A NEW NORMATIVE APPROACH FOR THE GRANT OF ASYLUM IN CASES OF NON-STATE ACTOR PERSECUTION

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TABLE OF CONTENTS

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I. INTRODUCTION

History has provided numerous examples of individuals who have suffered persecution at the hands of their governments. The Holocaust serves as perhaps the most poignant illustration of a targeted attempt to persecute a single group of people based on their common religious and ethnic identity. Out of the horrific events of the Second World War came a desire to design an approach to deal with the burgeoning problem of refugees;[1] so developed the 1951 Convention Relating to the Status of Refugees ("Refugee Convention").[2] Article 1 of the Refugee Convention defines a refugee as an individual who has a:

> well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is *unable* or, owing to such fear, is *unwilling* to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is *unable* or, owing to such fear, is *unwilling* to return to it.[3]

The convention was written as part of a number of initiatives that were intended to define and recognize the far reaching universality of human rights.[4]

While the United States is not a party to the Refugee Convention, its ratification of the 1967 Protocol relating to the Status of Refugees ("1967 Refugee Protocol") has resulted in its adoption of the terms of the Convention.[5] Central to the

1 Susan Kneebone, *Introduction* to REFUGEES, ASYLUM SEEKERS AND THE RULE OF LAW: COMPARATIVE PERSPECTIVES 5 (Susan Kneebone ed., 2009). *See also* GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 16-23 (3d ed. 2007) (discussing the historical development of the term "refugee" in the first half of the 20th Century).

2 Convention Relating to the Status of Refugees, July 28, 1951, 1989 U.N.T.S. 137 [hereinafter Refugee Convention], *available at* http://www2.ohchr.org/english/law/refugees.htm.

3 *Id.* at §1(A)(2) (emphasis added).

4 Kneebone, *supra* note 1.

5 Stephen H. Legomsky, *Refugees, Asylum and the Rule of Law in the USA, in* REFUGEES, ASYLUM SEEKERS AND THE RULE OF LAW: COMPARATIVE PERSPECTIVES 124 (Susan Kneebone ed., 2009). *See also* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter 1967 Refugee Protocol], *available at*

protections given to refugees under the Refugee Convention is the concept of non-refoulement.[6] Article 33(1)(A)(2) clearly sets out that a contracting party shall not expel or return (*refouler*), any refugee who would be threatened on account "of his race, religion, nationality, membership of a particular social group or political opinion."[7] However, as the number of individuals seeking refuge in the United States has grown,[8] American jurisprudence has become increasingly incapable of adequately defining the standard under which to adjudge when an asylum seeker is not to be refouled because of his inability, or unwillingness, to avail himself of his country's protection.[9] In cases where asylum-seekers allege non-state actor persecution, this inadequacy has resulted in the inability of American Courts to properly meet the definitional demands of Article 1, while at the same time meeting the non-

http://www.unhcr.org/3b66c2aa10.html; U.S. DEP'T OF HOMELAND SECURITY, ANNUAL FLOW REPORT 1 (2008), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2007.pdf (stating that the "definition of refugee was incorporated into the INA by the Refugee Act of 1980, and conforms to the international definition of refugee contained in the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol.").

6 Refugee Convention*, supra* note 2, at § 33(1)(A)(2).

7 *Id.*

8 *2007 UNHCR Statistical Yearbook*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER OF REFUGEES (Dec. 31, 2008), 2007 UNHCR STATISTICAL Y.B. at ch. IV, http://www.unhcr.org/4981c37c2.html.

9 *See, e.g.,* Menjivar v. Gonzales, 416 F.3d 918 (8th Cir. 2005). In *Menjivar*, the asylum applicant was a former citizen of El Salvador. *Id.* at 919. Despite persistent sexual and romantic advances she refused to be the girlfriend of "Moncho," a local gang member. *Id.* at 920. In response, "Moncho" shot at the applicant and several members of her family one day while they were out for a walk. *Id.* The asylum applicant's grandmother was shot and killed, and her niece was paralyzed from the waist down. *Id.* The police were contacted but arrived two hours late because of the remoteness of the applicant's village. *Id.* Following the shooting, "Moncho" allegedly fled to Honduras, but after a year returned. *Id.* The applicant left for the United States, and petitioned for asylum based on her fear of past persecution. *Id.* at 919. The presiding judge found that the applicant was ineligible for asylum because the police had made a concerted effort to investigate the murder of her family members. *Id.* at 920. *See also* Lleshanku v. Ashcroft, 100 F. App'x 546 (7th Cir. 2004). In *Lleshanku*, the asylum applicant was an Albanian citizen who claimed that a criminal gang had attempted to kidnap her. *Id.* at 547. Lleshanku was constantly harassed by gang members, stopped on the street, and visited at her home. *Id.* Young men would threaten to take the asylum applicant from her family, and she would occasionally stay home from school out of fear of being kidnapped. *Id*. The applicant alleged that kidnapping of young women for forced prostitution was rampant in Albania, and that gang members tried to kidnap her in order to force her into prostitution. *Id.* at 546. The court rejected Lleshanku's asylum application because it reasoned that there was a general crime problem in Albania, and that repeated harassment by gang members did not rise to the level of persecution. *Id.* at 548-49.

refoulement obligations of Article 33(1)(A)(2) of the Refugee Convention.[10]

The United Nations Office of the High Commissioner for Refugees ("UNHCR"), the agency charged with the protection of refugees worldwide,[11] has plainly stated that the silence of the Refugee Convention regarding the phrase "unable . . . or unwilling" should be read broadly. As an example of its position, the UNHCR has explained that "[O]ffensive acts . . . committed by the local populace . . . can be considered as persecution . . . if the authorities refuse, or prove unable, to offer effective protection."[12] In the second edition of his treatise on international refugee law, professor Guy Goodwin-Gill further clarifies the aforementioned statement by writing that "there is no basis in the 1951 Convention . . . for requiring the existence of effective operating institutions of government as a precondition to a successful claim to refugee status."[13] Despite the UNHCR's expansive construction of the terms "unable . . . or unwilling," United States courts have been reluctant to grant claims of asylum in cases where the applicant has argued that he has a well-founded fear based on his home country's inability or unwillingness to protect against persecution by a third party.[14]

Generally, applicants for asylum in the United States must

10 For the purposes of this note, persecution by "non-state actors" will be defined as persecution of individuals by third parties who are not part of the instrumentalities or administration of a country's national government. *See* Matthew J. Lister, *Gang-Related Asylum Cases: An Overview and Prescription*, 38 U. MEM. L. REV. 827, 829 (2007) (discussing the difficulty Latin American asylum applicants face when they attempt to bring asylum cases based on persecution by criminal gangs, or as a result of sexual violence); Bruce Finley, *Mexicans Grasp for Asylum,* DENVER POST, March 24, 2009, *available at* www.denverpost.com/immigrati on/ci_11980915 (detailing the attempts of human rights groups to challenge the position that asylum applicants who face persecution by Mexican drug cartels should not be entitled to a grant of their asylum claim). *See also* U.S. DEP'T OF HOMELAND SECURITY, *supra* note 5 (defining the difference between an asylee and a refugee: "An applicant for refugee status is outside the United States, while an applicant seeking asylum status is in the U.S. or at a U.S. port of entry.").

11 *History of UNHCR*, UNHCRU, http://www.unhcr.org/pages/49c3646cbc.html (last visited Oct. 14, 2009).

12 UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES para. 65 (1992), *available at* http://www.unhcr.org/cgibin/texis/vtx/search?page=searc h&docid=3d58e13b4&query=Handbook%20on%20procedures%20and%20criteria%20fo r%20determining%20refugee%20status.

13 GUY S. GOODWIN, THE REFUGEE IN INTERNATIONAL LAW 73 (2d ed. 1996).

14 Lister, *supra* note 10, at 837-39.

demonstrate that the harm feared in the case of their return home would not merely result from criminal activity or social unrest.[15] In *Lleshanaku v. Ashcroft*, the Seventh Circuit refused to grant asylum to a young female asylum applicant who alleged that criminal gangs constantly threatened her and had attempted to kidnap her for the purposes of forcing her into prostitution.[16] In *Romero-Rodriguez v. U.S. Attorney General,* the Eleventh Circuit ruled that the plaintiff's fear of being persecuted by gangs was ill founded because the Honduran Government had made efforts to control lawlessness.[17] The refusal of U.S. courts to grant asylum to refugees based on non-state actor persecution has arguably led to a rhetorical gap[18] in America's commitment to the rights of asylum seekers.[19]

Courts in the United Kingdom have similarly refused to grant asylum to individuals who would face significant risk from non-state actors if they were to return to their country of origin.[20] In *Horvath v. Secretary of State for the Home Department,* the House of Lords of the United Kingdom concluded:

> The standard to be applied is . . . not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes to all its own nationals.[21]

This standard reflects a strand of reasoning which is common to both American and British jurisprudence.[22] According to this reasoning, risk is not measured based on the subjective fear of an

15 *See* Immigration and Nationality Act § 101(a)(42)(a), 8 U.S.C § 1101(a)(42) (2006) [hereinafter *INA*].

