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Stephen Meili
University of Minnesota Law School, smeili@umn.edu

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THE RIGHT *NOT* TO HOLD A POLITICAL OPINION: IMPLICATIONS FOR ASYLUM IN THE UNITED STATES AND THE UNITED KINGDOM

Stephen Meili[*]

ABSTRACT

This Article analyzes the vastly different approaches taken by the United States Supreme Court and the Supreme Court of the United Kingdom toward asylum claims based on political neutrality. In the recent case of RT (Zimbabwe) v. Secretary of State for the Home Department (UKSC 38 (2012)), the U.K. Supreme Court ruled in favor of several apolitical Zimbabweans who sought asylum in the United Kingdom on the grounds that they would be tortured if they refused to swear allegiance to the Mugabe regime if deported. This case stands in stark contrast to the U.S. Supreme Court decision in INS v. Elias-Zacarias (502 U.S. 478 (1992)), which denied asylum to an apolitical Guatemalan man who fled to the United States after resisting the recruitment efforts of guerillas fighting a civil war against the government.

This Article uses these two seminal cases to illustrate the wide gulf between U.S. and U.K. jurisprudence in their reliance on

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international human rights norms and foreign law. In RT (Zimbabwe), the U.K. Supreme Court referenced numerous human rights treaties, as well as the jurisprudence of several common law countries (including the United States) in holding that those who choose not to express a political opinion—for whatever reason—are entitled to the same protection from persecution that extends to the politically active and vocal. In Elias-Zacarias, on the other hand, the U.S. Supreme Court did not cite any international or foreign law. Its decision was based entirely on statutory interpretation of the U.S. law governing asylum.

This Article contributes to the literature on the human rights approach to asylum law, which argues that domestic courts considering asylum claims should be guided by the norms promoted in human rights treaties. RT (Zimbabwe) embraces this approach; Elias-Zacarias ignores it. This contrast begs the question that this article interrogates: does the human rights approach to asylum law make a difference to asylum-seekers? It approaches this question through a counterfactual analysis: would Mr. Elias-Zacarias have obtained asylum before the U.K. Supreme Court, and how would the claimants in RT (Zimbabwe) have fared before the U.S. Supreme Court?

In addition, this Article suggests how U.S. courts might rely on the rulings of their sister signatories to the 1951 Convention relating to the Status of Refugees in ways that would promote a uniform interpretation of that treaty across national borders. It also suggests ways that lawyers representing refugees in the United States might utilize a human rights-based approach to refugee law to benefit clients. And finally, it considers whether one of the factors contributing to the effectiveness of human rights treaties is the adoption of the human rights approach to asylum law by the domestic courts of a ratifying country.

INTRODUCTION

Persecution in response to the expression of a political opinion is one of the fundamental grounds for asylum.[1] International human

1. Under Article I A(2) of the 1951 U.N. Convention relating to the Status of Refugees, in order to obtain asylum, a person must demonstrate a "well-founded fear" of being persecuted in her home country "for reasons of race, religion, nationality, political opinion, or membership in a particular social group." Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6233, 660 U.N.T.S. 267 (1967)

rights treaties and other instruments guarantee protection for expressing a point of view in opposition to the ruling regime.[2] But what about the right *not* to hold a political opinion? In most nations, citizens can choose to be agnostic on political issues with few repercussions. In some situations, however, political neutrality can result in the incarceration, rape, and murder of those who refuse to swear allegiance to a political regime or other powerful entity. Should asylum be available to those threatened with such persecution? And if so, on what basis?

The Supreme Court of the United Kingdom confronted this issue in its landmark 2012 decision in *RT (Zimbabwe) v. Secretary of State for the Home Department*.[3] That case involved several apolitical Zimbabweans who sought asylum in the United Kingdom on the grounds that they would face murder, rape, or other forms of persecution if they refused to swear allegiance to the Mugabe regime upon returning to Zimbabwe. The U.K. Home Secretary argued that the applicants were not entitled to asylum because their political neutrality was a matter of indifference rather than commitment.

The U.K. Supreme Court disagreed, ruling that the Refugee Convention and the European Convention[4] provide protection to

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[hereinafter 1967 Protocol]. The 1967 Protocol maintained all provisions of the Refugee Convention but deleted certain temporal and geographic restrictions to recognize changes in the causes of forced migration since World War II. *See* Deborah Anker, Law of Asylum in the United States 2, n.1 (2014) [hereinafter Anker (2014)] (explaining the context of creation of the Protocol).

2. *See* International Covenant on Civil and Political Rights, Articles 18 & 19. G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR] (Article 18 of both of these instruments guarantees the right to freedom of thought, conscience, and religion. Article 19 of both instruments guarantees the right to hold opinions without interference.). *See also* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter "ECHR" or "European Convention"] (Article 9 of the ECHR guarantees the right to freedom of thought, conscience, and religion. Article 10 guarantees freedom of expression.).

3. *RT (Zimbabwe) & Ors v. Secretary of State for the Home Department*, [2012] UKSC 38 (U.K.).

4. Refugee Convention, *supra* note 1; European Convention, *supra* note 2. The United Kingdom effectively incorporated the European Convention into its domestic law when it included it as an appendix to the Human Rights Act, which went into effect in Scotland in July 1999, and Wales and England in October 2000. Richard Maiman, *Asylum Law Practice in the United Kingdom After the Human Rights Act*, *in* The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice 410 (Austin Sarat & Stuart Scheingold eds., 2005).

those who refuse to express a political opinion, regardless of their motivation. In doing so, the Court rejected the Home Office's distinction between asylum-seekers whose neutrality is "conscientious or committed" and those who have "given no thought to political matters because the subject simply is of no interest to [them]."[5]

RT (Zimbabwe) stands in stark contrast to the 1992 U.S. Supreme Court decision in *INS v. Elias-Zacarias*.[6] Elias-Zacarias fled Guatemala for the United States in 1987 after guerillas unsuccessfully attempted to recruit him, using thinly veiled threats to his life in the process. He supported neither side in the conflict, but believed the guerillas would retaliate against him for his refusal to join them. The U.S. Supreme Court, with Justice Scalia writing for a 6-3 majority, held that Elias-Zacarias had not presented sufficient evidence to demonstrate that the guerillas would persecute him upon his return to Guatemala because of his political beliefs.[7]

Elias-Zacarias seriously questioned political neutrality as grounds for asylum.[8] Indeed, since that decision, few U.S. courts have held that passive neutrality alone suffices to justify a grant of asylum.[9] In most cases, a claimant must affirmatively articulate her

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5. *RT (Zimbabwe)*, UKSC 38, ¶ 41.

6. 502 U.S. 478 (1992).

7. The majority opinion states:

> [W]e need not decide whether the evidence compels the conclusion that Elias-Zacarias held a political opinion. Even if it does, Elias-Zacarias still has to establish that the record also compels the conclusion that he has a 'well-founded' fear that the guerillas will persecute him *because* of that political opinion, rather than because of his refusal to fight with them . . . [H]e has not done so at all. 502 U.S. at 483.

8. *See* Shelley M. Hall, *Quixotic Attempt? The Ninth Circuit, the BIA, and the Search for a Human Rights Framework to Asylum* Law, 73 Wash. L. Rev. 105, 131 (1998) (explaining the impact of the Elias-Zacarias case on the doctrine of political neutrality as grounds for asylum). The Elias-Zacarias case has also been criticized by scholars for requiring that asylum applicants prove the intent of their persecutor. *See* James C. Hathaway, *The Causal Nexus in International Refugee Law*, 23 Mich. J. Int'l L. 207, 208 (2002). *See also* Karen Musalo*, Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 Mich. J. Int'l L. 1179, 1181 (1994) (analyzing the Elias-Zacarias decision as part of a trend of Supreme Court cases that shifts the analysis away from the impact on the claimant and onto the intent of the persecutor).

9. Hall, *supra* note 8, at 129–31, citing Deborah Anker, Law of Asylum in the United States: A Guide to Administrative Practice and Case Law 128–31 (2d

neutrality.[10] The U.K. Supreme Court required no such profession of neutrality in *RT (Zimbabwe)*.[11]

One key distinction between these two Supreme Court opinions is the contrasting degree that they relied upon international human rights law, as well as foreign law, in justifying their conflicting results.[12] In *RT (Zimbabwe)*, the U.K. Supreme Court extensively referenced several international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR), as interpretive aids in determining that the Refugee Convention protects those who are passively neutral.[13] It also referenced judicial decisions in several other countries, including the United States, which had considered the right not to express a political opinion in a variety of contexts.[14] In *Elias-Zacarias*, on the other hand, human rights norms and foreign law played no role whatsoever.[15]

RT (Zimbabwe) and *Elias-Zacarias* exemplify two very different ways of analyzing asylum claims. *RT (Zimbabwe)* employed the human rights approach to asylum law, according to which the standard for what constitutes persecution under the Refugee

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ed. 1991); *see also* Anker (2014), *supra* note 1, at 372–74 (discussing neutrality as insufficient grounds for establishing a viable asylum claim).

