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THE UNITED STATES SUPREME COURT AND THE PROTECTION OF REFUGEES

LUNG-CHU CHEN*

INTRODUCTION

The problem of refugees is a worldwide phenomenon.¹ The twentieth century has been called the century of refugees.² Its history is replete with mass displacements of peoples fleeing war, political oppression, human rights deprivations or disasters of one kind or another. Currently, there are about seventeen million refugees around the world.³ The specter of masses of refugees huddled at national boundaries seeking asylum is common to the experience of many nations. The United States, being a nation of immigrants and a land of opportunity, is certainly not immune from such pressures, as most recently illustrated by the exodus of the Haitian boat people destined for U.S. shores.⁴

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¹ See generally DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES: A GUIDE TO ADMINISTRATIVE PRACTICE AND CASELAW* 5-9 (2d ed. 1991) (surveying various international responses to refugee problems).

² See REFUGEES: A WORLD REPORT 1 (Lester A. Sobel ed., 1979) (quoting German novelist Heinrich Boll).

³ Report of the United Nations High Commissioner for Refugees, U.N. GAOR, Supp. No. 12, at 1, U.N. Doc. A/47/12 (1992); U.S. Comm. for Refugees, *World Refugee Statistics*, 1992 WORLD REFUGEE SURV. 32-33.

⁴ See Claire P. Gutekunst, *Interdiction of Haitian Migrants on the High Seas: A Legal and Policy Analysis*, 10 YALE J. INT'L L. 151, 154 (1984). For several decades, political repression, human rights abuses and economic deprivation in Haiti have led to a steady flow of migrants seeking refuge in the countries neighboring Haiti, and the United States. *Id.* at 152-54. After the 1991 overthrow of President Jean-Bertrand Aristide's democratically elected government by members of the Haitian military, the number of boat people trying to reach U.S. shores increased significantly, prompting the Bush administration to resume a policy of interdiction and forced repatriation, which had been temporarily suspended after the coup. See Howard W. French, *U.S. Starts to Return Haitians Who Fled Nation After Coup*, N.Y. TIMES, Nov. 19, 1991, at A1; Thomas L. Friedman, *Haitians Returned Under New Policy*, N.Y. TIMES, May 27, 1992, at A1. Despite campaign promises to the contrary, President Clinton announced that he would continue to enforce the Bush administration's policies. See Elaine Sciolino, *Clinton Says U.S. Will Continue Ban on Haitian Exodus*, N.Y. TIMES, Jan. 15,

I. INTERNATIONAL EFFORTS

Beginning under the League of Nations and extending through the United Nations system, continuous international efforts have been made to improve the status and treatment of those who flee their land of origin in fear of persecution for political, racial, religious, or other reasons.⁵ Post-World War II efforts resulted not only in the creation of the Office of the United Nations High Commissioner for Refugees (the "UNHCR"),⁶ but also in the adoption of two important refugee treaties—the 1951 United Nations Convention Relating to the Status of Refugees (the "Convention"),⁷ and the 1969 United Nations Protocol Relating to the Status of Refugees (the "Protocol").⁸

Both the Convention and the Protocol define the term "refugee" as any person who has a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular

1993, at A1. For a general history and appraisal of the human rights situation in Haiti, see generally *Report on the Human Rights Situation in Haiti*, U.N. Comm. on Hum. Rts., U.N. Doc. E/CN.4/1992/50 & Add.1 (1992).

⁵ See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 1-19 (1983) [hereinafter GOODWIN-GILL, *THE REFUGEE*]; 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 12-27 (1966).

⁶ See GOODWIN-GILL, *THE REFUGEE*, *supra* note 5, at 129-31. The mandates of the Office of the United Nations High Commissioner for Refugees (the "UNHCR") are: to provide international protection to refugees; to seek permanent solutions for the problems of refugees; to promote the conclusion and supervise the application of international conventions for the protection of refugees; and to promote the implementation of measures calculated to improve the situation of refugees. *Statute of the Office of the High Commissioner for Refugees*, G.A. Res. 428, 5th Sess. Annex 5, U.N. GAOR, Supp. No. 20, at 46-48, U.N. Doc. A/1775 (1950); see also P.D. Maynard, *The Legal Competence of the United Nations High Commissioner for Refugees*, 31 INT'L & COMP. L.Q. 415, 415-25 (1982) (discussing jurisdiction of UNHCR). See generally LOUISE W. HOLBORN, *REFUGEES: A PROBLEM OF OUR TIME: THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 1951-1972* (1975) (providing comprehensive description of UNHCR's early work).

⁷ United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force April 22, 1954) [hereinafter Convention]. For a commentary on the Convention, see generally NEHEMIAH ROBINSON, *CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION* (1953); Paul Weis, *The International Protection of Refugees*, 48 AM. J. INT'L L. 193 (1954) (stating goal of Convention is establishment of international legal status for refugees and creation of international safeguards for its observation).

⁸ United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter Protocol]. For a commentary on the Protocol, see generally Paul Weis, *1967 Protocol Relating to the Status of Refugees and Some Questions of the Law of Treaties*, 42 BRIT. Y.B. INT'L L. 39 (1967).

social group, or political opinion.⁹ The Convention was originally designed to address only refugee situations created before, or as a result of, World War II. The definition of "refugee," therefore, was limited to Europeans displaced from their country of nationality as a result of events occurring prior to 1951.¹⁰ As the years passed, and as new refugee situations emerged, the need was felt to make the Convention applicable to new refugees. In response, the negotiators of the Protocol removed the Convention's geographical and temporal limitations in its definition of "refugee," thereby extending the Convention's protection to new refugees.¹¹ The Protocol not only expanded the potential range of refugees, but also incorporated by reference all substantive provisions of the Convention.¹²

Of the various protections provided for refugees by both refugee treaties, Article 33 of the Convention is the most important. Article 33, commonly known as the principle of *non-refoulement* (the principle of no forced return),¹³ prescribes that a state party "shall [not] expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."¹⁴

II. THE STATUTORY FRAMEWORK

In 1968, the United States became a party to the Protocol.¹⁵ Consequently, the United States became derivatively bound by all

⁹ See Convention, *supra* note 7, art. 1.A.(2); Protocol, *supra* note 8, art. I.2; see also GRAHL-MADSEN, *supra* note 5, at 102-261.