16 100 F. App'x at 546-49.

17 131 F. App'x 203, 203 (11th Cir. 2005).

18 "Rhetorical" is used in this context to point out that the refoulement of asylum seekers who face a risk of non-state actor persecution goes against the presumed commitment of the United States toward defending the rights of refugees.

19 Mathew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARV. INT'L L.J. 413, 450 (2006) (noting that "[S]tates have chosen to reduce the number of [asylum] applications in other ways—such as off-shore interdiction, carrier sanctions, and visa requirements—that less obviously run afoul of their rhetorical commitment to the 'rights' of asylum seekers and their legal commitment to non-refoulement.").

20 Horvath v. Sec'y of State for the Home Dep't [2000] 3 WLR 379 (H.L), *available at* http://
www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd000706/horv-1.htm.

21 *Id.*

22 *See supra* note 9.

individual, but rather on the availability of a state administered mechanism to protect an asylum applicant from persecution.[23] This rationale largely ignores the effectiveness of a state system of protection, as long as "goodwill" efforts are made to prevent persecution by third parties.[24] It has been noted that, "[t]he denial of status to . . . refugees fleeing non-state persecution is a clear violation of the spirit of the 1951 Refugee Convention . . . ."[25]

In stark contrast to the case law in the United States and the United Kingdom, the New Zealand Refugee Status Appeals Authority ("RSAA") has adopted an approach more attune to the humanitarian values enshrined in the 1951 Refugee Convention.[26] Criticizing the aforementioned *Horvath* standard, the Appeals Authority concluded:

> [T]his interpretation of the Refugee Convention is at odds with the fundamental obligation of *non-refoulement*. Article 33 (1) is explicit in prohibiting return in any manner to a country where the life or freedom of the refugee would be threatened for a Convention reason. This obligation cannot be avoided by a process of interpretation which measures the sufficiency of state protection not against the absence of real risk of persecution, but against the availability of a system for the

23 Vata v. Gonzales, 243 F. App'x 930 (6th Cir. 2007) illustrates this point. In that case, an Albanian man who had been studying in a Catholic Seminary attempted to file a police report after being beaten by a group of Muslim men. *Id.* at 933-35. The petitioner claimed that he was attacked because he taught Catholicism to local inhabitants, and because he had sympathized with the United States during a September 11th anniversary ceremony. *Id.* The asylum applicant went to the police station to file a report, but was turned away by the directing police officer. *Id.* at 935. The immigration judge opined that Vata's testimony was credible, but nevertheless concluded that he was ineligible for asylum because the Albanian government had made a significant effort to encourage religious tolerance, and to protect religious freedom. *Id.* at 936. The court determined that a single visit to the police station did not signify that the petitioner was unwilling or unable to avail himself of the government's protection. *Id.* at 935-36, 949.

24 *See id.*; Islam v. Sec'y of State for the Home Dep't, [1999] 2 A.C. (H.L.)629, a*vailable at* http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam08.htm. Lord Millett: "I am accordingly not willing to accept, as a general proposition, the submission that those who are persecuted because they refuse to conform to discriminatory laws to which, as members a particular social group, they are subject, thereby qualify for refugee status."

25 Jennifer Moore, *Whither the Accountability Theory: Second Class Status for Third-Party Refugees as a Threat to International Refugee Protection*, *in* THE REFUGEE CONVENTION AT FIFTY 115 (Joanne van Selm et al. eds., 2003).

26 *Refugee Appeal No. 71427/99* [2000] NZAR 545 (RSAA), *available at* http://www.refuge e.org.nz/71427-99.htm (asylum case of an applicant who faced persecution by her former husband and the government as a result of her status as a female).

> protection of the citizen and a reasonable willingness by a state to operate that system . . . . If the net result of a state's "reasonable willingness" to operate a system for the protection of the citizen is that it is incapable of preventing a *real chance* of persecution of a particular individual, refugee status cannot be denied to that individual.[27]

The method adopted by the New Zealand Refugee Status Appeals Authority endorses the view that there may be instances when a state's efforts to protect its citizens are not adequate or effective in accomplishing the intended result. A state's mere willingness to protect often cannot be equated with the effective elimination of the risk. The New Zealand approach reaffirms the obligations of the international community in not returning individuals to their country of origin when a real chance of persecution still exists.

This Note argues that the normative approach used by American courts in assessing claims of non-state actor persecution should be replaced with the standard laid out by the New Zealand Refugee Appeals Authority. New Zealand's approach would provide United States courts with a coherent norm to address non-refoulement issues and asylum claims involving the targeted victimization by groups that the government is "unwilling . . . or unable" to control.

Part II of this Note provides a historical background for the development of asylum law in the United States and New Zealand, drawing attention to the different approaches that the two countries took in implementing the Refugee Convention and the subsequent Protocol.

Part III tries to answer the question of when an asylum applicant deserves the protection of the Refugee Convention. Particular attention is paid to the relationship between a "well-founded fear" and the five grounds specified in the Refugee Convention. This section also examines when a state's actions constitute an unwillingness or inability to protect inhabitants.

Part IV defends the approach taken in New Zealand *Refugee Appeal No. 71427/99* and considers whether the American and British standards for asylum in cases of non-state actor persecution ignores the fundamental human right to live without fear. This part also explains why the adoption of the reasoning in *Refugee Appeal No. 71427/99* would allow United States courts to take a

27 *Id.* at para. 63 (emphasis added).

more objective and holistic approach toward adjudicating asylum petitions.

Finally, Part V rebuts possible criticisms regarding the implementation of the New Zealand standard in the United States, and defends the use of human rights norms in the context of American asylum jurisprudence.

II. BACKGROUND: ASYLUM LAW IN THE UNITED STATES AND NEW ZEALAND

A. The Development of Asylum Law in the United States

Prior to the United States' adoption of the Refugee Protocol of 1967,[28] the U.S. Internal Security Act of 1950 ("ISA") accounted for a measure similar to non-refoulement, which granted a means of relief to individuals alleging persecution.[29] Under the ISA, individuals present in the United States could not be deported "to any country in which the Attorney General . . . [found] that such alien[s] would be subjected to physical persecution."[30] With the passage of the Immigration and Nationality Act of 1952, the provision which disallowed the Attorney General from deporting any alien subjected to physical persecution was made discretionary, rather than mandatory.[31] This change in the law made it possible for an applicant who met the statutory grounds for relief to still be denied asylum in cases where the Attorney General deemed it to be against the best interests of the United States.[32] The statutory requirement of physical persecution was removed from the Immigration and Nationality Act in 1965.[33] Under the 1965 version of the statute, a person could not be deported if he or she were "subject to persecution on account of race, religion, or political opinion."[34]

28 *See* U.S. DEP'T OF HOMELAND SECURITY, *supra* note 5.

29 Internal Security Act of 1950, ch. 1024, §23, 64 Stat. 987, 1010 (1950).

30 *Id.* (The current version of this provision is commonly known as "withholding of removal."). It is important to note that under ISA the Attorney General had no discretion in granting relief once the applicant effectively demonstrated that he would be subject to physical persecution. *Id.* The ISA standard was mandatory rather than discretionary. *Id.*

31 Immigration and Nationality Act of 1952, Pub. L. No. 414, ch. 477, § 243(h), 66 Stat. 163, 214 (1952).

32 § 243(h), 66 Stat. at 184, 236.

33 Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918 (1965).