10. *See* Sangha v. INS, 103 F.3d 1482, 1488 (9th Cir. 1997) (stating "the applicant 'must not merely avow his political neutrality, however, but must also show that this opinion was articulated sufficiently for it to be the basis of his past or anticipated persecution.'") (quoting Ramos-Vasquez v. INS, 57 F.3d 857, 863 (9th Cir.1995)).

11. *RT (Zimbabwe)*, UKSC 38, para. 45.

12. There are numerous and significant factual differences between the two cases, which will be described in more depth later in this article. However, these differences do not, in my view, mitigate the importance of the very different approaches to neutrality that the two courts adopt.

13. *RT (Zimbabwe)*, UKSC 38, paras. 32–33.

14. *Id.* paras. 34–35, 37–39.

15. As will be discussed in more detail later in this Article, U.S. courts rarely rely on their sister signatories' interpretations of relevant human rights treaties. *See* Fatma Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U. J. Int'l L. & Pol. 391, 393 (2013) (arguing that in the case of the Refugee Convention, this reluctance detracts from the effort among judges and scholars in many refugee-receiving nations to arrive at a shared interpretation of treaty terms). *See also* Hélène Lambert, *Transnational Law, Judges and Refugees in the EU*, *in* The Limits of Transnational Law 1, 4–5 (Guy S. Goodwin-Gill & Hélène Lambert eds., 2010) (describing how the judicial globalization phenomenon exists among Commonwealth countries but not outside the Commonwealth).

Convention is the sustained or systemic denial of human rights demonstrative of a failure of state protection.[16] The U.K. Supreme Court ruled in favor of the claimants, in part, because their fundamental human right to refrain from expressing a political opinion would be violated if they were forced to return to Zimbabwe.[17] *Elias-Zacarias* followed a statutory interpretation model: the majority concluded, relying on U.S. Supreme Court precedent, that Mr. Elias-Zacarias had failed to satisfy the criteria for asylum under U.S. law.[18] Neither the majority nor the dissent in *Elias-Zacarias* inquired into the human rights implications of returning the claimant to Guatemala.

Comparing these approaches to analyzing asylum claims suggests that using human rights treaties can make the difference between life and death. It is no stretch to argue that the U.K. Supreme Court's reliance on international human rights law helped the claimants in *RT (Zimbabwe)* avoid persecution and possible death, whereas the U.S. Supreme Court's failure to reference such law may have contributed to the rejection of Mr. Elias-Zacarias' claim.

By considering this issue, this Article contributes to scholarship and practice on human rights and asylum law in four ways. First, it considers how the human rights approach to asylum law informs the definition of "political opinion" and whether that approach results in a broader basis of protection than offered by the statutory interpretation model followed by most courts in the United States. Second, it suggests how U.S. courts might rely on the rulings of their sister signatories to the Refugee Convention in ways that lead to an internationally uniform interpretation of that treaty.[19] Third, it

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16. James C. Hathaway & Michelle Foster, The Law of Refugee Status 183 (2d ed. 2014).

17. *RT (Zimbabwe)*, UKSC 38, paras. 41–42, 61.

18. *INS v. Elias-Zacarias*, 502 U.S. at 482–83.

19. Refugee law lacks an international court to harmonize different states' interpretations of the Refugee Convention. *See* Lambert, *supra* note 15, at 4. Given such a vacuum, senior appellate courts in many common law countries routinely engage in transnational dialogue about the scope of the refugee definition and are committed to finding common ground. *See* James Hathaway, The Rights of Refugees Under International Law 1–2 (2005). The International Association of Refugee Law Judges (IARLJ) is an institutional example of efforts towards finding such common ground. Created in Warsaw in 1997, the IARLJ seeks to develop consistent approaches to the interpretations and application of refugee law. *See* Kate Jastram & Marilyn Achiron, UNHCR, Refugee Protection: A Guide to International Refugee Law 35 (2001), *available at*

suggests ways that lawyers representing refugees in the United States might utilize a human rights-based approach to refugee law to benefit clients. And finally, it considers whether one of the factors contributing to the effectiveness of human rights treaties is the adoption of the human rights approach to asylum law by the domestic courts of a ratifying country.

Part I begins with a review of scholarship on the human rights approach to asylum law. Part II briefly describes the asylum adjudication processes in the United States and the United Kingdom. Parts III and IV review U.S. and U.K. law on neutrality as a basis for asylum, focusing on the decisions in *Elias-Zacarias* and *RT (Zimbabwe)*, respectively. Part V analyzes the potential result in these two cases had each applicants brought their claim in the other country. Finally, the Article concludes with reflections about how the comparison of these Supreme Court cases contributes to scholarship and practice on human rights treaties and asylum law.

I. THEORETICAL FRAMEWORK—THE HUMAN RIGHTS APPROACH TO ASYLUM LAW

In domestic courts in many countries of the world, the human rights approach is the dominant theory of interpreting and applying refugee law.[20] It promotes affording protection to those seeking asylum in any state party to the Refugee Convention or 1967 Protocol based upon a core set of rights established in several human rights treaties.[21] According to this approach, refugee law is a system of

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http://www.unhcr.org/3d4aba564.html*; see also* The Association – Introduction, IARLJ.org, http://www.iarlj.org/general/iarlj/the-association (stating a high-level overview of the history and mission of the IARIJ) (last visited Feb. 2, 2015).

20. Hélène Lambert, *International Refugee Law: Dominant and Emerging Approaches*, *in* Routledge Handbook of International Law 344–45 (David Armstrong ed., 2009).

21. Hathaway & Foster, *supra* note 16, at 193–208. The treaties and other instruments considered to form the core set of human rights protections are the ICCPR, the UDHR, the Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, art. 1, 144 U.N.T.S. 123, (entered into force Sept. 2, 1990) [hereinafter CRC]; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 1, 993 U.N.T.S. 3, (entered into force Jan. 3, 1976), the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, art. 1, 1249 U.N.T.S. 13, (entered into force Sept. 3, 1981), and the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 1, S. Exec. Doc. C, 95-2, at [S. Exec. Doc. page] (1978), 660 U.N.T.S. 195, [U.N.T.S.] (entered into force Jan. 4, 1969) [hereinafter Race

protecting human rights when the asylum-seeker's home country is unable to offer such protection.[22] The human rights approach emphasizes the human rights obligations of receiving states toward asylum-seekers and other refugees.[23] That is, domestic courts must adjudicate asylum claims in accordance with international human rights norms, as well as domestic law.[24]

The human rights approach manifests itself most prominently through domestic court interpretation of undefined terms in the Refugee Convention, such as "being persecuted."[25] According to

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Convention]. *See* Roger Haines QC, Deputy Chair, Refugee Status Appeals Auth., Paper given at the IARLJ Australia/New Zealand Chapter Meeting: The Intersection of Human Rights Law and Refugee Law: On or Off the Map: The Challenge of Locating *Appellant S395/2002* ¶ 9 (June 9, 2004), *available at* http://www.refugee.org.nz/Reference/Sydney04.html (arguing the more principled approach is for courts to determine the nature of the "right" asserted by the claimant, prior to addressing the issue of risk).

22. According to Deborah Anker, the human rights approach assists both the refugee law and human rights regimes. *See* Deborah Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 Harv. Hum. Rts. J. 133, 143 (2002) [hereinafter Anker (2002)]. (It aids, for example, the refugee law regime by elevating its status above that of "poor cousin" within the human rights milieu, and it aids the human rights regime by showing that human rights treaties can have demonstrable, positive impacts (e.g., helping an individual obtain protection from persecution or other serious harm)). Some scholars have critiqued Hathaway's conception of the human rights approach as too limited. For example, Kate Jastram's critique is more structural, as she asserts "significant differences between human rights analysis and refugee status determination," suggesting that it is difficult to align the two regimes in any meaningful way. *See* Kate Jastram, *Economic Harm as a Basis for Refugee Status and the Application of Human Rights Law to the Interpretation of Economic Persecution* in Critical Issues in International Refugee Law 143 (James C. Simeon, ed., 2010).