¹⁰ See Convention, *supra* note 7, art. 1.A.(2).

¹¹ See Protocol, *supra* note 8, art. I; see also GOODWIN-GILL, *THE REFUGEE*, *supra* note 5, at 12-13.

¹² See Protocol, *supra* note 8, art. I.

¹³ See GOODWIN-GILL, *THE REFUGEE*, *supra* note 5, at 69. Some commentators argue that the principle of *non-refoulement* has emerged as a generally accepted principle of customary international law and is therefore binding on all states regardless of whether or not they have adopted the Convention and the Protocol. See, e.g., Guy S. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 VA. J. INT'L L. 897, 898 (1986) (arguing that "moral obligation to assist refugees and to provide them with refuge or safe haven has, over time and in certain contexts, developed into a legal obligation"). But see Kay Hailbronner, *Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, 26 VA. J. INT'L L. 857, 878 (1986) (stating that no international principle exists for providing temporary refuge).

¹⁴ See Convention, *supra* note 7, art. 33.1.

¹⁵ 59 DEP'T ST. BULL. 431 (1968).

the substantive provisions of the 1951 Convention, including the provision of no forced return.¹⁶ It was not until 1980, however, that Congress adopted domestic legislation to give effective expression to the international legal obligations assumed by the United States in becoming a party to the Protocol.¹⁷

The Refugee Act of 1980,¹⁸ which amended the Immigration and Nationality Act of 1952 (the "INA"),¹⁹ provides a comprehensive framework for the admission of refugees into the United States. The key to the Act is the definition of "refugee" in INA section 101(a)(42), which grants "refugee" status to any person who has fled their native country under a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."²⁰

For persons outside the United States, INA section 207 creates an Overseas Refugee Program. To be eligible for the program, a person must not be firmly settled in a third country and must fall within the section 101(a)(42) definition of "refugee."²¹ If the person meets these eligibility requirements, the Attorney General has the discretion to admit the alien as a "refugee."²²

For persons already within the United States, INA section 208 provides asylum procedures. Under section 208(a), the Attorney General has the discretion to grant asylum to an alien if the Attorney General determines that the alien is a "refugee" as defined by section 101(a)(42).²³ Aliens admitted as "asylees" are en-

¹⁶ See Protocol, *supra* note 8, art. I.1.

¹⁷ For a comprehensive analysis of the U.S. legal response to the refugee problem since World War II, and a legislative history of the Refugee Act of 1980, see Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981); see also David A. Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. Y.B. INT'L LEGAL STUD. 91; *Immigration Law: Treatment of Refugees*, 21 HARV. INT'L L.J. 742 (1980); *Refugee Act of 1980*, 10 DENV. J. INT'L L. & POL'Y 155 (1980) (explaining how Act focuses U.S. policy towards refugees and their admittance into country).

¹⁸ Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections at 8, U.S.C. and at 22 U.S.C. § 2601).

¹⁹ Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1525 (1988 & Supp. 1991)).

²⁰ 8 U.S.C. § 1101(a)(42) (1988). The Senate Judiciary Committee noted that the new definition of "refugee" in the 1980 Act would bring U.S. law into conformity with international treaty obligations under the U.N. Convention and the Protocol. S. REP. NO. 256, 96th Cong., 1st Sess. 4 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 141.

²¹ See 8 U.S.C. § 1157(c)(1) (1988); see also 8 C.F.R. § 207.1(b) (1993) (overseas refugee program).

²² See 8 U.S.C. § 1157(c)(1) (1988).

²³ *Id.* § 1158(a).

titled to federal assistance, as are "refugees."²⁴ However, "asylum" status is subject to continuing review, and such status may be terminated if "circumstances" change in the alien's country.²⁵

Another key provision of the Refugee Act is INA section 243. Section 243 establishes, in principle, that aliens subject to deportation shall be directed by the Attorney General to a country designated by the alien.²⁶ Section 243(h), generally known as the withholding of deportation provision, closely parallels the provisions of *non-refoulement* as set forth in Article 33 of the U.N. Convention.²⁷ Section 243(h) provides that the Attorney General "shall not deport or return any alien . . . to a country if the Attorney General determines such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."²⁸

III. THE ROLE OF THE UNITED STATES SUPREME COURT

Since the enactment of the Refugee Act, the number and range of refugee and asylum claims heard by domestic courts, including the United States Supreme Court, have expanded significantly. The analysis applied by the Supreme Court in its early cases demonstrated a willingness to interpret the Refugee Act in accordance with international treaty obligations, thereby promoting the human rights concerns underlying international refugee law.

A. *Withholding of Deportation* - *INS v. Stevic*

In 1984 the United States Supreme Court had its first opportunity to rule on the standards applicable in deportation hearings under the Refugee Act. In *INS v. Stevic*,²⁹ the Court addressed the issue of whether a deportable alien must demonstrate a "clear probability of persecution" in order to be entitled to withholding of deportation under INA section 243(h).³⁰

²⁴ See THOMAS A. ALENIKOFF & DAVID A. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 735 (2d ed. 1991).