34 *Id.*

While the changes to the INA rectified[35] American law with international standards, they failed to account for persecution on account of social group membership or nationality, a cornerstone of the 1951 Convention.[36] This left thousands of individuals without relief, and ultimately granted the Attorney General very broad discretion in denying asylum status whenever he deemed necessary.[37]

The United States eventually revised its domestic law in 1980 in order to conform to its obligations under the 1967 Refugee Protocol.[38] Section 241(b)(3) of the Immigration and Nationality Act ("INA") currently forbids removal of an alien if his "life or freedom would be threatened . . . because of . . . [his] race, religion, nationality, membership in a particular social group, or political opinion.[39]

While current U.S. law has incorporated the language of Articles 1 and 33 of the Refugee Convention, the United States has not adopted other provisions of the Refugee Convention and the subsequent 1967 Refugee Protocol.[40] The failure of the United States to adopt other provisions of the Refugee Convention and the Protocol is due to a distinction in American law between "self-executing" and "non-self-executing" treaties.[41] A self-executing agreement is one that is automatically adopted into U.S. domestic law without the need for legislation that enacts the terms of the treaty.[42] On the other hand, treaties that are non-self-executing

35 The term "rectified" is used in this context to suggest that conformity of American domestic immigration law with the provisions of the Refugee Convention was a positive development because it recognized that physical abuse is not the only legitimate form of persecution.

36 *See* Refugee Convention, *supra* note 2.

37 *Supra* note 32. The Attorney General's broad discretion in denying relief substantially violated the non-refoulement principle in Article 33(1)(A)(2) of the Refugee Convention. This is due to the possibility that asylum applicants would be returned home even when there was a significant risk that they would be persecuted.

38 STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 892-93 (5th ed. 2009).

39 Immigration and Nationality Act, 8 U.S.C.A. § 1231 (2009).

40 *See id. See also* Immigration and Nationality Act, 8 U.S.C.A. § 1101 (a)(42) (2009) (defining a refugee as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person has habitually resided, and who is *unable or unwilling* to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .") (emphasis added).

41 LEGOMSKY & RODRIGUEZ, *supra* note 38, at 894.

42 *Id.*

are still considered binding international obligations, but they are not enforceable in the United States unless enacted by Congress.[43] "United States courts have typically viewed the 1967 protocol as being *non-self-executing,*"[44] and have therefore not bound themselves to all of the terms of the protocol.

B. The Development of Asylum Law in New Zealand

Unlike the United States, New Zealand has adopted the express terms of the 1951 Refugee Convention and the 1967 Protocol into its domestic law.[45] Part 6A of the October 1999 Immigration Amendment Act, titled "Refugee Determinations," definitively provides that "[i]n carrying out their functions under this Part, refugee status officers and the Refugee Status Appeals Authority are to act in a manner that is consistent with New Zealand's obligations under the Refugee Convention."[46] The statute also provides that every person seeking recognition as a refugee will do so under the Refugee Convention,[47] and directs refugee officers and Refugee Status Appeals Authority members to examine the text of the treaty.[48]

Due to its incorporation of the Refugee Convention and the 1967 Protocol into law, New Zealand, like the United States, recognizes persecution based on five protected grounds: race, religion, nationality, membership in a particular social group, and political opinion.[49] New Zealand also acknowledges that the definition of "refugee" in Article 1 of the Refugee Convention accounts for asylum seekers who fear persecution due to the unwillingness or inability of officials in their country of origin to protect them.[50] As such, New Zealand adheres to the idea that asylum seekers who face a significant risk of persecution—no

43 *Id.*

44 *Id.* at 895.

45 Regional Asylum Systems: New Zealand, UNHCR, http://www.unhcr.org.au/nzqandas.ht
ml (last visited Nov. 5, 2009) (affirming that "New Zealand is a signatory to the 1951 Refugee Convention and the 1967 Protocol relating to the status of refugees."). *See* Immigration Act 1987, 1987 S.N.Z No. 74, *amended by* Immigration Amendment Act 1999, 1999 S.N.Z. No. 16.

46 Immigration Amendment Act 1999, 1999 S.N.Z. No. 16, §40, Part VI(A), 129D(1).

47 *Id.* at 129C(1).

48 *Id.* at 129D(2).

49 *See* Refugee Convention, *supra* note 3.

50 *See id.*

matter who the persecutor—cannot be refouled.[51]

1. The Implementation of Asylum Law in New Zealand's Jurisprudence

The Refugee Status Appeals Authority of New Zealand ("RSAA"), the highest body in charge of administrative immigration appeals, has generally been much more willing than U.S. courts to consider applications for asylum based on persecution suffered by a social group at the hands of non-state actors.

In *Refugee Appeal No. 71193/98*, the RSAA granted asylum to a Roma family who had suffered in the Czech Republic due to racially motivated violence as well as an inability to properly access education, employment, and housing.[52] The RSAA suggested that the asylum seeker's socio-economic deprivation in that case constituted persecution within the meaning of the 1951 Refugee Convention.[53] On one occasion, the asylum seeker received a letter at his business threatening to kill him.[54] On several other occasions, the police turned the petitioner away or refused to properly address instances of criminal violence because they told him that he should not expect too much as a person of Roma ethnicity.[55] In addition, when the applicant suffered a work place injury, he was refused reinstatement.[56]

By granting asylum to the petitioner and his wife in *Refugee Appeal No. 71193/98* the RSAA implicitly recognized that non-state actor discrimination can constitute persecution as defined in the 1951 Refugee Convention.[57] This recognition has arguably

51 *See id.* at § 33(1)(A)(2).

52 *Refugee Appeal No. 71193/98* (unreported) Refugee Status Appeals Authority, No. 71193/98, 9 Sept. 1999, http://www.nzrefugeeappeals.govt.nz/PDFs/ref_19990909_71193.pdf (Roma family faced a lifetime of discrimination in the Czech Republic due to their ethnicity).

53 *Id.*

54 *Id.* at 5.

55 *Id.* at 6-7. Other instances of violence included physical and verbal attacks against the asylum seeker because he was a man of the Roma ethnicity who had married a Czech Woman. *Id.* at 8-10.

56 *Id.* at 4-5.

57

> [T]he appellant and his wife were subjected to treatment which, when considered cumulatively is found to amount to persecution. The Authority notes that the appellant experienced discrimination as a result of his own ethnic background but further that he (and his wife and children) also suffered discrimination as a result of his mixed race marriage.

opened the door for cases that read the non-refoulement principle using a broad definition that has traditionally not been employed by New Zealand's common law brethren in the United States and the United Kingdom.[58]

One of the most important cases recently decided by the RSAA is *Refugee Appeal No. 71247/99* ("Iranian Case").[59] In that case, an Iranian woman petitioned for asylum based on past persecution by her former husband as well as the failure of the state to protect her against such persecution.[60] The appellant's complaints to government authorities regarding harassment by her former husband were largely ignored due to his important status in the Revolutionary Guards.[61]

After reviewing applicable case law from the United Kingdom, the RSAA concluded that the standard adopted in *Horvath v. Secretary of State for Home Department*[62] failed to meet the demands of Article 33(1) of the Refugee Convention.[63] In *Horvath*, the House of Lords determined that an appellant who

Id. at 14. *See also id.* at 12 (detailing the discrimination against the petitioner's child which motivated him and his wife to seek asylum in New Zealand).

58 *See Lleshanku,* 100 F. App'x at 546-49.

59 *Refugee Appeal No. 71427/99* [2000] NZAR 545 (RSSA), *available at* http://www.refugee.
org.nz/71427-99.htm. The appellant was beaten regularly by her husband, forbidden to leave the home of her husband's family, and was erroneously told that her child had died at birth. *Id.* at paras. 15-16, 20. One month after the petitioner gave birth, the husband demanded a divorce and unbeknownst to her, sold their baby. *Id*. at paras. 21-22. The woman had no idea that the child was still alive. *Id*. After discovering the existence of her son, the appellant was able to win physical custody of the child after years of court proceedings, although legal custody was still given to the father. *Id*. at paras. 26-28. Due to the length of the court proceedings, the asylum applicant was only able to meet her son for the first time when he was six years old. *Id*. at para. 28. In retaliation for the appellant's judicial victory, the ex-husband used his position as a member of the Revolutionary Guard and directed subordinates to harass and detain the appellant and her new husband. *Id*. at paras. 30-33.

60 *Id*.

61 *Id*. at para. 30. *See also* Greg Bruno, *Iran's Revolutionary Guards, Backgrounder,* COUNCIL ON FOREIGN RELATIONS, June 22, 2009, at Introduction, *available at* http://www.cfr.or
g/publication/14324/ (explaining that "Iran's Revolutionary Guard Corps (IRGC) was founded in the aftermath of the 1979 Islamic Revolution to defend the regime against internal and external threats, but has since expanded far beyond its original mandate. Today the guard has evolved into a socio-military-political-economic force with influence reaching deep into Iran's power structure.").