23. Guy Goodwin-Gill "Refugees and their Human Rights", Refugee Studies Centre Working Paper No. 17 (Oxford, Refugee Studies Centre, 2004), *available at* http://www.rsc.ox.ac.uk/PDFs/workingpaper17.pdf.; Hathaway (2005), *supra* note 19; Hélène Lambert, *Protection against refoulement from Europe: human rights law comes to the rescue* (1999) ICLQ, 48:515-44; Hélène Lambert, *The European Convention on Human Rights and the protection of refugees: limits and opportunities* (2005) RSQ, 24: 39–55.

24. Hathaway & Foster, *supra* note 16, at 194.

25. In addition to providing a means of interpreting the Refugee Convention, human rights treaties have assisted refugees in at least two other ways: first, they include procedural protections not delineated in the Refugee Convention. Thus, for example, Article 12 of the Convention on the Rights of the Child requires States Parties to afford children "the opportunity to be heard in any judicial and administrative proceedings affecting the child . . . ." CRC, *supra* note 21, article 12.2. And second, they offer complementary or subsidiary protection to noncitizens, providing a source of relief independent of the protection

proponents of this approach, it is appropriate—and logical—to rely on human rights treaties because these treaties reflect a global consensus about the scope of persecutory harms.[26] As such, they offer a more objective approach than an individual state's view about whether conduct constitutes persecution under the Refugee Convention, and provide a bulwark against arguments that the harm asserted by a claimant is considered acceptable within a particular country or culture.[27] Human rights treaties also ensure that the standard for what constitutes persecution remains dynamic, adapting to evolving norms and conditions throughout the world.[28]

Upper level courts in numerous common law countries have, to varying degrees, adopted the human rights approach to asylum law over the past two decades.[29] Thus, for example, in *Gashi v. Secretary*

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offered by the Refugee Convention. Complementary protection is grounded on the international law principle of *non-refoulement*, which prohibits a country from returning a non-citizen to a territory where she is likely to face torture or cruel, inhuman, or degrading treatment or punishment. *See generally* Jason Pobjoy, *A Child Rights Framework for Assessing the Status of Refugee Children*, Cambridge University Legal Studies Research Paper Series, Paper No. 27/2013 (2013) at 29; Michelle Foster, International Refugee Law and Socio-Economic Rights 28, 34 (2007); Jane Mcadam, Complementary Protection In International Refugee Law (2007); Jastram, *supra* note 22; Guy Goodwin-Gill & Jane Mcadam, The Refugee In International Law (2007); Anker (2002), *supra* note 22, at 143; Hathaway (2005), *supra* note 19.

26. Hathaway & Foster, *supra* note 16 at 194.

27. Hathaway & Foster, *supra* note 16 at 194.

28. Hathaway & Foster, *supra* note 16 at 194–95 (citing *Bayatyan v. Armenia*, Application no. 23459/03, ¶¶ 98, 102 (Eur. Ct. H.R. July, 7, 2011), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105611. It is:

> of crucial importance that the [Refugee] Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory . . . . [The] Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today . . . .

See Hathaway & Foster, *supra* note 16, at 362–63 (explaining that this evolving approach to the interpretation of the Refugee Convention is exemplified by the "membership in a particular social group" grounds for asylum, which has evolved in recent years to include persecution based on gender, sexual orientation, family, age, and disability).

29. For a comprehensive summary of the increasing acceptance of the human rights approach by common law courts, civil law decision-makers, the UNHCR, and human rights scholars, *see* Hathaway & Foster, *supra* note 16, at 196–208. In addition, through documents such as its Handbook, the UNCHR has demonstrated support for this approach. *See* U.N. High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status,

of State for the Home Department, the U.K. Immigration Appeal Tribunal held that "the principles of an internationally shared surrogate protection, rooted in fundamental human rights, constitutes the basic approach to interpreting the word 'persecution.'"[30] Moreover, there is a consensus among senior courts in most common law countries (as well as decision-makers in many civil law countries) that the rather broad contours of the Refugee Convention notion of "being persecuted" should be interpreted by taking into account the broader international human rights framework.[31] Additionally, most scholars also favor a broadening of the Refugee Convention's definition of "refugee" that is consistent with human rights principles.[32]

Courts and administrative agencies in the United States, on the other hand, rarely follow the human rights approach.[33] Thus,

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HCR/IP/4/Eng/REV.1 (Jan. 1992) [hereinafter "UNHCR Handbook" or "Handbook"].

30. [1997] INLR 96. This reasoning was adopted by the U.K. Court of Appeal (*see*, *e.g*., Amare v. Secretary of State for the Home Department [2005] A11 ER (D) 300) and the House of Lords (which has now become the U.K. Supreme Court) (*see, e.g.*, *R v. Immigration Appeal Tribunal, ex parte Shah* [1999] Imm 2 A.C. 629; 644B-H, 648B, 651A, 652C, 653F, 658H).

31. *See* Pobjoy, *supra* note 25, at 28 n.157.

32. *See, e.g.*, Goodwin-Gill & Mcadam, *supra* note 25, at 91, 131–33; A. Zimmerman & C. Mahler, *Article 1A, para. 2 (Definition of the Term 'Refugee')*, *in* The 1951 Convention Relating To The Status Of Refugees And Its 1967 Protocol: A Commentary 346–47 (A. Zimmerman ed., 2011); Anker (2014), *supra* note 1, at 198–210; Kay Hailbronner et al., EU Immigration And Asylum Law: Commentary On EU Regulations And Directives 1067 (Kay Hailbronner ed., 2010); Hemme Battjes, European Asylum Law And International Law 289 (Elspeth Guild & Jan Niessen eds., 2006); Hathaway & Foster, *supra* note 16, at 196–97. Hathaway and Foster also argue that the principle of non-discrimination enshrined in treaties like CEDAW and CERD should inform the interpretation of the Refugee Convention's "for reasons of" clause, which requires a nexus between the harm feared and one of the five Convention grounds for asylum. Hathaway & Foster, *supra* note 16, at 390–91.

33. *See* Michelle Foster, Int'l Refugee Law and Socio-Economic Rights: Refuge from Deprivation (2007). However, one example of an explicit embrace of the human rights approach in interpreting the meaning of "persecution" under the Refugee Convention is the opinion in *Stenaj v. Gonzalez*, which held that "whether the treatment feared by a claimant violates recognized standards of basic human rights can determine whether persecution exists." Stenaj v. Gonzalez, 227 F. App'x 429, 433 (6th Cir. 2007) (*citing* Abay v. Ashcroft, 368 F.3d 634, 638–39 (6th Cir. 2004) (citing the Report of the Committee on the Elimination of All Forms of Discrimination Against Women, the Declaration on the Elimination of Violence Against Women, and the U.N. General Assembly in support of its finding that female genital mutilation "has been internationally

when U.S. courts adjudicate asylum cases, they normally focus on the U.S. domestic statute governing asylum (the Refugee Act of 1980, which adopted the Refugee Convention's definition of "refugee"), adhering to U.S. precedent on statutory interpretation.[34] They rarely refer to human rights treaties or foreign court interpretations of the Refugee Convention for guidance.[35] This aversion to relying on human rights norms in interpreting domestic statutes was articulated most dramatically by Justice Scalia (the author of the majority opinion in *Elias-Zacarias*) who referred to international human rights law as the new "brooding omnipresence in the sky."[36]

While this contrast in approaches to deciding asylum claims is interesting from a comparative jurisprudential standpoint, the more immediate issue is whether it makes a difference for asylum-seekers. That is, do asylum-seekers in those countries that have adopted the human rights approach to asylum law fare better in the asylum process than they would in the United States?[37] This Article considers this question within the context of whether "political opinion" under the Refugee Convention includes political neutrality. That is, does human rights law allow for a broader interpretation of "political opinion" than is the case under U.S. law? And if so, do applicants whose claims are based on neutrality have a greater chance of obtaining asylum in countries that embrace the human rights approach?

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recognized as a violation of women's and female children's rights")); *see also* Ngengwe v. Mukasey, 543 F.3d 1029, 1035 (8th Cir. 2008) (noting that the United Nations Committee on Economic, Social, and Cultural Rights "[deplores] the continuing discriminatory practices against women and girls which impede the enjoyment of their rights . . . ."); Hathaway & Foster, *supra* note 16, at 196, n.80.

34. Marouf, *supra* note 15, at 393.

35. *Id.* According to Marouf, this failure to consider sister signatories' interpretations of the Refugee Convention contravenes the U.S. Supreme Court's directive that such interpretations are entitled to "considerable weight." *Id*. (*citing Abbott v. Abbott*, 130 S. Ct. 1983, 1993 (2010)).