²⁵ See 8 U.S.C. § 1158(b) (1988).

²⁶ *Id.* § 1253(a).

²⁷ See STEPHEN H. LEGOMSKY, *IMMIGRATION LAW AND POLICY* 839-42 (1992).

²⁸ 8 U.S.C. § 1253(h) (1988).

²⁹ 467 U.S. 407 (1984).

³⁰ See *id.* at 409.

The Court, in an opinion delivered by Justice Stevens, unanimously answered this query in the affirmative.³¹ The Court reviewed existing law and found that before the United States acceded to the U.N. Protocol in 1968, an alien who was already within the United States was required to demonstrate a "clear probability of persecution" or a "likelihood of persecution" in order to avoid deportation under section 243(h).³² This standard, however, did not apply to an alien outside the United States seeking refuge within the United States due to persecution. Such an alien could gain admission to the United States through asylum proceedings by establishing a "good reason to fear persecution."³³ The Court found that the legislative history of the United States accession to the Protocol established that the President and the Senate believed that the Protocol was largely consistent with existing law.³⁴ However, while the Protocol raised questions about the standard for section 243(h) claims, the U.S. accession did not raise any questions concerning the standard to be applied to claims for asylum.³⁵

Turning to the text of section 243(h), as amended by the Refugee Act, the Court observed that section 243(h) makes no mention of the appropriate standard.³⁶ The Court stated:

To the extent such a standard can be inferred from the bare language of the provision, it appears that a likelihood of persecution is required. The section literally provides for withholding of deportation only if the alien's life or freedom "would" be threatened in the country to which he would be deported; it does not require withholding if the alien "might" or "could" be subject to persecution. Finally, § 243(h), both prior to and after amendment, makes no mention of the term "refugee"; rather, any alien within the United States is entitled to withholding if he meets the standard set forth.³⁷

The Court rejected Stevic's reliance on the "well-founded fear of persecution" standard found in the definition of "refugee" under both the Protocol and INA section 101(a)(42)(A). Because section 243(h), upon which Stevic relied, does not refer to the definition of

³¹ *Id.* at 413.

³² *Id.* at 414.

³³ *See id.* at 414-16.

³⁴ *Stevic*, 467 U.S. at 416-20.

³⁵ *Id.*

³⁶ *See id.* at 421-22.

³⁷ *Id.* at 422 (footnotes omitted).

"refugee," the Court held that there is no textual basis for concluding that the "well-founded fear of persecution" standard is relevant to withholding of deportation claims under section 243(h).³⁸

The Court then reviewed the legislative history of the Refugee Act to support its conclusion. The Court determined that the congressional motivation for the enactment of the Refugee Act was to revise and standardize the procedures governing the admission of refugees into the United States.³⁹ The Court discerned that while the Act adopted and expanded upon the Protocol's definition of "refugee," it was not intended to guarantee resettlement in the United States or change the standard for withholding of deportation.⁴⁰ Here, the Court thought it clear that Congress understood that refugee status alone did not require withholding of deportation, but rather that the alien had to satisfy the standard under section 243(h). In conclusion, the Court found nothing in the language of section 243(h), the structure of the INA as amended or the legislative history to support the conclusion that every alien who qualifies as a "refugee" under the statutory definition is also entitled to a withholding of deportation under section 243(h).⁴¹ Rather, in order to qualify for withholding of deportation, an alien must demonstrate that "it is more likely than not that the alien would be subject to persecution" in the country to which the alien would be returned.⁴²

B. *Well-Founded Fear of Persecution*—INS v. Cardoza-Fonseca

In *Stevic*, the Supreme Court expressly declined to decide the meaning of the phrase "well-founded fear of persecution" applicable to requests for discretionary asylum under the Act.⁴³ The Court revisited the issue, however, in 1986 in the case of *INS v. Cardoza-Fonseca*.⁴⁴ In *Cardoza-Fonseca*, a Nicaraguan citizen subject to deportation proceedings requested withholding of deportation pursuant to section 243(h) and applied for asylum as a refugee pursuant to section 208(a).⁴⁵ In support of her claims, Cardoza-Fonseca offered evidence that her brother had been tor-

³⁸ See *id.* at 422-24.

³⁹ *Stevic*, 467 U.S. at 425.

⁴⁰ *Id.* at 420.

⁴¹ See *id.* at 421-28.

⁴² *Id.* at 429-30.

⁴³ See *id.* at 430.

⁴⁴ 480 U.S. 421 (1987).

⁴⁵ See *id.* at 424.

tured and imprisoned because of political activities in Nicaragua. She believed that she would be tortured and interrogated about her brother's whereabouts if returned to Nicaragua.⁴⁶

In an opinion delivered by Justice Stevens, a divided Court held that the section 243(h) "clear probability" standard of proof does not apply to asylum applications under section 208(a).⁴⁷ Instead, the "well-founded fear of persecution" standard governs asylum applications under section 208(a).⁴⁸ In support of its conclusion, the Court set forth the basic distinctions between the asylum provisions of section 208(a) and the withholding of deportation provisions of section 243(h). First, the well-founded fear of persecution standard under section 208(a) is more generous than the "clear probability of persecution" standard: the reference to "fear" in the former standard makes it more subjective by focusing to some extent on the mental state of claimants, while the latter standard is more objective requiring claimants to establish by objective evidence that they are more likely than not to suffer persecution upon deportation.⁴⁹ Second, section 208 is discretionary, leaving the Attorney General the discretion to grant asylum, while section 243(h) is mandatory, leaving the Attorney General no discretion to withhold deportation.⁵⁰ In reaching this conclusion, the Court made reference to the statutory language of the Refugee Act, its legislative history, congressional intent, and past practices.⁵¹ The Court emphasized that the legislative history of the Act demonstrated the congressional intent to interpret the term "refugee" in conformity with the Protocol.⁵² The Court also gave prominent attention to the *United Nations High Commissioner for Refugees Handbook*⁵³ as an aid in the task of interpretation, and concluded that the Refugee Act framework was consistent with the U.S. obligations under the Convention and the Protocol.⁵⁴

⁴⁶ See *id.* at 424-25.

