the 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.* (citing McCullen v. INS, 658 F.2d 1312, 1319 (9th Cir. 1981)); *see* INS v. Elias-Zacarias, 112 S. Ct. 812 (1992).

163. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987).

164. *See supra* note 30 and accompanying text (explaining that punishment for refusal to serve in military action which international community condemns as contrary to basic rules of human conduct can be grounds for asylum).

165. U.N. HANDBOOK, *supra* note 14, ¶ 171.

166. INS v. Elias-Zacarias, 112 S. Ct. 812 (1992).

167. *See* U.N. HANDBOOK, *supra* note 14, ¶ 203 (explaining that "it is hardly possible for a refugee to 'prove' every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized"). The *U.N. Handbook*, expanding on the connection between the victim's opinion and his persecution, explains that

> [w]hile the [Protocol's] definition speaks of persecution "for reasons of political opinion" it may not always be possible to establish a causal link between the opinion expressed and the related measures suffered or feared by the applicant. Such measures have only rarely been based expressly on "opinion." . . . It will, therefore, be necessary to establish the applicant's political opinion, which is at the root of his behaviour, and the fact that it has led or may lead to the persecution that he claims to fear.

Id. ¶ 81.

168. *Id.* ¶ 203.

169. *See* Brief for Respondent, at 29, INS v. Elias-Zacarias, 112 S. Ct. 812

Moreover, the Court's decision contravenes the IRO Constitution, as illustrated through the IRO manual.[170] The manual, used by officers determining asylum eligibility, implements the goals of the IRO Constitution.[171] Unlike the *Elias-Zacarias* decision, the manual does not require asylum applicants to provide proof of the persecutor's intent.[172] The Court should have utilized the IRO Constitution because when Congress passed the Refugee Act, it intended to follow the 1951 Convention and 1967 Protocol, documents that incorporated the IRO definition of refugee.[173] The Court's decision to require that the asylum applicant provide proof of the persecutor's intent fails to accommodate the principles of the IRO Constitution, the 1951 Convention and the 1967 Protocol that fundamental human rights must be protected and that applicants for asylum need prove only that their fears of persecution are reasonable.[174] As a result, *Elias-Zacarias* bypasses Congress' intent that the Refugee Act place the United States into compliance with these international agreements.[175]

B. *The Implications of* Elias-Zacarias

Elias-Zacarias affects U.S. asylum law in two ways. First,

(1992). The attorney for Mr. Elias-Zacarias argued that evidence could be provided to show that the level of violence used by the guerrillas was at a level condemned by the international community. The attorney stated that

> [Zacarias] would submit evidence that the Guatemalan guerrillas kill people in retaliation for their refusal to join the guerrilla movement. In this regard, the State Department's country reports on human rights and newspaper articles have documented that the Guatemalan guerrillas forcibly recruit rural villagers and use extreme violence against those who oppose their revolutionary movement.

Id.

170. IRO MANUAL, *supra* note 16, at 24, ¶ 19.

171. *Id.*

172. *Id.*; *see supra* note 16 and accompanying text (explaining requirements of *IRO Manual*).

173. 1951 Convention, *supra* note 1, at 152; 1967 Protocol, *supra* note 1, at 6224; IRO Constitution, Annex 1, Pt. 1, § C1(a)(i), 62 Stat. 3037. *See supra* notes 14-23 and accompanying text (explaining interplay of IRO Constitution, 1951 Convention, and 1967 Protocol).

174. *See, e.g.*, IRO MANUAL, *supra* note 16, at 24 (explaining that applicants need only present "a plausible and coherent account" of why he fears persecution).

175. *See* H.R. CONF. REP. No. 781, 96th Cong., 2d Sess. 19-20, *reprinted in* 1980 U.S.C.C.A.N. 160; *see supra* notes 36 and 41 and accompanying text (explaining that Congress passed Refuge Act to place United States into compliance with 1967 Protocol and 1951 Convention).

the Court's new standard of proof forces aliens who seek asylum based on political opinion to provide some proof of their persecutors' intent.[176] This new standard forces aliens to show that their persecutors intended the prospective or actual punishment on account of the aliens' opinions rather than their refusal to serve.[177] Second, the Court casts doubt on the viability of asylum claims based on a political opinion of neutrality by stating that a refusal to serve on either side of a domestic war is not necessarily the expression of an opinion.[178]