62 [2000] 3 WLR 379 (HL), *available at* http://www.parliament.the-stationery-office.co.uk/p
a/ld199900/ldjudgmt/jd000706/horv-1.htm.

63 *Refugee Appeal No. 71427/99* [2000] NZAR 545 at para. 62.

claimed persecution due to his Roma ethnicity was ineligible for asylum because his country of origin had a system of protection[64] for its citizens *and* a reasonable willingness to operate it.[65] The court in *Horvath* adopted an approach to asylum similar to the one enlisted by numerous jurisdictions in the United States.[66] Under this standard, an asylum seeker with a significant fear of persecution due to one of the five protected grounds in the Refugee Convention[67] can still be returned to his country as long as that country is able and willing to *attempt* to protect him.

The key distinction between the *Horvath* approach and the requirements of the Refugee Convention is the construction of the phrase "unwilling . . . or unable."[68] Article 1 of the Convention explicitly provides that an asylum seeker cannot be deported to his country if he is "unable *or*, owing to such fear, is unwilling to avail himself of the protection of that country . . . ."[69] The House of Lords in *Horvath* implicitly amended the word "or" for the word "and," by stating that an asylum applicant is ineligible for relief under Article 1 of the Refugee Convention if his country of origin has a system of criminal law to punish persecutors and a "reasonable willingness" to enforce those laws.[70] Under this interpretation an applicant needs to be unable "and" unwilling to avail himself of his home country's protection before that applicant can argue that he or she faces significant fear of persecution upon deportation to his or her home state. For example, if an asylum applicant seeks protection but the state is unable to provide it for him, the state is still said to be willing to

64 *See Horvath,* 3 WLR 379, (in reference to the system of protection in the applicant's home country Lord Craighead wrote: "The institutions of government are effective and operating in the Republic of Slovakia. The state provides protection to its nationals by respecting the rule of law and it enforces its authority through the provision of a police force.").

65 *Refugee Appeal No. 71427/99* [2000] NZAR 545 at paras. 62-63 (discussing the analysis in *Horvath*).

66 Romero-Rodriguez v. U.S. Att'y Gen.,131 F. App'x 203 (11th Cir. 2005) and Wong v. Att'y Gen. of the U.S, 539 F.3d 225 (3d Cir. 2008) are both illustrative of an approach that denies relief to asylum seekers when their country of origin is able to administer a system of protection, and has taken some steps to provide that protection. This approach does not account for the end result of a state's willingness to protect its citizens. The analysis in both cases does not consider whether an applicant actually faces a risk of persecution, only whether the state has taken proactive steps to try to curb that risk.

67 Refugee Convention*, supra* note 3. The five protected grounds are race, nationality, religion, membership in a particular social group, and political opinion. *Id.*

68 *Id.*

69 *Id.*

70 *Horvath,* 3 WLR 379.

protect him, despite its actual inability to do so. The Canadian Supreme Court has expressly criticized the aforementioned construction by stating:

> Most States would be willing to attempt to protect when an objective assessment established that they are not able to do this effectively. *See Horvath,* 3 WLR 379. Moreover, it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.[71]

In line with the reasoning of the Canadian Supreme Court, the RSAA determined in the Iranian Case that an asylum seeker cannot be denied refugee status if there is a "real chance of persecution."[72] The court reasoned that the existence of laws that are designed to protect women in Iran does not warrant a conclusion that women are actually protected and not subjected to second class citizenship.[73] "If the net result of a state's 'reasonable willingness' to operate a system for the protection of the citizen is that it is incapable of preventing a real chance of persecution of a particular individual, refugee status cannot be denied . . . ."[74] Under this standard, it does not matter if an asylum petitioner's country of origin has made a good faith effort to prevent persecution. If the state has attempted to prevent persecution but is still unable to protect the applicant, then the asylum seeker's application should still be approved because a real risk of harm exists if he or she were to return.

The Iranian Case highlights the fact that the stated goal of refugee law is to protect refugees from the systematic denial of core human rights.[75] The RSAA, in recognizing this goal, made clear that sending asylum seekers back to their home countries when those countries had unsuccessfully attempted to protect them was both a violation of Article 33(1)(A)(2) of the Refugee Convention, and of the fundamental human right to live without fear.[76]

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71 Ward v. Att'y Gen. of Canada, [1993] 2 S.C.R 689, 724 *quoted in Refugee Appeal No. 71427/99* [2000] NZAR 545 at para. 64.

72 *Refugee Appeal* No. 71427/99 [2000] NZAR 545 at para. 63.

73 *Id.*

74 *Id.*

75 *Id.* at para. 51 *citing* JAMES HATHAWAY, THE LAW OF REFUGEE STATUS 104, 108 (1991).

76 *See* The Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), *available at* http://www.un.org/en/documents/udhr/

III. WHEN DOES AN APPLICANT DESERVE THE PROTECTION OF THE REFUGEE CONVENTION?

In order to qualify for protection under Article 1 of the Refugee Convention, an asylum seeker must demonstrate two things. The first of these is that he is unable or unwilling to avail himself of the protection of his country of nationality due to a well-founded fear of being persecuted on account of one the five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.[77] The most important question in this part of the analysis is determining when fear rises to the level of being well-founded due to a protected ground.[78] For example, an asylum applicant might fear returning to his country of origin, but that fear may be due to some factor other than persecution because of his race, religion, nationality, social group membership, or political opinion.

To be successful on an asylum claim, the second element that an asylum seeker must prove is that his country of origin is unable or unwilling to protect him from the fear of persecution that he faces.[79] The analysis shifts to an examination of what actions can be understood to constitute an inability or unwillingness of a state to protect its inhabitants.

A. Defining the Nexus

A key element in the discussion of what constitutes non-state actor persecution is the question of when a well-founded fear can be considered to have been based on one of the five grounds specified in the Refugee Convention.[80] Legal scholars and judges often refer to this as the nexus between a Convention ground and the anticipated harm.[81] It is not enough, for example, for a person to be a member of a particular social group and have a well founded fear of persecution.[82] That person must fear persecution because of his perceived or actual membership in that social

(explicitly recognizing the right of every "human being[ ] . . . [to] enjoy freedom of speech and belief and freedom from fear . . . .").

77 Refugee Convention*, supra* note 3.

78 *See* HATHAWAY, *supra* note 75, at 75-80 (discussing a "well-founded fear").

79 Refugee Convention*, supra* note 3.

80 MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS 24 (2007).

81 *Refugee Appeal No. 71427/99* [2000] NZAR 545 at para. 90.

82 *Id.* at para. 111.

group.[83]

This nexus is especially important in assessing cases of non-state actor persecution because applicants often present a muddled set of facts as justification for their asylum applications. Disparities in asylum seekers' stories make it difficult for judges to differentiate between a well-founded fear based on a Convention reason, and a fear that may have other causes, such as economic deprivation. One legal scholar maintains that any assessment of the meaning of terms in the Refugee Convention should be based on international human rights standards.[84]

The use of international human rights standards as a reference tool for determining when an applicant has met the burden for demonstrating a "well-founded fear" of persecution yields interesting results in the context of the non-refoulement principle laid out in Article 33(1)(A)(2) of the Refugee Convention. Consider, for example, that the Universal Declaration of Human Rights explicitly states that every person has a right to live without fear.[85] Theoretically then, an applicant who faces a risk of living in fear of persecution despite the government's best efforts to curb that persecution might be eligible for asylum based on one of the five enumerated grounds. This argument expands the traditional understanding of what constitutes "well-founded fear of persecution," because the Refugee Convention was arguably not intended to protect all people from all forms of fear.[86] Narrowing the definition of "well-founded fear" is largely the reasoning of American courts when determining that certain human rights abuses, such as domestic violence, are discriminatory, yet do not rise to the level of persecution required for the approval of a valid asylum petition.[87]

American courts that justify the rejection of asylum applications based on the finding that the applicant underwent discrimination and not persecution lend themselves to situations

83 *Id.*

84 FOSTER, *supra* note 80, at 58.

85 Universal Declaration of Human Rights, *supra* note 76.

86 See *Horvath,* 3 WLR 379, where Lord Hope of Craighead points out that,"[t]he applicant may have a well-founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill-treatment for a Convention reason which may be perpetrated against him. But the risk, however severe, and the fear, however well-founded, do not entitle him to the status of a refugee."