⁴⁷ See *id.* at 430.

⁴⁸ See *id.* at 427-28.

⁴⁹ *Cardoza-Fonseca*, 480 U.S. at 430-31.

⁵⁰ See *id.* at 427-29, 443-44.

⁵¹ See *id.* at 427-43.

⁵² See *id.* at 436-38.

⁵³ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (Geneva 1979) [hereinafter UNHCR HANDBOOK].

⁵⁴ See *Cardoza-Fonseca*, 480 U.S. at 438-41. For a discussion of the standard applied by the Board of Immigration Appeals and lower courts in response to *Cardoza-*

IV. RECENT SUPREME COURT DECISIONS

A. Reopening Deportation Proceedings

In the *Stevic* and *Cardoza-Fonseca* cases, the Supreme Court demonstrated a willingness to exercise its power of judicial review to ensure that the application of U.S. refugee law would be consistent with international refugee law. By going beyond a purely textual analysis of the Refugee Act and analyzing the Act against the background of its legislative history and the Convention and Protocol, the Court gave effect to congressional intent to bring U.S. law into conformity with international law.⁵⁵ Two decisions in the Court's most recent term, however, appear to signal a retreat from this position and an erosion of the Supreme Court's role in the development of legal protection for refugees.

The first case, *INS v. Doherty*,⁵⁶ illustrates the interplay between extradition and asylum law. Doherty, a citizen of both Ireland and the United Kingdom, had been found guilty *in absentia* for the murder of a British Army officer whom Doherty and other members of the Provisional Irish Republican Army had ambushed in Northern Ireland, but had escaped to the United States in 1982.⁵⁷ In 1983 the INS located Doherty and began deportation proceedings against him.⁵⁸ Doherty then applied for asylum under

Fonseca, see ALENIKOFF & MARTIN, *supra* note 24, at 759-66; see also Michael E. Mangelson, *Three Years After Matter of Mogharrabi: Is a "Reasonable Person" Test the Answer to the Confusing "Well-Founded Fear of Persecution" Standard in Asylum Cases?*, 1990 B.Y.U. L. REV. 1123 (stating that "well-founded fear of persecution" based on reasonable person standard substantially conforms to U.N. Protocol and will protect bona fide refugees). In 1990, the INS adopted regulations that provide further guidance on the application of the governing standards. The regulations provide that the applicant has a "well-founded fear of persecution" if there is a reasonable possibility of actually suffering such persecution if returned to the applicant's country. 8 C.F.R. § 208.13(b)(2) (1993). Applicants need not demonstrate that they have been "singled out" if there is evidence of a pattern or practice of persecution based on race, religion, nationality, membership in a particular social group, or political opinion. *Id.* Past persecution of the applicant creates a presumption of well-founded fear. *Id.* § 208.13(b)(1). To be eligible for withholding of deportation, the applicant must show that persecution would more likely than not occur. *Id.* § 208.16(b)(1).

⁵⁵ See Karen K. Jorgenson, *The Role of the U.S. Congress and Courts in the Application of the Refugee Act of 1980*, in REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES 129 (Ved P. Nanda ed., 1989). Jorgenson suggests that the Court did not go far enough in protecting refugees as required by international law. *Id.* She argues that the Court's positivistic reasoning has been used to construe the Act too narrowly; thus, asylum procedures required by the U.N. Protocol are denied. *Id.*

⁵⁶ 112 S. Ct. 719 (1992).

⁵⁷ *Id.* at 722.

⁵⁸ *Id.*

section 208.⁵⁹ The deportation proceedings were suspended, however, upon the initiation of extradition proceedings by the United States on behalf of the United Kingdom.⁶⁰

In 1984 Doherty's extradition was denied.⁶¹ The extradition magistrate held that Doherty was not extraditable because his crimes fell within the political offenses exception to the United States-United Kingdom extradition treaty.⁶² When the Government's attacks on the ruling failed, deportation proceedings were resumed.⁶³

Doherty believed that if he was immediately deported to Ireland, he would be safe from extradition to the United Kingdom. Therefore, at a deportation hearing in 1986, Doherty conceded deportability, designated Ireland as the country to which he be deported, and withdrew his application for asylum and withholding of deportation.⁶⁴

While Doherty's designation was being appealed, however, Ireland adopted the Irish Extradition Act (the "IEA"),⁶⁵ which effectively eliminated the political offenses exception as between Ireland and the United Kingdom, and thus, if Doherty had then been deported from the United States to Ireland, he would have been extradited to the United Kingdom. Doherty thereafter moved to reopen his deportation proceedings, claiming that the newly enacted IEA constituted "new" evidence regarding his claims for asylum and withholding of deportation.⁶⁶ Attorney General Richard Thornburgh denied Doherty's motion to reopen either proceeding.⁶⁷

The Court of Appeals for the Second Circuit, however, reversed the Thornburgh order on the grounds that the Attorney General abused his discretion in denying the motion to reopen.⁶⁸ The Second Circuit held that the passage of the IEA and the denial of Doherty's original designation by former Attorney General Edwin Meese constituted new evidence that entitled Doherty to

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ *Doherty*, 112 S. Ct. at 722.

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See Extradition Act (European Convention of the Suppression of Terrorism) (Ir. 1987).