1. The Court Should Not Require Proof of Persecutors' Intent

The Court's requirement that aliens provide evidence of their persecutors' intent severely limits the asylum eligibility of aliens who are political conscientious objectors and those who wish to remain neutral in a particular military action.[179] Prior to *Elias-Zacarias*, U.S. courts had followed the *U.N. Handbook*'s mandate that those who had been punished or faced imprisonment for refusing to serve in a particular military action could obtain asylum if the military action at issue was condemned by the international community as contrary to the basic rules of human conduct.[180] Under *Elias-Zacarias*' requirement that an alien prove his persecutor's intent, political conscientious objectors will not be able to gain asylum because the nature of the aliens' claims lies in their own personal objection to warfare rather than any intent on the part of the persecutor.[181]

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176. INS v. Elias-Zacarias, 112 S. Ct. 812, 817 (1992).

177. *Id.* at 817; *see supra* note 129 and accompanying text (describing Court's requirement that asylum applicant provide proof of persecutor's motive).

178. *Elias-Zacarias*, 112 S. Ct. at 816; *see infra* notes 191-201 and accompanying text (arguing that remaining neutral is expression of political opinion).

179. *See* U.N. HANDBOOK, *supra* note 14, ¶ 196. The *U.N. Handbook* explains that although the burden of proof is on the asylum applicant,

> an applicant may not be able to support his statements by documentary other proof . . . . In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. . . . [I]f the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

Id.

180. *See* M.A. A26851062 v. United States INS, 899 F.2d 304 (4th Cir. 1990); *see also supra* notes 82-87 (describing opinion in *M.A.*).

181. *See supra* note 29 and accompanying text (defining and describing political conscientious objection).

Moreover, courts have stated that the Refugee Act does not require proof of the persecutor's intent or motive.[182] Under the Court's holding in *Elias-Zacarias*, asylum applicants face the additional burden of proving that the persecutor intended to punish them because of religion, political opinion, or one of the remaining three protected categories in the Refugee Act.[183] Such a requirement contradicts the statutory language that requires only that the applicant prove a "well-founded" fear.[184] The requirement also contradicts *Cardoza-Fonseca*'s mandate that an alien need only show that the fear of persecution is objectively reasonable and subjectively genuine.[185] Moreover, the decision in *Elias-Zacarias* contradicts the Refugee Act's main goal of providing refuge to those aliens facing persecution for their political beliefs.[186]

2. The Court Should Allow Neutrality to Serve as Opinion

The Supreme Court asserted that refusing to serve in either side during a domestic war is not necessarily the expression of political opinion.[187] The Court did not settle this issue because it found that, regardless of whether Mr. Elias Zacarias had expressed an opinion through neutrality, the persecution was not on account of that opinion.[188] Therefore, the Court

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182. *See, e.g.*, Canas-Segovia v. INS, 902 F.2d 717, 726 (9th Cir. 1990), *vacated and remanded*, 1992 U.S. LEXIS 1260 (U.S. Feb. 24, 1992), *on remand*, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992).

183. *See supra* note 129 and accompanying text (describing Court's requirement that asylum applicant provide proof of persecutor's intent).

184. 8 U.S.C. § 1101(a)(42)(A) (1988).

185. INS v. Cardoza-Fonseca, 480 U.S. 421, 431-32 (1987).

186. INS v. Stevic, 467 U.S. 407, 422 (1984) (describing Congress' intent on burdens of proof). H.R. REP No. 608, 96th Cong., 1st Sess. 10, 17-18 (1979). *See* S. CONF. REP No. 590, 96th Cong., 2d Sess. 18 (1980); 126 CONG. REC. 4500 (1980) (explaining that Congress intended to "insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with [the United States'] obligations under international law") (statement of Rep. Holtzman, co-sponsor of House bill);

187. INS v. Elias-Zacarias, 112 S. Ct. 812, 816 (1992); *see supra* note 125 and accompanying text (explaining that Court's comments indicate that if Mr. Elias-Zacarias had affirmatively expressed his opinion of neutrality, he would have established the existence of political opinion as required by the Refugee Act). However, the existence of a political opinion provides asylum eligibility only if the persecution is on account of that opinion. 112 S. Ct. at 816; *see supra* note 124 and accompanying text (explaining Court's holding that, assuming political opinion existed, persecution was not on account of opinion).