87 *See, e.g., In re* R-A-, 22 I. & N. Dec. 906 (B.I.A. 1999) (rejecting the claim of a Guatemalan woman who fled domestic abuse on the basis that she did not suffer persecution based on a Refugee Convention ground).

where judges must rely on their own subjective understanding of the difference between persecution and discrimination. In a justice system concerned with limiting the discretion of judges in their interpretation of the law,[88] a reasonable standard to apply in cases of non-state actor persecution should provide an objective set of criteria for determining when an applicant faces a real fear of persecution upon his or her return home. The standard laid out by the RSAA in the Iranian Case serves this goal by requiring that an asylum application be granted if a real risk of persecution exists, regardless of the government's "reasonable willingness" to attempt to limit that risk.[89] Such a standard limits the discretionary role of the judiciary because it accepts as given that the "reasonable willingness" of a government in protecting its citizens can only be said to be effective if the applicant's fear is reduced below the level of being well-founded.[90]

In *I.N.S. v. Elias-Zacarias,*[91] the asylum petitioner argued that he faced persecution as a result of his political opinion.[92] He based this claim on his refusal to join a guerilla army in Guatemala.[93] The petitioner contended that he did not join the rebel army out of fear of retaliation by government forces.[94] In addition, Elias-Zacarias argued that political neutrality was itself a definitive political opinion.[95]

The Supreme Court rejected the asylum seeker's petition.[96] Justice Scalia, writing for the majority, reasoned that the plaintiff

88 Steven J. Cleveland, *Judicial Discretion and Statutory Interpretation*, 57 OKLA. L. REV.31,
38 (2004), http://adams.law.ou.edu/olr/articles/Vol57/Cleveland571.pdf (noting that interpretation of statutes at a lower level of generality may limit inappropriate judicial discretion).

89 *Refugee Appeal No. 71427/99* [2000] NZAR 545 at para. 63.

90 The UNHCR defines a well-founded fear in the following manner:

> In general, 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 [of refugee in Article 1 of the Refugee Convention], or would for the same reasons be intolerable if he returned there.

UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ¶ 42, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992).

91 502 U.S. 478 (1992).

92 *Id.* at 479-80.

93 *Id.* at 480.

94 *Id.*

95 *Id.* at 483.

96 *Id.* at 478-79.

did not have a political motive in refusing to join the guerilla movement.[97] Instead he was acting to protect himself and his family.[98] According to the majority opinion, "The ordinary meaning of the phrase 'persecution on account of . . . political opinion' . . . is persecution on account of the *victim's* political opinion, not the persecutor's."[99] Justice Scalia conceded, however, that the petitioner could have been successful in his asylum claim if he had shown that he was persecuted on account of his political opinion rather than his refusal to fight with the rebels.[100] The Court also noted that there is a fine line between a "well-founded" fear of prosecution due to political opinion and concepts such as fear based on risk averseness.[101]

The Supreme Court's refusal to acknowledge that persecution due to political opinion may arise in cases that do not customarily fit into the understanding of what it means to have a "well-founded fear," is too rigid in its approach. Under the *Elias–Zacarias* methodology, asylum seekers who may have a significant fear of going home cannot argue that the government is "unable or unwilling" to protect them in instances when the motivating factor in their flight was the protection of themselves or their families. Some commentators have properly pointed out that under such an approach, an applicant must provide direct or circumstantial evidence of his prosecutor's motive in order to successfully demonstrate prosecution.[102] In cases of non-state actor persecution—which may involve singular instances of domestic violence, sporadic threats of violence by gangs, not to mention a general prevalence of secrecy in refugee-ridden societies—this is often impossible to do. Requiring proof of the persecutor's motive ignores the fundamental quality of non-refoulement and implicitly condemns asylum seekers to be returned to places where their lives or the lives of their families may still be at risk.

If the *Elias-Zacarias* standard had been to be applied to the Iranian Case, the result might have been a markedly different one. In the Iranian Case, the RSAA concluded that the applicant's position as a woman in a deeply religious society placed her at a

97 *Id.* at 482-83.

98 *Id.*

99 *Id.* at 482.

100 *Id.* at 483.

101 *Id.*

102 *See* Shayna S. Cook, *Repairing the Legacy of INS v. Elias-Zacarias,* 23 MICH. J. INT'L L. 223, 229 (2002).

serious risk of being harmed by her former husband or by the state.[103] The Appeals Authority further determined that the indifference of state authorities created a nexus between the asylum seeker's position as a woman and the persecution she had undergone.[104] Although it was ultimately decided that the asylum seeker was ineligible for asylum based on the persecution she had undergone by her husband alone, the RSAA did conclude that the failure of the state to protect the applicant from harm qualified her as an asylee on several Refugee Convention grounds.[105] The Appeals Authority reasoned that the asylum applicant had been a member of a social group which consisted of women in Iran; she had been persecuted because of a religious acceptance of the derogation of women in Muslim society; and she had undergone persecution for having a political opinion that challenged the traditional role of women in Iranian society.[106]

If the asylum seeker had been required to prove that both her husband and the state were motivated by a desire to persecute her, it is likely that she would not have prevailed. Requiring asylum applicants to prove the subjective intent of their persecutors ignores the fact that many refugees flee quickly, and are therefore unable to provide substantial evidence in order to back up their asylum claims. In the Iranian Case, the RSAA made clear that the refugee was granted asylum because the state was "unwilling or unable" to protect her from persecution by her husband.[107] Interestingly, the Appeals Authority also concluded that the serious harm that the asylum applicant had faced at the hands of her husband was not based on a Convention reason.[108] Accordingly, the RSAA recognized that there may be instances of non-state actor persecution where the humanitarian concerns of returning a refugee home outweigh the practical aspects of conforming his or her asylum claim to one of the five grounds listed in the Refugee Convention. In the Iranian Case the Appeals Authority ultimately concluded that there were other reasons for finding persecution based on social group membership, religion, and political opinion.[109] However, the broader scope of the

103 *Refugee Appeal* No. 71427/99 [2000] NZAR 545 at para. 119.
104 *Id.*
105 *Id.*
106 *Id.* at paras. 111-20.
107 *Id.* at paras. 118-19.
108 *Id*. at para. 120.
109 *Id.* at paras. 118-20.

holding leaves the door open for instances when an asylum applicant may not be able to conclusively prove persecution based on one of the grounds listed in the Refugee Convention, and still qualify for relief.

The ruling of the RSAA in the Iranian Case recognizes that the refoulement of asylum seekers who still fear persecution on their return home cannot be justified under the 1951 Refugee Convention or the subsequent 1967 Protocol.

B. When do a Government's Actions Constitute an Unwillingness or Inability to Protect?

American courts have disagreed as to which actions or inactions constitute governmental unwillingness or inability to protect an asylum applicant for purposes of protection under the INA. In *Wong v. Attorney General of United States,* the plaintiff contended that she had a well-founded fear of persecution because of her status as an ethnically Chinese Christian in predominantly Muslim Indonesia.[110] The Third Circuit rejected the plaintiff's arguments because it reasoned that the Indonesian government was taking proactive steps to protect religious minorities.[111] The court recognized that isolated incidents of anti-Christian violence existed, including the burning of numerous churches in 2003 and 2004, but nevertheless concluded that these instances were only discriminatory, thus failing to rise to the level of persecution.[112] The court did not discuss whether Wong faced a real risk upon her return to Indonesia, but only inferred that such risk was unlikely.[113] In fact, as one of its justifications for denying Wong's asylum petition, the court stated that the petitioner had not suffered persecution at the hands of government officials, and was therefore unable to prove that the government was "unwilling or unable" to protect him.[114]

In *Wong* the court reasoned that general civil unrest and violence do not support an asylum claim,[115] just as it had earlier held in *Konan v. Attorney General of the United States*.[116] Courts

110 539 F.3d 225 (3rd Cir. 2008).
111 *Id.* at 233.
112 *Id.*
113 *Id.* at 236.
114 *Id.* at 233-34.
115 *Id.* at 233.
116 432 F.3d 497, 506 (3d Cir. 2005).

in the majority of jurisdictions have reached the same conclusion, at times stretching the limits of what constitutes civil strife.[117] In addition, the Third Circuit noted in *Wong* that in order to show that there is a "'pattern or practice of persecut[ing]'"[118] ethnically similar people, the applicant must show that the persecution of the group was "'systemic, pervasive, or organized.'"[119]

In contrast to *Wong,* in *Mashiri v. Ashcroft*, the Ninth Circuit remanded a case where the asylum applicant was a Muslim woman from Afghanistan with German citizenship.[120] The woman testified that she and her husband had repeatedly been subjected to derogatory comments, beatings, and damage to their property based on of their status as "foreigners."[121] The asylum seeker claimed that these incidents had largely been ignored by the police, leading her to fear for her own life and that of her husband's.[122] While the court seems to have conceded that the police did make some effort to investigate the applicant's allegations of violent attacks and threats,[123] the court nevertheless concluded that the plaintiff had met her burden of proof regarding the claim that the German government was "unwilling or unable" to protect her.[124]

It is interesting to note that in *Mashiri,* the Ninth Circuit remanded the case even though the German government had clear and established mechanisms to prevent violence against minorities.