⁶⁶ See *Doherty*, 112 S. Ct. at 723.

⁶⁷ See *id.*

⁶⁸ See *id.* at 723-24.

have his deportation proceedings reopened.⁶⁹ Moreover, the court held that Thornburgh erred in determining that Doherty was not entitled to withholding of deportation.⁷⁰

A divided Supreme Court reversed the Second Circuit and held that the Attorney General did not abuse his discretion in denying the motion to reopen.⁷¹ Writing for the Court, Chief Justice Rehnquist noted that there is no statutory authority under the INA for reopening proceedings.⁷² Applying the "abuse of discretion" standard and relying on *INS v. Abudu*,⁷³ Rehnquist found that the Attorney General did not abuse his discretion because the treaty upon which the IEA was based, the European Convention of the Suppression of Terrorism,⁷⁴ had been in effect at the time Doherty withdrew his applications for asylum and withholding of deportation and therefore did not constitute "new" material evidence.⁷⁵

Justice Scalia filed a separate opinion, concurring in part and dissenting in part. Justice Scalia agreed with the Court's ruling that the Attorney General has broad discretion in denying motions to reopen asylum proceedings because the granting of asylum is itself subject to the discretion of the Attorney General.⁷⁶ However, Scalia disagreed with the breadth of discretion the Court afforded the Attorney General in granting or denying motions to reopen withholding of deportation proceedings. Scalia noted that the withholding of deportation provisions of the Refugee Act are mandatory in nature, paralleling the U.S. mandatory *non-refoulement* obligations under Article 33 of the Convention.⁷⁷ He argued that because of the mandatory nature of the withholding of deportation provisions, the Attorney General has no discretion to deny a motion to reopen and then to further proceed with deportation without a hearing to determine if the alien satisfies the requirements of section 243(h).⁷⁸ Moreover, Scalia reasoned that the discretion afforded the Attorney General in the *Abudu* case, to grant asylum or the suspension of deportation, did not ap-

⁶⁹ See *id.* at 723.

⁷⁰ See *id.* at 723-24.

⁷¹ *Doherty*, 112 S. Ct. at 724.

⁷² See *id.*

⁷³ 485 U.S. 94 (1988).

⁷⁴ Extradition Act, *supra* note 65.

⁷⁵ See *Doherty*, 112 S. Ct. at 724-26.

⁷⁶ *Id.* at 728 (Scalia, J., dissenting).

⁷⁷ *Id.* at 728-29.

⁷⁸ *Id.*

ply in *Doherty* because the Attorney General does not have the discretion to grant or deny withholding of deportation.⁷⁹ Simply put, the majority's reliance on *Abudu* as the ground for denying the reopening was misplaced.⁸⁰

By granting broad discretion to the Attorney General in the *Doherty* case, the Supreme Court weakened the protection afforded aliens who qualify for withholding of deportation, or *non-refoulement*. In applying the same standard of discretion to determinations of whether to reopen proceedings under section 243(h) as is applied to determinations of whether to reopen asylum proceedings, the Court undermined the mandatory relief afforded refugees who can show that their life or liberty would be threatened if deportation is executed. In so doing, the Court gave no consideration to the effect this decision would have on the United States mandatory obligations under the Convention or Protocol. Moreover, the Court's decision allowed the Government to utilize deportation proceedings as a surrogate for unsuccessful extradition proceedings, further eroding the protection of aliens threatened with persecution on political grounds.⁸¹

B. *Persecution on Account of Political Opinion*

In a second opinion decided last term, the Supreme Court had occasion to interpret the substantive aspects of the "well-founded fear" standard. In *INS v. Elias-Zacarias*,⁸² the issue was whether a guerrilla organization's attempt to coerce a person into performing military service necessarily constitutes "persecution on account of . . . political opinion."⁸³

In 1987, Elias-Zacarias, a native of Guatemala, was approached at his home by two guerrillas seeking to recruit him.⁸⁴ When Elias-Zacarias refused, the guerrillas threatened to return and "take" him or "kill" him if he did not change his mind.⁸⁵ Elias-Zacarias did not want to join the guerrillas because he was afraid

⁷⁹ *Id.* at 729-30.

⁸⁰ *Doherty*, 112 S. Ct. at 729-30 (Scalia, J., dissenting).

⁸¹ See Michael J. Bowe, *Deportation as De Facto Extradition: The Matter of Joseph Doherty*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 263 (1990) (arguing governmental use of deportation ignores function and rationales underlying these two mechanisms).

⁸² 112 S. Ct. 812 (1992).

⁸³ See *id.* at 814.

⁸⁴ See *id.*

⁸⁵ See *id.* at 817 (Stevens, J., dissenting).

of retribution by the government if he did so.⁸⁶ Fearing that the guerrillas might return, he fled to the United States, where he was later subjected to deportation proceedings.⁸⁷

Elias-Zacarias applied for asylum and withholding of deportation. An Immigration Judge and the Board of Immigration Appeals (the "BIA") denied his application on the grounds that the evidence did not establish persecution or a well-founded fear of persecution on account of political opinion.⁸⁸ The Court of Appeals for the Ninth Circuit reversed the BIA ruling, holding that "acts of conscription by a nongovernmental group constitute persecution on account of political opinion, and determined that Elias-Zacarias had a 'well-founded fear' of such conscription."⁸⁹

The Supreme Court, in an opinion by Justice Scalia, reversed the Ninth Circuit, holding that a guerrilla organization's attempt to recruit a person did not necessarily constitute persecution on the account of political opinion.⁹⁰ First, the Court reasoned that a person might resist recruitment for a variety of nonpolitical reasons, such as a fear of combat or a desire to remain at home or earn a better living.⁹¹ Second, the Court reasoned that the guerrillas' motives for recruiting persons to fulfill their own political goals did not render the forced conscription "persecution on account of . . . political opinion."⁹² The Court held that the plain meaning of the phrase "persecution on account of . . . political opinion" means persecution on account of the victim's political opinion, not that of the persecutors. As the Court explained:

If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion. Thus, the mere existence of a generalized "political" motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that Elias-Zacarias fears persecution *on account of* political opinion, as section 101(a)(42) requires.⁹³

⁸⁶ See *id.* at 814.