188. *Elias-Zacarias*, 112 S. Ct. at 816.

found that it did not need to decide whether Mr. Elias-Zacarias held a political opinion.[189]

The Court should have settled this issue so that lower U.S. courts could maintain a consistent approach to U.S. asylum law.[190] Instead, the Court has failed to provide a clear standard to evaluate the asylum claims of aliens seeking refuge in the United States. As a result, lower courts will reach conflicting results. The Court should not only clarify its holding, but it should also follow the dissent's acceptance of neutrality as political opinion. As the dissent in *Elias-Zacarias* indicated, neutrality has always been considered to be the expression of an opinion under First Amendment jurisprudence in the United States.[191] The Court has held that refusals to support a cause, for example by refusing to take an oath or to pledge allegiance to a flag, are expressions of an opinion.[192] Prior to *Elias-Zacarias*, the Ninth Circuit had held that political neutrality constituted a political opinion under the Refugee Act.[193] However, under *Elias-Zacarias* the Court has suggested a new approach such that neutrality, without any additional expression, may not constitute a political opinion under the Refugee Act.[194] Such a result contradicts Congress' intent to provide a haven for those fearing persecution.[195] This more restrictive approach to asylum law also violates the *U.N. Handbook*'s repeated warnings that aliens will usually have difficulty proving

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189. *Id.*

190. *See, e.g.*, Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 957 (1985) (stating that function of Supreme Court is to "secure harmony of decision and the appropriate settlement of questions of *general importance*") (emphasis in original) (quoting Hughes, *Address of the Chief Justice*, 11 A.L.I. PROC. 313, 315 (1934) (emphasis added)); SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIARY PROCESS 48 (1986) (stating that Supreme Court "is responsible for maintaining the uniformity of federal law"). *See* SUP. CT. R. 17(a) (stating that when considering writ of certiorari, Court should consider whether federal courts of appeal are split on issue); *see also* ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 16, 113, 114 (1976).

191. *See supra* note 134 and accompanying text (explaining that political opinions can be expressed by refusals to act).

192. *Id.*

193. *See, e.g.*, Arriaga-Barrientos v. INS, 925 F.2d 1177 (9th Cir. 1991); *see also supra* notes 92-101 and accompanying text (describing holding in *Arriaga-Barrientos*).

194. INS v. Elias-Zacarias, 112 S. Ct. 812, 816 (1992).

195. *See supra* notes 153-157 and accompanying text (explaining that aliens should have broad eligibility for asylum).

their claims and should be given the benefit of the doubt.[196]

C. *The Potential Effects of* Elias-Zacarias

Elias-Zacarias will have a dramatic and potentially disastrous impact on U.S. immigration law when U.S. courts apply it in cases beyond those involving persecution on account of political opinion. Shortly after *Elias-Zacarias*, the Supreme Court vacated the Ninth Circuit's judgment in *Canas-Segovia* and remanded the case for further consideration in light of *Elias-Zacarias*.[197] On remand, the Ninth Circuit was compelled by *Elias-Zacarias* to find that an asylum applicant who claimed religious persecution due to his refusal to serve in the military on religious grounds had not provided evidence of his persecutor's intent.[198] As a result, asylum could not be granted on that theory.[199] If the holding and approach in *Elias-Zacarias* continues to be followed in other contexts, as it was in the *Canas-Segovia* decision on remand, the United States will abrogate its international obligations.[200] In addition, *Elias-Zacarias* will make asylum nearly impossible to obtain in contexts in which Congress intended aliens to obtain refuge.[201]

1. The Standards of Proof Established in *Elias-Zacarias* Contradict U.S. Obligations Under International Law

In passing the Refugee Act of 1980, Congress intended to comply with the IRO Constitution, 1951 Convention, the 1967 Protocol, and the *U.N. Handbook*.[202] In *Cardoza-Fonseca*, the

196. *See supra* note 167 and accompanying text (describing *U.N. Handbook*'s lenient standard of proof for asylum applicants).

197. INS v. Canas-Segovia, 902 F.2d 717 (9th Cir. 1990), *vacated and remanded*, 1992 U.S. LEXIS 1260 (Feb. 24, 1992), *on remand*, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992).