117 In Rostomian v. I.N.S., 210 F.3d 1088 (9th Cir. 2000), the court held that an Armenian asylum applicant failed to establish past persecution because he incurred a knife wound during a period of "random violence," even though the knife wound was perpetrated during an Azeri attack on Armenian residents of a town in an disputed area.

118 *Wong*, 539 F.3d at 232, *quoting*, Lie v. Ashcroft, 396 F.3d 530, 537 (3rd Cir. 2005).

119 *Wong*, 539 F.3d at 233, *quoting*, Lie v. Ashcroft, 396 F.3d 530, 537 (3rd Cir. 2005).

120 383 F.3d 1112 (9th Cir. 2004).

121 *Id.* at 1119-22 (while both the asylum applicant and her husband had lived in Germany for many years, *Mashiri* explained that they were still derogatorily labeled "foreigners."). The petitioner recalled several instances when ethnic Germans threatened to inflict or had inflicted physical harm on her or her husband. *Id.* at 1115. One of these incidences happened to her husband, who worked as a taxi driver. *Id.* A group of three passengers started making anti-foreigner comments, and when Mashiri's husband objected to these statements by pulling over, the passengers told him to shut up and beat him severely. *Id.* In an unrelated incident , two passengers called Mashiri's husband a "shit foreigner" and continued beating him until he was able to run away. *Id.* In addition, on New Year's Eve of 1993, the applicant's family was forced to hide because a Neo-Nazi mob ransacked a nearby store that was owned by a person of Turkish descent. *Id.* at 1115-16.

122 *Id.* at 1119-22.

123 *Id.* at 1121, n.5.

124 *Id.* at 1122.

In fact, the German government has taken numerous steps in order to ensure that perpetrators of violence are held accountable for their actions.[125] In contrast, the Third Circuit court rejected evidence of rampant violence against Christians in Indonesia in *Wong* (including the burning of churches) as evidence of the likelihood of future persecution. This is an important conclusion considering that Indonesia's geographic and developmental status is not conducive to the effective prevention of minority violence in that country.[126]

American case law reflects a general lack of uniformity among the Federal Circuit courts when adjudicating asylum applications based on persecution by non-state actors. This inconsistency arises from the lack of a normative approach to determine whether a government is "unable or unwilling" to protect against future threats of persecution.

IV. A NEW APPROACH TO ASYLUM JURISPRUDENCE IN THE UNITED STATES

A. Defending the Standard Laid Out in the Iranian Case

Referencing a recent immigration case, one legal scholar observed that: "[D]omestic proceedings in the United Kingdom . . . illustrate[ ] the vulnerability of a refugee protection regime that lacks consensus regarding the status of victims of non-state agents of persecution."[127] The problem of refugee protection is not limited to the United Kingdom; it is also present in the United States, where federal district courts have been unable to fashion a normative approach for adjudicating asylum applications

125 Richard Bernstein, *In Germany a Cautious Sense 'That We Don't Have to Fear This,'* N.Y. TIMES, Nov. 8, 2005, *available at* http://www.nytimes.com/2005/11/07/world/europe/07iht-react.html?pagewanted=all (quoting Norbert Seitz, director of the German Forum for Crime Prevention, who cited reports that suggest that police have made an effort to build relationships with immigrant groups).

126 Maya Safira Muchtar, *Is Religious Tolerance A Success in Indonesia? No, it's not!,* JAKARTA POST (Feb. 03, 2010), http://www.thejakartapost.com/news/2010/02/03/is-religious-tolerance-a-success-indonesia-no-it%E2%80%99s-not.html (opinion piece by the founder of the Indonesian National Integration Movement explaining that the Indonesian government has inappropriately turned a blind eye to religious violence).

127 Moore, *supra* note 25, at 115.

alleging persecution by non-state actors.[128] Considering that the United States and the United Kingdom are both parties either to the 1951 Refugee Convention, or the 1967 Protocol,[129] it is to be expected that they apply similar standards when determining the merit of asylum petitions.

In the Iranian Case, the RSAA reaffirmed the position that there are four circumstances which amount to a failure of state protection:

> a) Persecution committed by the state concerned.
>
> b) Persecution condoned by the state concerned.
>
> c) Persecution tolerated by the state concerned.
>
> d) Persecution not condoned or not tolerated by the state concerned but nevertheless present because the state either refuses or is unable to offer adequate protection.[130]

Of the four circumstances listed above the most important of these is the last: "persecution not condoned or tolerated by the state concerned but nevertheless present . . . ." Asylum seekers from such countries face the most substantial difficulty in proving that they face a significant risk of persecution if they were to return home. On its face, the country of origin may have a system of measures in place to deal with persecution, but in reality this system of measures may fall well short of actually eliminating the risk.

Unlike courts in the United Kingdom and the United States, which have dismissed asylum cases upon finding that the state attempted to protect its residents from persecution, the standard employed by the RSAA considers the net result of a state's efforts to protect its inhabitants.[131] Under this standard, individuals who face fear of persecution, even when their governments have made an effort to curtail the reasons for that fear, are not repatriated. Conversely, American and British courts continue to *refoul*[132] asylum applicants who face a significant fear of returning home but are unable to justify their fear based on one of the five

128 *See* Wong, 539 F.3d at 233; Mashiri*,* 383 F.3d at 1119-22.

129 United Nations High Commissioner for Refugees, *UNHCR Global Report 2007 – State Parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol*, (Jan. 1, 2008), http://www.unhcr.org/4848f6072.html.

130 *Refugee Appeal No. 71427/99* [2000] NZAR 545 at para. 60.

131 *Compare Horvath*, 3 WLR 379; *Wong*, 539 F.3d at 233 with *Refugee Appeal No. 71247/99* [2000] NZAR 545.

132 For a discussion of refoulement please refer to article 33(1)(A)(2) of the Refugee Convention. *See* Refugee Convention*, supra* note 2.

enumerated grounds recognized by the Refugee Convention. This is due to the inability of American and British courts to delineate a clear method of analysis when examining asylum petitions in cases of where the applicant has been abused by non-state actors.[133]

Justifying the refoulement of asylum seekers on the ground that their governments have taken proactive steps to protect them even when such steps have resulted in limited protection ignores the fundamental human right to live without fear.[134] The importance of the right to live without fear is so paramount that the drafters of the Universal Declaration of Human Rights decided to include it in the preambulatory clause.[135] In doing so, the authors must have recognized that an individual who lives in constant fear is one who is deprived of both his liberty and his dignity. Professor James Hathaway, a leading scholar in the field of international refugee law, has pointed out that any decision which attempts to determine if an asylum seeker faces a risk of persecution must scrutinize the effort with which a state attempts to protect its inhabitants from that risk.[136]

Other legal scholars have taken this argument one step further by contending that non-refoulement,[137] as embodied in Article 33(1)(A)(2) of the Refugee Convention, has become a norm of *jus cogens*.[138] In defense of this position, at least one

133 *See Horvath*, 3 WLR 79; *Wong*, 539 F.3d at 233. Some would contend that the United States immigration code does account for asylum seekers who may not be able to qualify for asylum but nevertheless have a fear of returning home. Section 241 (b)(3)(B) of the INA has a provision titled "Withholding of Removal." 8 U.S.C.A 1231 (2009). Withholding of removal is designed to protect asylum seekers who face a threat to their life or freedom because of their "race, religion, nationality, membership in a particular social group, or political opinion." *Id.* Under this provision the Secretary of the Department of Homeland Security cannot deport an asylum seekers who demonstrate that it is more likely that not that they will face persecution upon return to the country of their last residence. INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987). The problem with this provision is that the statutory language lends itself to the same judicial analysis as in asylum claims—the only difference being the burden of proof and the fact that the adjudicator cannot deny relief to an applicant who has met the burden.

134 *See* The Universal Declaration of Human Rights, *supra* note 76.

135 *Id.*

136 HATHAWAY, *supra* note 78, at 125.

137 *See* Refugee Convention, *supra* note 2.