⁸⁷ *Elias-Zacarias*, 112 S. Ct. at 814-15.

⁸⁸ See *id.* at 815.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.* at 815-16.

⁹² *Elias-Zacarias*, 112 S. Ct. at 816.

⁹³ *Id.* at 816.

Finding that Elias-Zacarias had failed to establish a "well-founded fear" of persecution because of his political opinions, rather than his refusal to fight with the guerrillas, the Court declined to address Elias-Zacarias's argument that taking sides with any political faction is itself an expression of political opinion.⁹⁴

Justice Stevens, in a dissent with two other Justices, disagreed with the majority's reasoning on both counts. First, Stevens argued that political opinion can be expressed both negatively and affirmatively. Choosing to remain neutral, even if motivated by a desire to remain with one's family, is, in Stevens' view, an act of political expression that the asylum provisions of the Refugee Act were intended to protect:

A rule that one must identify with one of two dominant warring political factions in order to possess a political opinion, when many persons may, in fact, be opposed to the views and policies of both, would frustrate one of the basic objectives of the Refugee Act of 1980 — to provide protection to all victims of persecution regardless of ideology. Moreover, construing "political opinion" in so short-sighted and grudging a manner could result in limiting the benefits under the ameliorative provisions of our immigration laws to those who join one political extreme or another; moderates who choose to sit out a battle would not qualify.⁹⁵

Stevens found more than adequate evidence in the record to support the conclusion that Elias-Zacarias's refusal to join the guerrillas was a form of political expression within the meaning of "political opinion."⁹⁶

Second, Stevens determined that the guerrillas' threat to "take" or "kill" Elias-Zacarias was sufficient to establish a "well-founded fear" of persecution. Stevens reasoned that the Refugee Act did not require the alien to prove the motivation behind his persecutors' conduct; the alien need only show a "reasonable possibility" of persecution.⁹⁷

In marked contrast to the *Stevic* and *Cardoza-Fonseca* decisions, and even Scalia's own dissent in *Doherty*, no consideration was given in *Elias-Zacarias* to congressional intent or to the effect such a narrow interpretation of "political opinion" would have on

⁹⁴ See *id.*

⁹⁵ *Id.* at 818 (Stevens, J., dissenting) (quoting *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1985)).

⁹⁶ See *id.* at 819 (Stevens, J., dissenting).

⁹⁷ *Elias-Zacarias*, 112 S. Ct. at 819-20 (Stevens, J., dissenting) (citing *Cardoza-Fonseca*, 480 U.S. at 440).

the U.S. obligations under international law. By grounding the decision on the so-called "ordinary meaning" of the term "political opinion," Scalia indulged in the sort of semantic argument typical in the application of "plain meaning" analysis. As recognized by Stevens, such an analysis fails to take into account the purposes that the Refugee Act sought to accomplish.⁹⁸

V. INTERDICTION OF HAITIAN REFUGEES AND *NON-REFOULEMENT*

The most recent Supreme Court decisions on the protection of refugees reveal a trend away from consideration of the underlying humanitarian concerns and international human rights implications of U.S. refugee policy. Instead, the Court appears to prefer emphasizing matters of administrative law and the application of procedural rules, rather than focusing on the fundamental human rights that are implicated. This trend was continued in the Supreme Court's recent decision in *Sale v. Haitian Centers Council, Inc.*⁹⁹

The case resolved a split in the circuits over the application of the *non-refoulement* provisions of the Refugee Act to Haitians interdicted outside United States territory. In *Haitian Refugee*

⁹⁸ See *id.* at 818-19 (Stevens, J., dissenting).

⁹⁹ 113 S. Ct. 2549 (1993). In a related proceeding filed in the United States District Court for the Eastern District of NY, *Haitian Ctrs. Council, Inc. v. Sale*, 817 F. Supp. 336 (E.D.N.Y. 1993), Judge Sterling Johnson Jr. ordered medical treatment for Haitian refugees sick with AIDS detained at the naval base at Guantanamo Bay. See Deborah Sontag, *Judge Orders Better Care for Haitians With AIDS*, N.Y. TIMES, Mar. 27, 1993, at 9. About 250 Haitian refugees detained at Guantanamo were found to have credible claims of political persecution and had permission from the INS to come to the United States. *Id.* Since they or members of their families tested positive for HIV, however, their entry into the United States was refused based on an administrative regulation that allowed the exclusion and their detainment at the naval base for 16 months. See *id.*; Ron Howell, *Finding the "Promised Land": Haitian Refugees Given Shelter in Brooklyn Amid HIV Storm*, NEWSDAY, Apr. 18, 1993, at 16. After a two-week trial, Judge Johnson, in an interim order issued without opinion on March 26, 1993, ordered medical treatment for the Haitians "to prevent loss of life." *Sale*, 817 F. Supp. at 337. Since the naval base lacks adequate facilities to treat the sickest Haitians, Judge Johnson ordered that they be brought to the United States for treatment. *Id.* at 337. Fifty-one refugees who qualified for this treatment were released and the remainder, about 200 refugees remained at Guantanamo. Howell, *supra*, at 16.