198. Canas-Segovia v. INS, 1992 U.S. App. LEXIS 15505, at *2-3 (9th Cir. July 10, 1992).

199. *Id.* The Ninth Circuit, however, granted asylum on the theory that Mr. Canas-Segovia faced persecution on account of political opinion falsely imputed to him. *Id.* at *4-5.

200. *See supra* notes 14-23 and accompanying text (explaining U.S. obligations under U.N. treaties).

201. *See supra* notes 176-83 and accompanying text (describing how Court selected category under Refugee Act which poses great burden of proof).

202. *See* H.R. CONF. REP. No. 781, 96th Cong., 2d Sess. 19-20, *reprinted in* 1980 U.S.C.C.A.N. 160; *see supra* notes 36 and 41 and accompanying text (explaining Con-

Supreme Court acknowledged Congress' intent to comply with these international sources.[203] Yet, in *Elias-Zacarias* none of these documents was utilized and the Court's decision violates these international agreements.

Other signatories to the 1951 Convention and the 1967 Protocol follow the approach described in the *U.N. Handbook* rather than the more limited approach of requiring proof of the persecutor's intent as stated in *Elias-Zacarias*. The Vienna Convention on the Law of Treaties[204] dictates that when interpreting a treaty, nations should consider the subsequent actions of other signatories as guidance.[205] The approach to asylum advocated in the *U.N. Handbook*, and the related international agreements has been followed in Germany, the Netherlands, Canada, and Austria.[206] These countries have maintained a low standard of proof for persons seeking asylum when facing punishment for persecution on account of religion or political opinion.[207] To uphold basic principles of international law, the U.S should follow the *U.N. Handbook*, the 1951 Convention, and the 1967 Protocol in a similar way.

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gress passed Refuge Act to place United States into compliance with 1967 Protocol and 1951 Convention).

203. INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987).

204. May 23, 1969, 1155 U.N.T.S. 331. The United States recognizes that the Convention codifies international law binding on the United States. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Introductory Note to Part III (explaining that "Department of State has on various occasions stated that it regards particular articles of the Convention as codifying existing international law; United States courts have also treated particular provisions of the Vienna Convention as authoritative"); *see also* Congressional Research Service, 98th Cong., 2d Sess., S. Pr. No. 98-205, *Treaties and Other International Agreements: The Role of the United States Senate* 41 (1984) (explaining that Vienna Convention "retains its status as a primary source of international law concerning treaties, even for nonparties").

205. Vienna Convention, May 23, 1969, art. 31, 1155 U.N.T.S. at 340 (explaining that "[t]here shall be taken into account . . . [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation").

206. *See supra* notes 32-35 (explaining approach of other countries).

207. *Id.*

2. The Standards of Proof Established in *Elias-Zacarias* Should Not Be Applied Beyond the Context of Persecution on Account of Political Opinion

The Court's requirement of proof of motive will pose great difficulty for asylum applicants fleeing punishment for failure to comply with a facially neutral conscription policy that infringes on religion. When *Elias-Zacarias* is applied in the future, it will make asylum eligibility nearly impossible for religious conscientious objectors like those in *Canas-Segovia*.[208] In *Canas-Segovia*, Jehovah's Witnesses, whose religious faith prohibited them from participating in any kind of military service, applied for asylum due to persecution on account of religion.[209] The Ninth Circuit originally followed the *U.N. Handbook* and granted asylum because the persecutors' conscription law was the equivalent of persecution on account of religion. The court found that even the facially neutral intent of recruiting soldiers could, in effect, result in persecution.[210] On remand, the Ninth Circuit found that, in light of *Elias-Zacarias*, the asylum applicant needed to present some evidence of the persecutor's motives.[211] The applicant was not able to provide such evidence.[212] In addition, the Ninth Circuit followed the lead of the Supreme Court and failed to utilize the *U.N. Handbook*.[213]

Canas-Segovia would have been decided differently under the *U.N. Handbook*, rather than under *Elias-Zacarias*. Under the *U.N. Handbook*, aliens seeking asylum for refusal to serve in the military on account of religion need only show that their reli-

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208. *See* Linda Greenhouse, *Supreme Court Limits Political Asylum Claims*, N.Y. TIMES, Jan. 23, 1992, at A20 (writing that "[o]n the basis of today's ruling, the Court is likely to overturn [*Canas-Segovia*]"); *see also* Nat Hentoff, *40 More Years of Clarence Thomas*, THE VILLAGE VOICE, Mar. 3, 1992, at 24-25 (explaining that *Elias-Zacarias* will "affect thousands of people from Central America, Asia, and other places who want to take refuge here from political retaliation that can lead to death or imprisonment").