138

> The notion of jus cogens is given a voice in international law through articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties. These provisions provide that treaties may be invalidated upon their ratification or may later be terminated if their content "conflicts with a peremptory norm of general international law" when it is "accepted and recognized by the international community of states as a whole as a norm from which no

scholar has pointed out that the executive committee of the UNHCR concluded that non-refoulement is not subject to derogation, thereby acquiring the level of a norm of *jus cogens*.[139] Furthermore, the *jus cogens* nature of non-refoulement is found in state practice, and embodied in such international agreements as the 1984 Cartagena Declaration on Refugees (an agreement which has been signed and ratified by ten Latin American countries).[140] Some also contend that non-refoulement, based on the language of Article 33 of the Refugee convention, has become a principle of customary international law.[141]

If the norm of non-refoulement has in fact become a part of customary international law then the outcome in cases such as *Horvath* and *Wong* arguably ignores universally accepted principles of international refugee law. While this is, in and of itself, a reason for condemning the outcome in these cases, the *jus cogens* nature of non-refoulement further supports the argument that, when adjudicating asylum claims based on non-state actor persecution, United States courts should adopt the standard laid out by the RSAA in the Iranian Case. The fundamental right to live without fear is ignored when asylum applicants are returned home to possible persecution, despite a country's "reasonable willingness" to institute a system of measures for protection. By equivocating a willingness to protect against persecution with the actual act of protecting citizens, the United States continues to fail to meet its obligations under the 1951 Refugee Convention and the subsequent 1967 Protocol. Article 33 of the Refugee Convention clearly sets out that "[n]o Contracting State shall 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."[142] The term "in any manner whatsoever" suggests that a refugee cannot be refouled if *any* threat exists, not just a threat which has

derogation is permitted."

Jean Allain, *Insisting on the Jus Cogens Nature of Non-Refoulement*, in THE REFUGEE CONVENTION AT FIFTY 82 (Joanne van Selm et al. eds., 2003). "Norms of *jus cogens,* . . . do not allow for . . . deviation–they are higher norms of which no violation is allowed." *Id.*

139 *Id.* at 84.

140 *Id.*

141 S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 351-54 (3d ed. 2007).

142 Refugee Convention, *supra* note 2, at § 33(1)(A)(2) (emphasis added).

been diminished by the willingness of local officials to attempt to protect their inhabitants.

A state may have enacted, in some abstract sense, a "reasonable" system of measures to protect its citizens, but those steps are not relevant if the asylum applicant continues to have a well-founded fear of serious harm or the abuse of his or her human rights.[143] In other words, it is not sufficient that the state is endeavoring to fulfill its obligations pursuant to international human rights law; it must provide sufficient protection to eliminate the well-founded fear.[144] The varied approaches taken by U.S. courts in assessing whether the government of the asylum applicant's country of origin has taken "reasonable" measures to prevent persecution also raises the question of which actions are reasonable. For instance, it is unclear whether investigation of a murder would be enough to constitute reasonableness, even if that investigation was done by individuals who either sympathized with the murder, or were too afraid themselves to come forward with the truth. Surely, such an investigation would not protect the family of the murdered. Yet, some might contend that this should considered a reasonable attempt by a government to protect its citizens.

The question of when a state's willingness to protect its inhabitants is reasonable introduces a much larger concern in American jurisprudence: the reluctance of American courts to use international human rights instruments to assess the interpretation of the terms of the Refugee Protocol and the subsequent 1967 Protocol.

B. Why the Adoption of the Standard Laid Out in the Iranian Case Would Allow the United States to Reaffirm its Commitment to the Objective Adjudication of Asylum Petitions

The first two preambulatory clauses of the Refugee Convention express the idea that the treaty was intended to provide asylum seekers universal access to the refugee regime:

> Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and

143 Deborah E. Anker et al., *Gender and Social Group: Comments to Proposed Regulations*, 6 BENDER'S IMMIGR. BULL. 185 (2001)

144 FOSTER, *supra* note 80, at 202.

> freedoms without discrimination, [and]
>
> Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms, . . .[145]

Although the refugee definition in Article 1 of the Convention only provides for protection based on five enumerated grounds, the preamble makes clear that all human beings have a right to enjoy fundamental freedoms and live without discrimination.[146] This suggests that the Refugee Convention is to be applied in a manner which provides asylum applicants with the highest possible level of protection.

The prevalent view is that the sustained or systematic denial of fundamental human rights is the proper standard for determining when human dignity has been denied.[147] This reasoning is consistent with Professor Hathaway's widely cited characterization of persecution as the sustained or systematic failure of the state to protect its inhabitants from the violation of core human rights, as recognized by the international community.[148]

Whether the harm anticipated rises to the level of persecution depends on a holistic assessment of a complex set of factors.[149] These might include the nature of the threatened right, the nature of the threat itself, and the gravity of the harm threatened.[150]

The requirement that the risk of persecution be well-founded[151] necessitates an objective consideration of the risk of persecution that the asylum seeker faces if he or she is deported.[152] This requirement presents a difficult challenge for both the claimant and the adjudicator when making a determination of the

145 Refugee Convention*, supra* note 2, at Preamble.

146 *Id.*

147 Ward v. Att'y Gen. of Canada, [1993] 2 S.C.R 689, 733.

148 HATHAWAY, *supra* note 78, at 105.

149 Roger Haines, *Gender-Related Persecution* ¶ 21 (UNHCR, drft., Aug. 10, 2001), *available at* http://www.unhcr.org/cgibin/texis/vtx/search?page=search&docid=3b93912e4&query=new%2
0zealand%20and%20non%20state%20agents. Note that the author of this article was also the chairperson who delivered the opinion in the Iranian Case.

150 *Id.*

151 Refugee Convention*, supra* note 3.

152 UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, *supra* note 90, at ¶ 38.

facts in instances when it may be difficult to definitively qualify the asylum applicant's assertions. [153] In such cases, the testimony of the refugee should be given the benefit of the doubt regarding credibility.[154] The evidentiary requirement should therefore be applied leniently.[155]

In the United States, courts have been reluctant to use an objective analysis to assess the validity of asylum petitions alleging persecution by non-state actors.[156] Critics have pointed out that use of the subjective approach is dangerous because it allows the adjudicator to make a determination of what constitutes "reasonableness."[157] As an example of the validity of this critique, the Fourth Circuit denied withholding of removal to an applicant who argued that she had a well-founded fear of female genital mutilation if she were forced to return to Senegal.[158] The Circuit Court upheld the findings of the immigration judge, who concluded that the applicant's testimony was credible, but that she was misinformed about the likelihood of female genital mutilation in Senegal.[159] Writing in dissent, Judge Gregory criticized the majority's opinion because it failed to objectively consider the evidence before it, instead relying on generalized State Department reports.[160]

Judicial use of language such as "our country does not recognize as legitimate" when interpreting what it means to be "persecuted" only promulgates the idea that domestic jurisprudence in the United States ignores universally accepted human rights standards which inform the meaning of the Refugee Convention.[161] The use of domestic human rights standards in the

153 *Id.* at ¶ 197.

154 *Id.*

155 *Id.*

156 *See* Gomis v. Holder, 571 F.3d 353, 356-57 (4th Cir. 2009) (involving a case where withholding of removal was denied to an applicant who alleged a well-founded fear of female genital mutilation. The majority articulated the need to measure the applicant's credibility against an objective standard, yet failed to effectively do so.).

157 FOSTER, *supra* note 80, at 38.

158 *Gomis,* 571 F.3d at 360-61.

159 *Id.* at 356-67.

160 *Id.* at 364 (arguing that "[i]t is difficult to understand how the majority can essentially nullify the unequivocal language in her father's letter. This is a rare case where we need not speculate on percentages. Her father clearly states, 'I guarantee you that you'll not get from this situation. . . . You'll be circumcised and sent into marriage before my death.' Therefore . . . the likelihood that Gomis will be circumcised if returned to Senegal is 100%.").