For a discussion of U.S. policy regarding the Haitian refugees, see generally Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269 (1993); Arthur C. Helton, *The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 N.Y.L. SCH. J. HUM. RTS. 325 (1993).

Center, Inc. v. Baker,¹⁰⁰ the Eleventh Circuit held that Haitians challenging the United States Government policy of interdiction and repatriation without agency review of their claims could not avail themselves of judicial review because they never reached the borders of the United States.¹⁰¹ The court ruled that the rights regarding asylum claims vested only for aliens who had reached the United States.¹⁰² In *Haitian Centers Council, Inc. v. McNary*,¹⁰³ the Second Circuit interpreted section 243(h) and took the view that the *non-refoulement* provisions of the Act did apply to Haitians interdicted on the high seas. In the Second Circuit's view, section 243(h) makes no distinction between aliens seized inside or outside the United States, and Congress intended that the prohibition against the "return" of aliens to their persecutors apply to aliens seized extraterritorially.¹⁰⁴ The Second Circuit found support for this conclusion in the object and purpose of the Convention and specifically the *non-refoulement* provisions of Article 33.¹⁰⁵

This split is consistent with the considerable debate regarding whether the principle of *non-refoulement* applies to refugees on the high seas.¹⁰⁶ Those who argue against extraterritorial application of the principle tend to rely on statements made during the negotiation of the treaty which suggest that a refugee must reach the territory of a contracting state before *non-refoulement* protection attaches.¹⁰⁷ Commentators who argue that *non-refoulement* does apply extraterritorially, on the other hand, rely on the plain language of Article 33, citing practices subsequent to the negotiation of the Convention, including those of the Reagan-Bush administration itself, and customary international law.¹⁰⁸ For example, the UNHCR, in its amicus curiae brief in *Sale*, argued that Article 33 is unambiguous in its proscription against the return of refugees to the country of their persecution, and that to do so would violate the Convention's broad remedial and humanitarian goals of assuring "refugees the widest possible exercise of . . . fun-

¹⁰⁰ 953 F.2d 1498 (11th Cir.), *cert. denied*, 112 S. Ct. 1245 (1992).

¹⁰¹ *See id.* at 1505.

¹⁰² *See id.* at 1505-06.

¹⁰³ 969 F.2d 1350 (2d Cir. 1992), *rev'd sub nom.*, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).

¹⁰⁴ *See id.* at 1360-61.

¹⁰⁵ *See id.* at 1361-63.

¹⁰⁶ *See* Gutekunst, *supra* note 4, at 167-73.

¹⁰⁷ *See, e.g.*, ROBINSON, *supra* note 7, at 163.

¹⁰⁸ *See, e.g., id.*; Goodwin-Gill, *supra* note 13, at 899-903.

damental rights and freedoms.”¹⁰⁹ Moreover, the customary obligation of non-return, which, according to the UNHCR, has attained the status of a “peremptory norm of international law” and is therefore not governed by geographical or territorial limitations, also confirms the plain language of Article 33.¹¹⁰

The *UNHCR Handbook* does not specifically address the principle of *non-refoulement* and whether it applies to aliens interdicted on the high seas; since Article 33 includes the term “refugee,” the Handbook’s comments on the application of the term provide some guidance. The *UNHCR Handbook* provides that once an alien fulfills the criteria for a refugee as defined by the Convention, that person automatically has “refugee” status. “This would necessarily occur prior to the time at which his refugee status is formally determined.”¹¹¹ Because Article 33 contains the term “refugee,” a person would be entitled to *non-refoulement* protection once he fulfills the criteria for a “refugee.” Article 33 does not make any reference to the refugee’s current location. On the contrary, it specifically makes reference to the refugee’s past location, the country where the refugee’s life or freedom would be threatened. Based on this reasoning, the Second Circuit in *McNary* concluded that the Convention does not require an alien to reach the shores of the deporting or returning country before the protection of Article 33 attaches.¹¹²

The Supreme Court, as it had done in *Doherty* and *Elias-Zacarias*, took a narrow approach to the interpretative dilemmas posed by the *McNary* appeal. In *Sale v. Haitian Centers Council, Inc.*,¹¹³ the Court adopted the Eleventh Circuit’s agreement with the United States Government’s interpretation on interdiction and repatriation, reversing the Second Circuit’s *McNary* decision.¹¹⁴ The Court held that section 243(h)(1) of the INA and Article 33 of the Convention do not prohibit the President from interdicting Haitians in international waters and forcing their return to Haiti without the benefit of either a deportation or an

¹⁰⁹ Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).

¹¹⁰ See *id.*

¹¹¹ UNHCR HANDBOOK, *supra* note 53, at 9.

¹¹² See *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1361-63 (2d Cir. 1992), *rev’d sub nom.*, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993).

¹¹³ 113 S. Ct. 2549 (1993).

¹¹⁴ *Id.* at 2567.

exclusion hearing to determine their refugee status.¹¹⁵ In reaching its decision, the Court analyzed both the text and history of section 243(h)(1) and Article 33.