36. William S. Dodge, *Justice Scalia on Foreign Law and the Constitution*, Opinio Juris (Feb. 22, 2006, 2:19 PM), http://opiniojuris.org/2006/02/22/justice-scalia-on-foreign-law-and-the-constitution (quoting Justice Scalia's remarks in a speech at the American Enterprise Institute).

37. During the four year period between 2009 and 2012 (the last year for which data is available in both countries), the asylum grant rate was 51.5% in the United States and 31.6% in the United Kingdom. *See* U.S. Dep't of Justice, FY 2013 Statistics Yearbook (2014), *available at* http://www.justice.gov/eoir/statspub/fy13syb.pdf; House of Commons Library, Asylum Statistics (2014), *available at* http://socialwelfare.bl.uk/subject-areas/services-client-groups/asylum-seekers-refugees/houseofcommonslibrary/163170SN01403.pdf. Of course, numerous factors contribute to the asylum grant rate in a particular country.

The answers to these questions will contribute to the scholarship on the human rights approach to asylum in at least two ways: first, they will suggest whether that approach offers guidance on the meaning of "political opinion," "being persecuted," and "for reasons of" under the Refugee Convention; and second they will suggest how that approach might—or might not—enhance protection for refugees whose asylum claim are based on political neutrality.

In addition, this Article supplements my previous research on the impact of human rights treaties on domestic court asylum jurisprudence, by considering whether a country's adoption of the human rights approach provides more effective protection to asylum-seekers.[38] In empirical studies of published decisions in Canada and the United Kingdom since the early 1990s, I found statistically significant relationships between references to human rights treaties that assisted refugees to obtain asylum or complementary protection and two variables: whether the destination country had incorporated the treaty into its domestic law, and the gender of the applicant.[39] I also found that in certain situations, human rights-based claims can hurt asylum-seekers, such as when refugee lawyers overuse them to the point that they obfuscate an otherwise straightforward case

38. *See* Stephen Meili, *Do Human Rights Treaties Help Asylum-Seekers? Lessons from the U.K.*, 48 Vanderbilt J. Transnat'l L. 123 (2015) (exploring the connection between human rights and the protection of asylum seekers) [hereinafter Meili (2015)]; Stephen Meili, *When Do Human Rights Treaties Help Asylum-Seekers? A Study of Theory and Practice in Canadian Jurisprudence Since 1990*, 51 Osgoode Hall L.J. 625 (2014) [hereinafter Meili (2014)]. This research relates, in turn, to the broader question of the effectiveness of human rights treaties more generally, which has been the subject of considerable scholarship over the past 15 years. *See generally* Ryan Goodman & Derek Jinks, Socializing States: Promoting Human Rights Through International Law (Oxford Univ. Press ed., 2013); Alison Brysk & Arturo Jimenez-Bacardi, *The Politics of the Globalization of Law*, in The Politics Of The Globalization Of Law: Getting From Rights To Justice 1–25 (Alison Brysk, ed., 2013); Oona Hathaway, *The Promise and Limits of the International Law of Torture,* in Torture: A Collection 199–212 (Sanford Levinson, ed. 2004); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L.J. 1937 (2002); Pammela Quinn Saunders, *The Integrated Enforcement of Human Rights*, 45 N.Y.U. J. Int'l L. & Pol. 97 (2012).

39. These empirical studies included published decisions from administrative tribunals and appellate courts, as well as interviews with refugee lawyers, in both countries. In both Canada and the United Kingdom, judicial decisions involving female applicants were more likely than decisions involving male applicants to contain references to human rights treaties that assisted the applicant in obtaining protection. *See* Meili (2015), *supra* note 38; Meili (2014), *supra* note 38.

under the Refugee Convention.[40] This Article considers whether a country's adoption of the human rights approach to asylum law merits inclusion on the list of variables that influence the effectiveness of human rights treaties in the asylum context.

In order to place the analysis of these issues in the proper procedural context, this Article will now briefly review the asylum adjudication processes in both the United States and the United Kingdom.

II. BACKGROUND ON ASYLUM LAW IN THE UNITED STATES AND THE UNITED KINGDOM

The domestic law of asylum in both the United States and the United Kingdom is based on the Refugee Convention and the 1967 Protocol.[41] The United States incorporated these treaties into its domestic law through the Refugee Act of 1980.[42] That statute amended the Immigration and Nationality Act of 1965 ("INA"), and adopted a definition of "refugee" virtually identical to the Refugee Convention.[43]

The United Kingdom's Asylum and Immigration Appeals Act 1993 requires the Secretary of State to act in accordance

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40. *Id.*

41. The United States has never ratified the Refugee Convention, but acceded to the 1967 Protocol. *See* Anker (2014), *supra* note 1, at 2–10; Mark Symes & Peter Jorro, Asylum Law and Practice 1–6 (2010); Dallal Stevens, U.K. Asylum Law and Policy: Historical and Contemporary Perspectives 127–30 (2004).

42. *See* Anker (2014), *supra* note 1, at 2 (indicating that the purpose of the Refugee Act was to harmonize U.S. law with the Refugee Convention). The U.S. approach to refugee status determinations prior to the passage of the Refugee Act has been described as *ad hoc*. Marouf, *supra* note 15, at 398, n.20 (citing Deborah Anker & Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,* 19 San Diego L. Rev. 9 (1981)).

43. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 437 (1987) (explaining that the legislative history of the Refugee Act demonstrates Congress' intent was to harmonize US law with the Refugee Convention). The main difference between the two definitions is that the Refugee Convention requires an applicant for asylum to demonstrate that she has a well-founded fear of persecution "for reasons of" one or more of the five enumerated grounds for protection (race, religion, nationality, political opinion, and membership in a particular social group), whereas the 1980 Refugee Act requires an applicant to demonstrate that her well-founded fear of persecution is "on account of" one or more of the same five enumerated grounds. *See* Refugee Convention, *supra* note 1, Article I(A)(2); INA § 101(a) (42)(A), 8 U.S.C.§ 1101 (a)(42)(A)(2011).

with the Refugee Convention with respect to immigration rules, administrative practices, and procedure.[44] Moreover, according to the Treaty Establishing the European Community, of which the United Kingdom is a Member, the common asylum policy across the European Union "must be in accordance" with the Refugee Convention and the 1967 Protocol.[45]

In broad outline, the asylum adjudication systems in the United States and the United Kingdom are very similar.[46] In both

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44. *See* Symes & Jorro, *supra* note 41, at 4–5 (noting that although the United Kingdom has never fully incorporated the Refugee Convention into its domestic law, according to section 2 of the Asylum and Immigration Appeals Act, which is entitled "Primacy of Convention," "Nothing in the immigration rules . . . shall lay down any practice which would be contrary to the [Refugee] Convention." Moreover, in section 1 of the Act, "claim for asylum" is defined as "a claim made by a person . . . that it would be contrary to the United Kingdom's obligations under the [Refugee] Convention for him to be removed from, or required to leave, the United Kingdom.").

45. Treaty Establishing the European Community art. 78, ¶ 1 states, in relevant part:

> The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the [Refugee Convention] and the [1967 Protocol], and other relevant treaties.

See also Symes & Jorro, *supra* note 41, at 2–3.

46. In addition to asylum, other forms of refugee protection outside the Refugee Convention are available in each country. In the United States, these alternatives include humanitarian asylum, which is available when there are "compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution" or if "[t]he applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country." 8 C.F.R. § 208.13(b)(1)(iii). Another form of relief in the United States is Temporary Protected Status, which protects persons from removal to countries experiencing armed conflict or environmental disaster. *See* INA §244, 8 U.S.C. §1254a. A third alternative is withholding of removal, which prohibits the United States from returning to her country of origin a person who is more likely than not to suffer persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. *See* INA §241 (b)(3)A). In the United Kingdom, an individual can submit a claim for complementary protection or a "human rights claim" under the ECHR and the Human Rights Act. *See* Maria O'Sullivan, *The Intersection Between the International, the Regional and the Domestic*: *Seeking Asylum in the U.K.*, *in* Refugees, Asylum Seekers and the Rule of Law: Comparative Perspective 228, 251 (Susan Kneebone ed., 2009). However, none of these forms of protection offer applicants the same citizenship rights to which asylees are entitled. McAdam, *supra* note 25 at 5, 12–13; Jean-Francois Durieux, *Salah Sheekh is a Refugee:*

countries, governmental agencies with authority over immigration matters make the initial decision: in the United States, the decision-maker is an asylum officer within the Department of Homeland Security.[47] In the United Kingdom, the initial determination is made by U.K. Visa and Immigration (formerly the U.K. Border Agency), which is part of the Home Office.[48]

If asylum is not granted at the initial stage, the applicant in each country may pursue the matter before an administrative tribunal: an immigration judge in the United States and the First Tier of the Immigration and Asylum Chamber of the Tribunal Service (IAT) in the United Kingdom.[49] Each of these tribunals considers asylum claims *de novo.*[50] If an applicant is unsuccessful at the initial administrative level, she may appeal to a higher administrative body: the Board of Immigration Appeals ("BIA") in the United States and the Upper Tribunal of the IAT ("Upper Tribunal") in the United Kingdom.[51] In either country, if an applicant is unsuccessful at this

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New Insights into Primary and Subsidiary Forms of Protection, Refugee Studies Centre Working Paper Series No. 49, Oct. 2008, at 8. Thus, asylum is the preferred form of relief for refugees and their advocates.