209. Canas-Segovia v. INS, 902 F.2d 717, 720 (9th Cir. 1990), *vacated and remanded*, 1992 U.S. LEXIS 1260 (U.S. Feb. 24, 1992), *on remand*, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992).

210. *Id.* at 728.

211. Canas-Segovia v. INS, 1992 U.S. App. LEXIS 15505, at *2-3 (9th Cir. July 10, 1992).

212. *Id.*

213. *Id.*

gious beliefs have not been taken into account by the authorities.[214] The applicant need not demonstrate the persecutor's motive or intent to harm.[215] The relevant inquiry should be the effect of the forced conscription on the applicant and whether the applicant's religious beliefs have been "taken into account."[216] Moreover, the *U.N. Handbook* requires the United States to decide any ambiguity in favor of the alien.[217] When applying *Elias-Zacarias* to *Canas-Segovia*, the Ninth Circuit found that the asylum applicant facing a facially neutral conscription policy had not demonstrated an intent to persecute. This result does not comport with U.S. international obligations as set out in the *U.N. Handbook*. Even the U.S. Solicitor General has argued that the decision in *Elias-Zacarias* should not control *Canas-Segovia*.[218] Nevertheless, the Supreme Court remanded

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214. U.N. HANDBOOK, *supra* note 14, ¶ 172 (stating that "[i]f an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status").

215. *Id.* ¶¶ 167-74.

216. *See supra* notes 55-74 (discussing Ninth Circuit's approach in *Canas-Segovia*).

217. *See supra* note 167 and accompanying text (describing *U.N. Handbook*'s low standard of proof).

218. *See* Petition for Certiorari at 9, n.3, INS v. Elias-Zacarias (90-1342). The Solicitor General argued that

> [l]ike this case, *Canas-Segovia* raises an important question of the meaning of "on account of" in the Refugee Act. But the issues are in substantial respects significantly different—here, the significance of the political objectives of a guerilla group and in *Canas-Segovia* the significance of the conscript's conscientious objection to government-required military service—that we believe both decisions warrant plenary review. Moreover, a decision in either case would not necessarily govern disposition of the other case.

Id. This is directly contrary to the Supreme Court's remand of *Canas-Segovia*. 902 F.2d 717, 720 (9th Cir. 1990), *vacated and remanded*, 1992 U.S. LEXIS 1260 (U.S. Feb. 24, 1992), *on remand*, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992); *see* Reply Brief for Petitioner on Petition for Certiorari at 4, n.2, INS v. Elias-Zacarias 112 S. Ct. 812 (1992). The Solicitor General also argued that

> [t]he lower court's reliance on the political motivation for the guerrillas' threat does serve to distinguish this case from INS v. Canas-Segovia . . . . The Ninth Circuit there held that, in the circumstances of government recruitment of a conscientious objector, asylum eligibility does not require *any* proof of the alleged persecutor's motivation. Here, on the other hand, the Ninth Circuit did look to the persecutor's motivation but then held that proof of motive to persecute an individual "on account of . . . political opinion"is satisfied by evidence of the alleged persecutor's political motivation. Thus, the reversal of the judgment in *Canas-Segovia* would not necessitate the reversal of the judgment in this case. We therefore urge the Court to grant the petition here as well as in *Canas-Segovia*.