Justice Stevens, writing for the majority, reasoned that the plain meaning of section 243(h)(1) and its requirements and limitations relating to the treatment of refugees refers solely to the Attorney General. According to Stevens, the section "cannot reasonably be construed to describe either the President or the Coast Guard."¹¹⁶ Moreover, Stevens noted, absent clear statutory language or legislative history to the contrary, there is a presumption that Acts of Congress do not normally have extraterritorial effect, especially if a statute involves foreign or military affairs, which are a unique responsibility of the President.¹¹⁷

In further analyzing the text of the statute, the Court repudiated the respondent's broad interpretation of the word "return" within the section. The respondents had argued that the word "return" referred solely to the destination to which the alien may be removed.¹¹⁸ According to Justice Stevens, such an interpretation would be broad enough to encompass aliens involved in both deportation and exclusion proceedings, thus making the word "deport" within the section redundant and unnecessary.¹¹⁹ Rather, Stevens adopted a narrower interpretation of the word "return," drawing a distinction between the word "return" as referring to the action involved in an exclusion hearing and the word "deport" as referring to the action involved in a deportation hearing.¹²⁰ Justice Stevens noted that the use of "return and deport" implies an exclusively territorial application in that both words reflect the "traditional division between the two kinds of aliens and the two kinds of hearings."¹²¹

The Court found additional support for its interpretation in the legislative history of the 1980 amendment of section 243(h)(1). The section was amended by adding the word "return" and removing the phrase "within the United States."¹²² For the majority, this signalled congressional intent to afford broader protection to

¹¹⁵ *Id.* at 2560-65.

¹¹⁶ *Id.* at 2559.

¹¹⁷ *Id.* at 2567.

¹¹⁸ *Sale*, 113 S. Ct. at 2560.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 2560-61.

¹²¹ *Id.* at 2560.

¹²² *Id.* at 2561.

aliens who are within United States territory, but not yet within the United States.¹²³ This distinction between being within United States territory and within the United States for purposes of section 243(h)(1) was first addressed by the Supreme Court in *Leng May Ma v. Barber*.¹²⁴ Illustratively, an alien who is at or near the U.S. border seeking admission is physically in U.S. territory; however, for purposes of the statute, the alien is not within the United States. Accordingly, the amendment provided that section 243(h)(1), in addition to applying to deportation proceedings (within the United States), would apply to exclusion hearings (within U.S. territory but not within the United States).

On the other hand, the Court discerned no basis for finding that the statute was intended to reach beyond U.S. territory. The Court stated that if Congress had intended an extraterritorial effect, it would have expressly provided for such a broad application in the statute itself or in the legislative history.¹²⁵

The Court, in analyzing the text and the negotiation history of Article 33 of the Convention, arrived at the same conclusion it reached in analyzing section 243(h)(1)—that there is no indication that the drafters of the Article intended an extraterritorial application. First, the Court rejected the broad interpretation of the Article proposed by the Haitians because such a reading “create[s] an absurd anamoly [in that] dangerous aliens on the high seas would be entitled to the benefits of [Art.] 33.1 while those residing in the country that sought to expel them would not.”¹²⁶ Second, the Court determined that the terms “expel or return (‘refouler’)” were the “obvious parallel to the words ‘deport or return’ in section 243(h)(1).”¹²⁷ The word “expel,” the Court stated, has the identical meaning of “deport” in that both refer to the deportation or expulsion of an alien already within the host country.¹²⁸ The term “return (‘refouler’)” refers to the exclusion of aliens who are on “the threshold of initial entry.”¹²⁹ The term implies a “defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination,” thus, the Court

¹²³ *Sale*, 113 S. Ct. at 2561.

¹²⁴ 357 U.S. 185 (1958).

¹²⁵ *Sale*, 113 S. Ct. at 2561.

¹²⁶ *Id.* at 2563.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 2563 (citing *Leng May Ma*, 357 U.S. at 187 (quoting *Shaughnessy v. United States*, 345 U.S. 206, 212 (1953))).

reasoned, it has a legal meaning narrower than its common meaning.¹³⁰

Finally, the Court found support for its opinion in the Convention's negotiation history. Stevens relied on statements made by the Swiss representative and supported by others.¹³¹ Those representatives had opined that "the word 'expulsion' referred to a refugee already admitted into a country, whereas the word 'return ('refouler')' related to a refugee already within the territory but not yet resident there."¹³²

In dissent, Justice Blackmun criticized the overly technical approach taken by the majority in derogation of the fundamental human rights considerations inherent in the *non-refoulement* argument. As he remarked, "If any canon of construction should be applied in this case, it is the well-settled rule that 'an act of congress ought never to be construed to violate the law of nations if any other possible construction remains.'"¹³³ To do otherwise, Blackmun concluded, would be to "close our ears" to the Haitians' "modest plea."¹³⁴

In *Sale*, the Supreme Court had the opportunity to make a significant contribution to the progressive development of both international and domestic refugee law. Unfortunately, the Court did not sound a battle cry, but rather sent the message that the United States is retreating from an active role in the promotion of the international rights of refugees. The *Sale* decision strikes a serious blow against international efforts to provide protection for the thousands of people who have been forced to seek asylum abroad because of human rights deprivations at home.

CONCLUSION

It cannot be overemphasized that the Refugee Act is not just another statute. It is a statute that is designed to implement and give effective expression to the obligations assumed by the United States under international refugee law, which is part of the supreme law of the land.¹³⁵ The standards applicable to refugees, both in formulation and interpretation, must conform with rele-

¹³⁰ *Sale*, 113 S. Ct. at 2564.

¹³¹ *Id.* at 2565-66.

¹³² *Id.*

¹³³ *Id.* at 2577 (Blackmun, J., dissenting) (quoting *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

¹³⁴ *Id.* at 2577 (Blackmun, J., dissenting).

¹³⁵ See U.S. CONST. art. VI.

vant international standards. It would appear essential that, in giving meaning to a particular provision in a concrete case, the Court adopt a method of contextual interpretation that fully takes into account the underlying purposes, the legislative history (both domestic and international), subsequent practice, alternative value consequences, and other relevant factors involved in a particular context.¹³⁶ The underlying policy of humanity and human rights should be given the fullest possible expression even under the pressures of other considerations.

¹³⁶ See LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 277-80 (1989). See generally MYRES S. MCDUGAL, ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE (1967).