47. Anker (2014), *supra* note 1, at 28.

48. *See* Robert Thomas, Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication 16–25 (2011) (listing a summary of the many changes in the U.K. refugee status determination system over the past two decades). *See also* O'Sullivan, *supra* note 46, at 251; Sarah Craig and Maria Fletcher, *The Supervision of Immigration and Asylum Appeals in the U.K. — Taking Stock*, 24 Int'l J. Refugee L. 1, 60–84 (2012) (providing a detailed analysis of the impact of recent legislative reforms on appellate rights within the U.K. asylum adjudication process).

49. In the First-tier Tribunal, appeals are heard by one or more judges. Anker (2014), *supra* note, 1 at 29; *Immigration and Asylum Chamber: First-tier Tribunal Guidance*, Ministry of Justice (Oct. 20, 2014), http://www.justice.gov.uk/tribunals/immigration-asylum.

50. *See* Marouf, *supra* note 15, at 399.

51. The Upper Tribunal is comprised of 40 full-time judges, who hear cases individually or in panels of two or three, depending on the scope and importance of the case. Robert Thomas, *Refugee Roulette: A U.K. Perspective*, *in* Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform, 164 (Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag eds., 2009); Symes & Jorro, *supra* note 41, at 875–1112. Judges who only occasionally hear appeals to the Upper Tribunal are those who have other positions in the judiciary, as well as some part-time judges who are either recently retired or still in professional practice. *See Upper Tribunal Immigration and Asylum Chamber*, Ministry of Justice, http://www.justice.gov.uk/tribunals/immigration-asylum-upper (last visited Mar. 10, 2015); s*ee also About Us*, HM Courts and Tribunals Service, http://www.justice.gov.uk/about/hmcts/tribunals (last visited Mar. 10, 2015). For a

level, she may appeal to a court of appeal and, ultimately, to the nation's Supreme Court.[52]

III. NEUTRALITY AS GROUNDS FOR ASYLUM IN THE UNITED STATES

Although the U.S. Supreme Court in *Elias-Zacarias* questioned the doctrine of political neutrality as the basis for asylum, earlier cases show support for the idea that such neutrality is the expression of a political opinion and thus worthy of protection under the Refugee Act. This idea was first articulated by the Ninth Circuit in *Bolanos-Hernandez v. I.N.S*.[53] Mr. Bolanos-Hernandez, a native and citizen of El Salvador, fled to the U.S. amid the conflict between government forces and guerillas in his country. He asserted that he favored neither side, but that he would be persecuted for refusing to join either should he be deported. In overturning the BIA's rejection of his claim, the Ninth Circuit held that neutrality is, in fact, a political opinion: "Choosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction."[54]

Judge Reinhardt, who authored the decision in *Bolanos-Hernandez*, did not refer to international norms in recognizing neutrality as the basis for a political opinion claim. He based his decision entirely on statutory interpretation of the 1980

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more detailed description of the asylum adjudication system in the United Kingdom, see Meili (2015), *supra* note 38, at 139–41.

52. In the United States, appeals of BIA decisions are made to the federal circuit court of appeals (bypassing the federal district courts) and then to the U.S. Supreme Court. In the United Kingdom, appeals of Upper Tribunal decisions are made to the Court of Appeal in England and Wales, the Court of Session Inner House in Scotland, and the Northern Ireland Court of Appeal in Northern Ireland. All appeals from those courts are heard by the United Kingdom Supreme Court, which assumed the judicial functions of the House of Lords in 2009. *See* Symes & Jorro, *supra* note 41, at 875–1112; *Appeal a decision by the immigration and asylum tribunal*, GOV.UK, http://www.justice.gov.uk/tribunals/immigration-asylum-upper/appeals (last visited Apr. 13, 2015); *see* A guide to bringing a case to The Supreme Court ¶¶ 1.1, 1.2, *available at* http://supremecourt.uk/docs/a-guide-to-bringing-a-case-to-the-uksc.pdf; *see also Appeals to the Supreme Court*, The Crown Prosecution Service, http://www.cps.gov.uk/legal/a_to_c/appeals_to_the_supreme_court/ (last visited Apr. 13, 2015).

53. 767 F.2d 1277 (9th Cir. 1984).

54. *Id*. at 1286.

Refugee Act. However, in his subsequent opinion in *Hernandez-Ortiz v. I.N.S,*[55] issued in 1985, he explicitly referenced the UNHCR Handbook for the proposition that a government's persecution of persons to whom it attributes a political opinion (even erroneously) is persecution on account of political opinion.[56] He also referenced the UNHCR Handbook regarding the interpretation of the "well-founded fear" requirement.[57] In making these references, Judge Reinhardt noted that the Handbook "contains standards for interpreting the United Nations Protocol for the Status of Refugees . . . to which the United States acceded in 1968, and informed Congress' actions when it passed the Refugee Act in 1980."[58] He also observed that the BIA, as well as several federal courts (including the U.S. Supreme Court), had referred to the Handbook for guidance.[59] Similarly, in *Barraza v. I.N.S.*, the Ninth Circuit explicitly relied on the Handbook in interpreting the meaning of "persecution . . . on account of . . . political opinion."[60] Thus, early U.S. jurisprudence on the scope of "political opinion" under the Refugee Convention relied on international norms, as articulated by the UNHCR.

The Ninth Circuit continued to expand the doctrine of neutrality throughout the mid–1980s and early 1990s in a series of cases that linked neutrality to imputed political opinion.[61] That is, as long as the persecutor *thought* that the applicant held an opposing political opinion, it did not matter whether the applicant actually had

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55. Hernandez-Ortiz v. I.N.S., 777 F.2d 509 (9th Cir. 1985).

56. *Id*. at 517. The U.S. Supreme Court had previously identified the UNHCR Handbook as a significant source of statutory interpretation in *Cardoza-Fonseca*, 480 U.S. at 438.

57. *Hernandez-Ortiz*, 777 F.2d at 514 n.3.

58. *Id*.

59. *Id*. As Marouf notes, the U.S. Supreme Court "has confirmed Congress's intent to actualize our international obligations based on the legislative history of the Refugee Act and the adoption of a definition of 'refugee' that mirrors the definition in the Protocol." Marouf, *supra* note 15, at 398, n.25 (citing *Cardoza-Fonseca*, 480 U.S. at 436–37).

60. Barraza Rivera v. I.N.S., 913 F.2d 1443, 1451 (9th Cir. 1990). In that case, the Ninth Circuit determined that an asylum-seeker may qualify for relief under the Immigration and Nationality Act after desertion from military conscription or draft evasion if he or she can show that continued military service would have compelled the applicant to engage in activities "contrary to basic rules of human conduct." *Id.* at 1451 (quoting UNHCR Handbook, *supra* note 29, at ¶¶ 170–71).

61. *See* Anker (2014), *supra* note 1, at 328.

any opinion at all for purposes of obtaining asylum.[62] Indeed, in *Hernandez-Ortiz v. I.N.S.*, the Ninth Circuit articulated an explicit presumption that when the government exerts its military strength against members of society who have clearly not committed any crime or other actions justifying such use of force, the government's actions are politically motivated.[63] Such decisions lightened the applicant's burden of establishing that her persecution was "on account of . . . political opinion." As long as she could demonstrate that the persecutor believed (however erroneously) that she opposed the government, the nexus requirement would be satisfied.