Canas-Segovia for reconsideration in light of *Elias-Zacarias*, indicating that the holding of *Elias-Zacarias* should be extended beyond the context of persecution on account of political opinion. In fact, the Ninth Circuit specifically found that the requirement of proof of intent was not limited to persecution based on political opinion, but applied to the other categories of the Refugee Act, including religion.[219]

These events are troubling because, in *Elias-Zacarias*, the Court addressed a broad area of U.S. asylum law and articulated new standards of proof by deciding a case involving the Refugee Act category that poses the greatest difficulty for asylum applicants. Under the Act, aliens who fear persecution due to political opinion or religion are eligible for asylum.[220] However, the courts have recognized three different categories of cases involving aliens seeking asylum after facing punishment for refusal to join the military. First, aliens may refuse military service because their religion forbids such violent activity.[221] Second, aliens may refuse military service based on political conscientious objection.[222] Finally, in limited circumstances an alien may refuse to serve in the military of the government or guerrillas because of a political opinion of neutrality.[223]

The final category of cases, involving a political opinion of neutrality, poses the most difficult standard of proof of the three categories for two reasons. First, the applicant may have difficulty demonstrating that the punishment is for the opinion rather than the refusal to serve because the applicant may not have articulated an opinion.[224] As a result, asylum applicants will have more difficulty meeting the *Cardoza-Fonseca* requirements that the fear of persecution be subjectively genuine and

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Id. (citations omitted). The Court granted certiorari in both cases, but decided *Elias-Zacarias* first and then remanded *Canas-Segovia* in light of *Elias-Zacarias*.

219. Canas-Segovia v. INS, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992).

220. *See* 8 U.S.C. §§ 1101(a)(42)(A), 1158(a) (1988).

221. *See supra* notes 52-74 and accompanying text (describing approach to religious conscientious objector cases).

222. *See supra* notes 78-87 and accompanying text (explaining objection to military service because of political conscientious objection).

223. *See supra* notes 25-31 and accompanying text (describing *U.N. Handbook*'s approach).

224. *Id. See supra* note 167 and accompanying text (explaining difficulty that applicants face in providing evidence of their claims).

objectively reasonable.[225] Second, because aliens with an opinion of neutrality object to a particular war rather than warfare in general, the *U.N. Handbook* states that each nation retains the discretion to grant or deny asylum on a case-by-case basis.[226]

Faced with three possible categories that address the Refugee Act's applicability to those opposing military service, the Court in *Elias-Zacarias* chose the third and most difficult category to set out new standards of proof. *Elias-Zacarias* presented the least compelling case for asylum because the applicant's only expression of an opinion was his refusal to serve with the anti-government guerillas.[227] Moreover, the applicant presented no evidence that the guerrillas who threatened him knew he had an opinion; it is likely that the threats against him were due only to his refusal to serve.[228] Unfortunately, the Court chose to decide *Elias-Zacarias* and to remand *Canas-Segovia*, rather than give both cases a full hearing.[229] The new *Elias-Zacarias* requirement that an applicant present proof of the persecutor's motive would make it nearly impossible for aliens to obtain asylum under other categories of cases. This result contradicts the Refugee Act, violates several international agreements, and ignores Congress' intent to institute an asylum policy that would provide sanctuary for oppressed people around the world.[230] Due to the Supreme Court's changing approach to asylum law and its refusal to follow its own precedent in *Cardoza-Fonseca*, Congress should clarify its intention by passing further legislation in this area.

CONCLUSION

The Supreme Court's decision in *Elias-Zacarias* marks a de-

225. *See supra* notes 43-47 and accompanying text (describing proof requirements under *Cardoza-Fonseca*).

226. U.N. HANDBOOK, *supra* note 14, ¶ 171.

227. *See* INS v. Elias-Zacarias, 112 S. Ct. 812 (1992).

228. *Id.* at 816.

229. *Compare* INS v. Elias-Zacarias, 921 F.2d 844 (9th Cir. 1990), *rev'd* 112 S. Ct. 812 (1992) *with* INS v. Canas-Segovia, 902 F.2d 717 (9th Cir. 1990), *vacated and remanded*, 1992 U.S. LEXIS (U.S. Feb. 24, 1992), *on remand*, 1992 U.S. App. LEXIS 15505 (9th Cir. July 10, 1992).

230. *See* U.N. HANDBOOK, *supra* note 14, ¶¶ 196-97 (explaining that nations should grant asylum applicants benefit of doubt because of difficulty in presenting claims for asylum); INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987).

parture from Supreme Court precedent, international agreements, the *U.N. Handbook*, and the congressional intent behind the Refugee Act. Requiring an asylum applicant in cases like *Elias-Zacarias* and *Canas-Segovia* to provide proof of the persecutors' intent is an unwarranted change from the past and poses an insurmountable burden of proof on aliens. For those reasons, the approach in *Elias-Zacarias* should not be extended in the future.

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