161 Osaghae v. INS, 942 F.2d 1160, 1163 (7th Cir. 1991).

context of international human rights agreements is undesirable because it "simultaneously allows too easily the intrusion of ideology and also the implication of censure of the state of origin."[162] The RSAA has also reasoned that human rights abuses in the country of asylum could prejudice the adjudicator when determining what types of discrimination rise to the level of persecution.[163]

Use of a more objective standard[164] when deciding asylum petitions would allow United States courts to adopt a holistic approach in their application of refugee law. Instead of relying on their own subjective criteria, adjudicators would be forced to consider each of the factors which constitute persecution in the broader scheme of the refugee protection regime.[165] Acceptance of the reasoning in the Iranian Case[166] would simplify the job of American judges and allow them to make judgments more in tune with the formulation of protection which the preambulatory clauses of the Refugee Convention suggest.[167]

Instead of trying to figure out when risk rises to the level of a well-founded fear, judges would construct the analysis in much more objective terms. They would ask whether a real chance of

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162 *Refugee Appeal No. 74665/03* [2005] NZAR 60 at para. 38 (RSSA), *available at* http://www.nzrefugeeappeals.govt.nz/srchdisp.aspx?D=FullTexts&F=ref_20040707_74665.htm&Str=during+2004+OR+74665/03.

163 *Id.*

164 Although U.S. courts profess to use an objective standard, their ultimate conclusions often suggest a much more subjective approach. *See Gomis,* 571 F.3d at 356-67.

165 *See Refugee Appeal No. 74665/03* [2005] NZAR 60 at para. 48. The most important factors constituting persecution within the meaning of the Refugee Convention would include a well-founded fear of serious harm due to the applicant's race, religion, nationality, social group membership, or political opinion, and a failure of state protection. *See* Refugee Convention*, supra* note 3; *Horvath,* 3 WLR 379.

166 As a reminder, the New Zealand Refugee Status Appeals Authority stated that,

> Article 33(1) is explicit in prohibiting return in any manner to a country where the life or freedom of the refugee would be threatened for a Convention reason. This obligation cannot be avoided by a process of interpretation which measures the sufficiency of state protection not against the absence of a real risk of persecution, but against the availability of a system for the protection of the citizen and a reasonable willingness by the state to operate that system . . . . If the net result of a state's "reasonable willingness" to operate a system for the protection of the citizen is that it is incapable of preventing a *real chance* of persecution of a particular individual, refugee status cannot be denied that individual.

Refugee Appeal No. 71427/99 [2000] NZAR 545 at para. 63 (emphasis added).

167 That is, a protection of fundamental rights and the freedom to live without discrimination. Refugee Convention*, supra* note 2, at Preamble.

persecution exists if the asylum applicant were refouled.[168] A formulation of the analysis in this way simplifies the judge's job and mandates that he or she ask only one question: "Does the risk exist?" If it does not, the asylum application is denied. If it does, asylum status is granted. No longer would the adjudicator have such a difficult time delineating shades of gray. If a state's "reasonable willingness" to operate a system of protection has resulted in little actual protection, it cannot affirmatively be said that the state has removed the well-founded fear.[169]

Formulating the approach along the lines laid out in the Iranian Case would ensure that the United States does not return refugees to countries where they face imminent harm. Making refugees seek protection in their country of origin prior to departing only to demonstrate the ineffectiveness of that protection, places refugees at a significant risk.[170] Burdening asylum seekers with such a risk contradicts both the conception of non-refoulement in Article 33(1)(A)(2) of the Refugee Convention and the definition of refugee set out in Article 1.[171]

V. RESPONDING TO CRITICISM

Critics of adopting the New Zealand approach might argue that the standard laid out in the Iranian Case interprets too broadly the harm against which refugees should be protected. They would cite numerous opinions which make it clear that the Refugee Convention and international human rights law were not designed to protect all refugees from all harm.[172]

They might further contend that applying a standard that grants asylum if there is a *real chance* of persecution loads the discussion by suggesting that any chance of persecution is a real one. Evidence of this, however attenuated, could be inferred from RSAA opinions which suggest that discrimination and socio-economic deprivation could rise to the level of persecution.[173]

Most important, critics might maintain that the United States

168 *See Refugee Appeal No. 71247/99* [2000] NZAR 545 at para. 63.

169 Anker et al., *supra* note 143.

170 *Ward*, 2 S.C.R at 724 *quoted in Refugee Appeal No. 71427/99* [2000] NZAR 545 at para. 64.

171 Refugee Convention*, supra* note 2.

172 *See* Gao v. INS, 947 F.2d 660, 664 (2d Cir. 1991); *Horvath,* 3 WLR 379; *Refugee Appeal No. 71404/*99 (unreported) Refugee Status Appeals Authority, No. 71404/9929, 29 Oct. 1999, at para. 65,

173 *See Refugee Appeal No. 74665/03* [2005] NZAR 60 at para. 38.

already admits so many immigrants that it would be unfair and impractical to adopt a more liberal standard which lessens the burden on asylum seekers, and makes it easier for tens of thousands more individuals to enter this country. In support of this claim, they might make the often asserted claim that the number of immigrants entering the country has risen in recent years.[174]

Lastly, a targeted critique of the approach enlisted by the RSAA in the Iranian Case would likely disapprove of the use of international human rights standards in the context of domestic statutory analysis on the ground that United States courts should not use other countries' interpretations of law to inform our own jurisprudential understanding. Central to this concern is the idea that "a large body of rights violations are equated with persecution," and that the "practical impact of . . . [enlisting human rights norms in asylum cases] would be enormous."[175]

While all of the aforementioned criticisms present valid arguments in wider asylum related jurisprudence, they also seem to assume that the denial of human rights in fringe cases is acceptable as long as the larger self-interests of the United States are served. This ignores the reasons behind the drafting of the Refugee Convention and the 1967 Protocol in the first place: to provide refugees with a system of protection when their country of origin failed to properly do so.[176]

Applying a standard that accounts for a real chance of risk does not load the discussion, it informs it. It ensures that large groups of people are not repatriated in the face of a well-founded fear of being persecuted upon their return home. The standard in the Iranian Case would likely increase the number of individuals eligible for asylum in the United States. Nevertheless, such an increase would be in line with the broader goals of protecting "fundamental rights"[177] and guaranteeing that all human beings shall enjoy the freedom to live without fear.[178]

174 In contradiction of any such claim, it must be noted that the number of refugees entering the United States, a significant source of immigrants, has actually declined from about 120,000 in 1990, to about 50,000 in 2007. DEPARTMENT OF HOMELAND SECURITY, ANNUAL FLOW REPORT, *supra* note 5.

175 Daniel J. Steinbock, *Interpreting the Refugee Definition,* 45 UCLA L. REV. 733, 782 (1998).

176 *See* HATHAWAY, *supra* note 78, at 104-07.

177 Refugee Convention, *supra* note 2.

178 The Universal Declaration of Human Rights, *supra* note 76.

Critiques of the use of international human rights norms as a tool to inform domestic asylum jurisprudence misconstrue the nature of the suggested approach.[179] One commentator argues that the human rights approach attempts to "serve as a working definition of the kinds of deprivation that, by themselves, constitute persecution without any showing of a prohibited reason for the human rights infringement."[180] This argument fails to recognize that the use of international human rights norms to inform domestic statutory interpretation does not mean that every breach of human rights will equate with a grant of asylum.[181] On the contrary, adoption of the New Zealand standard in the Iranian Case would only assist American judges by allowing them to apply a more objective and holistic approach in their analysis.

VI. CONCLUSION

We live in an imperfect world, where instances of tragedy and the denial of human dignity confront us on an almost daily basis. In an attempt to provide relief to individuals who have suffered targeted persecution, the United States, like many other countries, has enlisted a statutory regime that adopts the language of Articles 1 and 33 of the Refugee Convention.[182] In doing so, the United States implicitly recognizes that the protection of refugees is a burgeoning problem which requires an effective framework to come up with a solution.

Unfortunately, United States courts have ignored human rights norms by failing to adequately define a standard under which to adjudge when an asylum seeker is to be returned home. Justifying the refoulement of refugees on the ground that their governments have taken proactive steps to protect them fails to consider whether that attempted protection has been effective.

Adoption of the standard employed in the Iranian case[183] would provide American courts with a coherent normative approach to address non-refoulement issues and asylum claims involving targeted victimization by groups that the government is "unwilling . . . or unable" to control. By asking whether or not a "real chance" of persecution exists upon the asylum seeker's

179 FOSTER, *supra* note 80, at 79, *criticizing* Steinbock, *supra* note 175.

180 Steinbock, *supra* note 175, at 781-82.

181 *Id.*

182 Refugee Convention*, supra* note 2.

183 *Refugee Appeal No. 71247/99* [2000] NZAR 545.

return home, the approach in the Iranian Case provides decision makers with an objective and holistic way to address the question of when a "well-founded" fear rises to the level of persecution. Most importantly, however, embracing the New Zealand standard would reaffirm America's commitment to the rights of refugees.