The trend in easing the "on account of" burden under U.S. law came to an abrupt halt in *Elias-Zacarias v. I.N.S*.[64] Mr. Elias-Zacarias, a native of Guatemala, sought asylum in the United States after guerillas in that country had unsuccessfully attempted to recruit him for their cause in 1987.[65] Mr. Elias-Zacarias testified that he did not want to join the guerillas because they were against the government and he feared that if he joined the guerillas the government would retaliate against him.[66] The Ninth Circuit found in favor of Mr. Elias-Zacarias on the grounds that acts of conscription by a nongovernmental entity such as the guerillas in Guatemala constitute persecution on account of political opinion because "the person resisting forced recruitment is expressing a political opinion

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62. *See* Lazo-Majano v. I.N.S., 813 F.2d 1432 (9th Cir. 1987); Beltran-Zavala v. I.N.S., 912 F.2d 1375 (9th Cir. 1990); Auilera-Cota v. I.N.S., 914 F.2d 1375 (9th Cir. 1990); s*ee also* Anker (2014), *supra* note 1, at 325–27.

63. Hernandez-Ortiz, 777 F.2d at 516. This presumption was based on the Ninth Circuit's observation that:

> A government does not under ordinary circumstances engage in political persecution of those who share its ideology, only of those whose views or philosophies differ, at least in the government's perception. It is irrelevant whether a victim's political view is neutrality, as in *Bolanos-Hernandez,* or disapproval of the acts or opinions of the government. Moreover, it is irrelevant whether a victim actually possesses any of these opinions as long as the government believes that he does.

Id. at 517.

64. *See* Bruce J. Einhorn, *Political Asylum in the Ninth Circuit and the Case of Elias-Zacarias*, 29 S.D. L. Rev. 597, 609–11 (1992); *See also* Musalo, *supra* note 8.

65. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 479–80 (1992).

66. *Id*. at 480.

hostile to the persecutor and because the persecutor's motive in carrying out the kidnapping is political."[67]

The U.S. Supreme Court, with Justice Scalia writing for the majority, reversed.[68] In an opinion criticized for its remarkable "brevity and lack of analytical content,"[69] the majority questioned, but did not outright reject, neutrality as a basis for asylum. Initially it categorically denied that someone who resists forced recruitment is expressing a political opinion (such an assertion "seems to us untrue").[70] Later in the opinion, however, the majority softened its view somewhat:

> Elias-Zacarias appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion. *That seems to us not ordinarily so*, since we do not agree with the dissent that only a "narrow, grudging construction of the concept of 'political opinion'" . . . should distinguish it from such quite different concepts as indifference, indecisiveness, and risk averseness.[71]

The majority thus drew a distinction between an affirmative statement of political neutrality and neutrality based on "indifference, indecisiveness, and risk averseness."[72] Merely sitting on the sidelines does not suffice. A successful applicant must make an affirmative—one assumes outspoken—expression of neutrality. In addition to finding that Mr. Elias-Zacarias had failed to affirmatively express his neutrality in a way that would transform it into a political opinion, the majority held that Mr. Elias-Zacarias had failed to establish that he had a well-founded fear that the guerillas would persecute him "on account of" that opinion.[73] Under this part of the ruling, an applicant must divine the persecutor's intent: that he or she intended to persecute the applicant because of the applicant's political opinion.[74]

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67. *Elias-Zacarias v. I.N.S.*, 921 F.2d 844, 850 (9th Cir. 1990).
68. *Elias-Zacarias*, 502 U.S. at 484.
69. *See* Musalo, *supra* note 8, at 1190.
70. *Elias-Zacarias*, 502 U.S. at 481.
71. *Id.* at 483 (emphasis added).
72. *Id*.
73. *Id*.
74. *Id.* (finding that since the statute makes motive critical, the plaintiff must provide *some* evidence, direct or circumstantial, of the persecutors' motive to persecute him *because of* the political opinion). According to Karen Musalo, this intent requirement is at odds with the Refugee Convention and 1967 Protocol, whose purpose was to protect refugees rather than to punish persecutors. *See*

In his dissent, Justice Stevens (who was joined by Justices Blackmun and O'Connor) took the majority to task for rejecting the view that neutrality is, in itself, a political opinion:

> A political opinion can be expressed negatively as well as affirmatively. A refusal to support a cause—by staying home on election day, by refusing to take an oath of allegiance, or by refusing to step forward at an induction center—can express a political opinion as effectively as an affirmative statement or affirmative conduct. Even if the refusal is motivated by nothing more than a simple desire to continue living an ordinary life with one's family, it is the kind of political expression that the asylum provisions of the statute were intended to protect.[75]

The dissent cautioned that the only persons eligible for asylum under the majority's conception of "political opinion" would be those who joined one political extreme or the other: "moderates who choose to sit out a battle would not qualify."[76] The dissent also noted that the 1980 Refugee Act "speaks simply in terms of a political opinion and does not require that the view be well developed or elegantly expressed."[77]

The majority opinion did not reference international human rights law, which is remarkable given the origins of the 1980 Refugee Act.[78] Indeed, unlike some of the Ninth Circuit's prior decisions on political neutrality as a ground for asylum, the majority did not even cite the UNCHR Handbook for authority or guidance.[79] The dissent,

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Musalo, *supra* note 8, at 1181. Moreover, the dissent argued that it ignores the legislative history of the 1980 Refugee Act, on which the Supreme Court had previously relied in ruling that in order to establish a "well-founded fear of persecution," a claimant need not prove that it was more likely than not that he or she would suffer persecution. *Elias-Zacarias*, 502 U.S. at 487 (Stevens, J., dissenting) (citing *INS v. Cardoza-Fonseca*, 480, U.S. 421 (1987)).

75. *Elias-Zacarias*, 502 U.S. at 486 (Stevens, J., dissenting).

76. *Id*. at 487.

77. *Id*. at 488 n.5.

78. In an earlier decision, the U.S. Supreme Court made explicit reference to the link between the 1980 Refugee Act and international law. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. at 436–37 ("[I[f one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol], to which the United States acceded in 1968.").

79. The briefs of both parties, as well as all three of the amicus briefs, cited to international human rights law. The Respondent's brief made numerous references to the Refugee Convention, the 1967 Protocol, and the UNCHR Handbook. *See* Brief for Respondent, INS v. Elias-Zacarias, 502 U.S. 478 (1992)

on the other hand, cited the legislative history of the 1980 Refugee Act, which referenced the Refugee Convention and the 1967 Protocol.[80]

The majority's interpretation of "persecution on account of . . . political opinion" was based entirely on the U.S. law of statutory construction, rather than on how those terms have been interpreted by international bodies or courts in other countries: "In construing statutes, 'we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'"[81]

Justice Scalia went on to conclude that the "ordinary" meaning of "political opinion" refers to the opinion of the victim rather than the perpetrator, and that not taking sides with any political faction is not "ordinarily" the affirmative expression of a

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(No. 90-1342), 1991 WL 521636. The amicus brief filed by UNHCR asserted, "verbal expression of political beliefs simply is not required under the 1951 Convention definition." Brief for UNHCR as Amici Curiae Supporting Respondents, INS v. Elias-Zacarias, 502 U.S. 478 (1992) (No. 90-1342), 1991 WL 11003948. The UNCHR brief also cited to Guy Goodwin-Gill's work for the proposition that the refusal to bear arms is a political act, and to James Hathaway's for the proposition that political opinions can be conveyed in actions as well as words. *See* Brief for Respondent, INS v. Elias-Zacarias, 502 U.S. 478 (1992) (No. 90-1342); *see also* Guy Goodwin-Gill, The Refugee in International Law 31 (Oxford University Press 1st ed. 1983); James Hathaway, The Law of Refugee Status 152 (Cambridge University Press 1st ed. 1991). Neither the majority nor the dissent referenced any of these authorities.

80. 502 U.S. at 487 (Stevens, J., dissenting). In addition, the dissent cites the UNHCR Handbook for the proposition that fear of prosecution and punishment for desertion or draft-evasion does not constitute a well-founded fear of persecution under the 1967 Protocol. *Id*. at 489.

81. 502 U.S. at 482; *see also* Richards v. Unites States, 369 U.S. 1, 9 (1962); INS. v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987); INS v. Phinapathya, 464 U.S. 183, 189 (1984). Although the majority in *Cardoza-Fonseca* looked to the plain meaning of the 1980 Refugee Act in determining that the "well-founded fear" standard does not require a showing that it is more likely than not that a claimant will be persecuted upon return to her home country, it also relied on an extensive analysis of the legislative history of the 1980 Refugee Act. 480 U.S. at 436 (citing the Refugee Convention, the 1967 Protocol, the 1946 Constitution of the International Refugee Organization, and the UNHCR Handbook). Justice Stevens, who authored the dissent in *Elias-Zacarias*, wrote the majority opinion in *Cardoza-Fonseca*. Justice Scalia concurred with the decision in *Cardoza-Fonseca*, but objected to the majority's reliance on the legislative history of the 1980 Refugee Act in reaching that result.

political opinion.[82] His conclusions here are made without reference to any authority, foreign or domestic.[83]

The failure of the *Elias-Zacarias* majority to utilize the sources upon which the 1980 Refugee Act is based, namely international human rights law or other countries' interpretations of the treaties, was criticized by several observers shortly after the decision was published. For example, the Chair of Canada's Immigration and Refugee Board criticized the majority opinion for its failure to "cite a single international precedent, judicial or academic," and noted that most jurisdictions throughout the world had found that the refusal to join a guerilla group constitutes a political opinion.[84] This is another example of the failure of most U.S. courts to consider the interpretations of the Refugee Convention or the 1967 Protocol by other signatories to those treaties.[85]

As a result of *Elias-Zacarias*, few asylum claims have been adjudicated on the basis of political neutrality over the past two decades.[86] Rather, in most cases, neutrality claims are subsumed

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82. 502 U.S. at 482–83.

83. Even as a matter of basic statutory interpretation, one could argue that the *Elias-Zacarias* decision is flawed. The court failed to cite its own seminal precedent on the right not to express a political opinion, West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943). In that case, the Supreme Court upheld a challenge by Jehovah's Witnesses as to the constitutionality of a state law requiring children in public schools to salute the U.S. flag and pledge allegiance to the U.S. government.

84. R.G.L. Fairweather, Temporary Sanctuary Tends to Get Permanent; Political Persecution, New York Times, Mar. 7, 1992, http://www.nytimes.com/1992/03/07/opinion/l-temporary-sanctuary-tends-to-get-permanent-political-persecution-043892.html. The IRB hears all first instance claims for asylum in Canada. As a matter of asylum adjudication procedure, it is akin to the Immigration Court in the United States and the AIT in the United Kingdom. *See* Meili (2015), *supra* note 38; *see also* Meili (2014), *supra* note 38, at 634–35; Musalo, *supra* note 8, at 1191–92 (criticizing the *Elias-Zacarias* majority for ignoring international precedent when interpreting the 1980 Refugee Act); William John Wingert, *Closing the Door on Asylum-Seekers: Persecution on Account of Political Opinion after* INS v. Elias Zacarias, 13 B.C. Third World L.J. 287, 307 (1993) (noting that in its amicus curiae brief to the Supreme Court, the U.N. High Commissioner for Refugees asserted that the government's position in *Elias-Zacarias* would contravene U.N. policy by requiring a higher standard of proof for humanitarian relief and by rejecting forced recruitment as a political activity that can justify refugee relief).

85. *See* Marouf, *supra* note 15.

86. *See* Anker (2014), *supra* note 1, at 372–74. One branch of the political neutrality doctrine that has survived *Elias-Zacarias*, at least in the Ninth Circuit, is known as "hazardous neutrality." Thus, in *Navas v. INS*, 217 F.3d 646 (9th Cir.

under the category of imputed political opinion.[87] That is, the applicant asserts that the persecutor has interpreted her neutrality as a sign of political opposition and persecuted her as a result. For example, in *Singh v. Ilchert*, the Ninth Circuit granted asylum to the applicant because the Indian government persecuted him due to its erroneous belief that he was a supporter of Sikh separatists.[88] This argument has been endorsed by U.S. Customs and Immigration Services, whose Asylum Office notes that "the persecutor may impute an opposition political opinion to anybody who is neutral."[89]

Even in the Ninth Circuit, where the neutrality doctrine was once robust, the court requires more than refusal to participate in a conflict in order to allow asylum based on neutrality. For example, in *Rivera-Moreno v. INS*, the Ninth Circuit suggested that the refusal to join any political faction, by itself, is "not ordinarily" an "affirmative

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2000) the Court noted that since the *Elias-Zacarias* decision, the Ninth Circuit has "stated unequivocally that its pre-*Elias-Zacarias* decisions holding that persecution on account of political neutrality in an environment in which political neutrality is 'fraught with hazard' is a basis for asylum." *Id*. at 656 (citing Sangha v. INS, 103 F.3d 1482 (9th Cir. 1997)). On the other hand, the Eleventh Circuit takes a much more restrictive approach, rejecting the Ninth Circuit's "political opinion" interpretation as including neutrality. *See* Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292 (11th Cir. 1990). According to the Eleventh Circuit, the Ninth Circuit's interpretation would "create a sinkhole that would swallow the rule." *Id*. at 1298. The First Circuit has taken something of a middle ground on the issue, requiring an applicant whose claim is based on political neutrality to demonstrate a well-founded fear of one of the following: (1) a group with the power to persecute him intends to do so specifically because the group dislikes neutrals, or (2) such a group intends to persecute him because he will not accept its political point of view, or (3) one or more groups intend to persecute him because each (incorrectly) thinks he holds the political views of the other side. Novoa-Umania v. INS, 896 F.2d 1, 3 (1st Cir. 1990). Of course, both *Novoa-Umania* and *Perlera-Escobar* predate *Elias-Zacarias.* The lack of post-*Elias-Zacarias* jurisprudence on neutrality from either the First or Eleventh Circuits renders it difficult to conclude that a circuit split exists on this issue. *See also* Mark G. Artlip, *Neutrality as Political Opinion: A New Asylum Standard for a Post-*Elias-Zacarias *World,* 61 Chi. L. Rev. 559 (1994); Bruce J. Einhorn, *Political Asylum in the Ninth Circuit and the Case of* Elias-Zacarias, 29 S.D. L. Rev. 597 (1992); Mark R. von Sternberg, *Emerging Bases of "Persecution" in American Refugee Law: Political Opinion and the Dilemma of Neutrality*, 13 Suff. Transnat'l. L.J. 1 (1990).

87. *See* Anker (2014), *supra* note 1, at 372–74.

88. 69 F.3d 375 (9th Cir. 1995).

89. *See* Asylum Officer Basic Training Course, *Asylum Eligibility*, *Part III: Nexus and the Five Protected Characteristics* 57 (Mar. 12, 2009).

expression of a political opinion."[90] Courts now require some form of affirmative expression of neutrality.[91] Thus, in *Tecun-Florian v. INS*, the Ninth Circuit held that even though the applicant had testified that he was told by the Guatemalan guerillas that tried to recruit him that they were persecuting him because he refused to join them, such evidence was not sufficient to justify asylum.[92] The Ninth Circuit explicitly (and one might assume bitterly) stated that it was "bound by the authority of *Elias-Zacarias,*" and refused to reverse the BIA's determination that the guerillas' persecution of Tecun-Florian was not motivated by their perception of his religious or political beliefs.[93]

As the following discussion of the U.K. Supreme Court's decision in *RT (Zimbabwe)* highlights, the U.S. Supreme Court's narrow view of what constitutes a political opinion is at odds with the

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90. 213 F.3d 481, 483 (9th Cir. 2000). This conclusion seems to be strongly influenced by the very similar language in the majority opinion in *Elias-Zacarias*. *See* 502 U.S. at 483; *see also* Ramos-Vasquez v. INS, 57 F.3d 857, 863 (9th Cir. 1995) (holding that while political neutrality can be the basis for asylum in the Ninth Circuit, the claimant must do more than simply avow his neutrality; he must show that he had "articulated [it] sufficiently for it to be the basis of his past or anticipated persecution").

91. *See* Umanzor-Alvarado v. INS, 896 F.2d 14 (1st Cir. 1990) (holding that neutrality may be considered a political opinion where the applicant affirmatively chose to remain neutral, articulated that opinion, and had been or reasonably could be singled out for persecution on the basis of that neutrality); *see also* Rivera-Moreno v. INS, 213 F.3d 481 (9th Cir. 2000) (finding that applicant did not establish that guerillas sought to persecute her because of her neutrality).

92. *See* Tecun-Florian v. INS, 207 F.3d 1107, 1109 (9th Cir. 2000) (holding that such "evidence presented was not so compelling that no reasonable fact finder could fail to find the requisite fear of persecution").

93. Mr. Tecun-Florian testified that his refusal to participate in the Guatemalan conflict was the result of his religious and political beliefs, but the majority found insufficient evidence linking those beliefs to the guerilla's persecution of him. *Id.* In his dissent, Judge Ferguson asserted that the majority had read *Elias-Zacarias* too broadly, and that it does not stand for the proposition that "persecution following a refusal to assist can never constitute a basis for seeking asylum." *Id.* at 1112 (Ferguson, J., dissenting). What rendered *Elias-Zacarias* inapplicable to *Tecun-Florian*, in Judge Ferguson's view, is that Mr. Tecun-Florian's aversion to the guerillas was motivated by religious and political beliefs, rather than a desire to avoid conflict. Thus, Ferguson's dissent highlights the distinction drawn by the *Elias-Zacarias* majority between politically-based neutrality and neutrality based on "indifference, indecisiveness, and risk averseness." 502 U.S. 478, 483. Indeed, in stating that "the absence of any political motive was the key to the Court's holding that Mr. Elias-Zacarias was not eligible for asylum," Judge Ferguson appears to endorse the Supreme Court's distinction between active and passive forms of political neutrality for purposes of asylum eligibility. *Id.* at 1112.

human rights norms upon which the Refugee Convention is based. As such, *Elias-Zacarias* and its progeny detract from a unified interpretation of the Refugee Convention, rendering it more susceptible to the interpretive whims and cultural biases of individual states, and thus less protective of refugees.[94] Given its position as one of the world's most prevalent destinations for asylum-seekers, with well-developed asylum jurisprudence, the United States considerably influences how other states interpret the Refugee Convention.[95] Its reluctance to engage vigorously in judicial conversations about that interpretation, however, has left its full potential unfulfilled and thus impeded the development of evolving international norms of refugee protection.[96] It also impedes the development of a unified application of human rights law more generally.

IV. NEUTRALITY AS GROUNDS FOR ASYLUM IN THE UNITED KINGDOM

In *RT (Zimbabwe)*, the U.K. Supreme Court considered whether neutrality constitutes a political opinion for purposes of asylum.[97] RT, who was deemed to be a credible witness, had never been politically active in Zimbabwe or in the United Kingdom.[98] She

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94. *See* Marouf, *supra* note 15, at 485 (positing that the U.S. courts' failure to engage with foreign courts on questions of asylum law contributes to disparate refugee policies internationally, despite common treaties and governing norms); Hathaway & Foster, *supra* note 16, at 194–95.

95. *See* Marouf, *supra* note 15, at 484 (finding that "[t]he United States is one of the largest recipients of refugees in the world, with one of the most developed and influential bodies of case law on asylum"). According to the UNHCR, the United States received over 70,000 asylum applications in 2012, the most recent year for which statistics are available. *See* United Nations High Commissioner for Refugees, Top Population Outflows by Origins: Refugees v. Asylum-Seekers 6 (2012) *available at* http://www.unhcr.org/52a722559.html (noting that the United States ranked behind only South Africa in the number of asylum applications received for that year).

96. Marouf, *supra* note 15, at 485.

97. *RT (Zimbabwe) & Ors v. Secretary of State for the Home Department*, [2012] UKSC 38 (U.K.), paras. 24–52. The Supreme Court's judgment in *RT (Zimbabwe)* also included a judgment in KM (Zimbabwe) (FC) v. Secretary of State for the Home Department, [2012] UKSC 38.

98. *Id.* paras. 5, 8. Three other claimants, in addition to RT, were before the U.K. Supreme Court. All three were determined not to be credible by First-Tier immigration judges. Two of these claimants (SM and AM) provided inconsistent testimony about their support for the opposition and their political activity generally. *Id.* paras. 6–7. The immigration judge found that the other

supported neither the government of Robert Mugabe and the ruling Zanu-PF party nor the opposition Movement for Democratic Change ("MDC").[99] She left Zimbabwe legally in 2002 and was given leave to enter the United Kingdom for six months, where she worked as a nanny for a family.[100] She overstayed her leave and claimed asylum in 2009.[101]

In ruling on RT's claim, the U.K. Supreme Court considered substantial evidence that the Mugabe regime tortured anyone who failed to profess loyalty to the Zanu-PF party.[102] Militia gangs set up

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claimant (KM) was not a reliable witness regarding events in Zimbabwe. *Id.* para.12. The Supreme Court remanded the cases of SM and AM to the Upper Tribunal in order to determine whether their lack of overall credibility would render their claims baseless. *Id.* paras. 64–65. The Supreme Court allowed KM's appeal because his son's status as a successful asylum-seeker in the United Kingdom on account of his support for the opposition MDC would be discovered by the ruling Zanu-PF party and thus place KM "in an enhanced risk category by making it more difficult for him to demonstrate his loyalty to the regime." *Id.* para. 66.

99. *Id.* paras. 5, 61.

100. *Id.* para. 4.

101. *Id.* para. 4.

102. *See id.* para. 16 (discussing the implementation of various violent acts threatened against anyone perceived to be disloyal to the Mugabe regime). One of the key differences between the asylum adjudication systems in the United States and the United Kingdom pertinent to this Article is the United Kingdom's use of so-called "Country Guidance" decisions at the Upper Tribunal. Such decisions are usually based on an extensive record of written reports from a variety of sources, as well as live testimony by experts on the country from which the claimant is seeking protection. Country Guidance decisions are considered authoritative in any subsequent appeal involving the same country of origin. *See* Symes & Jorro, *supra* note 41, at 1080–81. Once a particular claim is identified as a Country Guidance matter, the parties frequently bolster their country condition information, aware that the eventual decision will be referenced by litigants and courts in future cases, at least until circumstances within the country of origin warrant a revised Country Guidance decision. *Id.* Thus, in *RT (Zimbabwe),* the U.K. Supreme Court relied heavily on the Upper Tribunal's Country Guidance decision in *RN (Returnees) Zimbabwe CG,* [2008] UKAIT 00083, in concluding that the claimants would likely face persecution for their political neutrality if they were forced to return to Zimbabwe. *See RT (Zimbabwe)*, UKSC 38, paras. 15, 16, 57–59. This enabled the U.K. Supreme Court to determine that the claimants' fear of such persecution was "well-founded" for purposes of the Refugee Convention. *Id.* para. 42. The United States, in contrast, employs no such Country Guidance system. Country conditions are generally considered *de novo* with each asylum claim filed in the United States. Thus, in *Elias-Zacarias,* the U.S. Supreme Court made no references to (and was not bound to consider) decisions of prior courts regarding country conditions in Guatemala in determining whether

roadblocks across the country at which persons were required to produce a Zanu-PF card or sing the latest Zanu-PF campaign songs. The inability to meet these requirements was interpreted as evidence of disloyalty to the party and thus support for the opposition.[103] According to the U.K. Supreme Court:

> In deploying these militia gangs the regime 'unleashed against its own citizens a vicious campaign of violence, murder, destruction, rape and displacement designed to ensure that there remains of the MDC nothing capable of mounting a challenge to the continued authority of the ruling party.' People living in high density urban areas and rural areas were most at risk of being required to demonstrate loyalty. Those living in more affluent, lower density urban areas or suburbs were at less risk.[104]

RT's claim was denied by the Home Office and her appeal to the First-Tier of the Asylum and Immigration Tribunal was dismissed in July 2009. She appealed to the Upper Tribunal, which dismissed her appeal on the grounds that "she is in a position to explain that she has never been politically involved at home or abroad, should anyone see fit to enquire."[105] The Court of Appeal, referencing new country condition information revealing the scope of persecution of politically neutral persons by the Zanu-PF, ruled that her claim for asylum should have been allowed.[106] The Home Secretary appealed to the U.K. Supreme Court.

Prior cases involving similar Zimbabwean applicants held that whether asylum should be granted depended on the importance to the individual of the human right at issue.[107] For example, in *TM*

Mr. Elias-Zacarias's fear of retribution by the guerillas was well-founded. *See Elias-Zacarias*, 502 U.S. 478 (1992).

103. *See RT (Zimbabwe)*, UKSC 38, para. 15.

104. *Id.*, *quoting* the Asylum and Immigration Tribunal country guidance opinion in *RN (Zimbabwe),* UKAIT 00083 (2008) para. 215. The evidence in the record did not suggest that any of the applicants in *RT (Zimbabwe)* would be returning to more affluent, lower density urban areas or suburbs.

105. *Id.*, para 5.

106. RM (Zimbabwe) v. Sec'y of State for the Home Dep't, [2010] EWCA (Civ) 1285, [42]. The Court of Appeal remitted (or remanded, in U.S. jurisprudential parlance) the cases involving the non-credible witnesses to the Upper Tribunal in order to determine whether their cases would fail for lack of proof. *Id.* at [46], [52].

107. In Gomez v. Sec'y of State for the Home Dep't, INLR 549 (2000), the Court of Appeal (Civil Division) recognized that political neutrality could form the basis of an asylum claim, but focused on situations where neutrality was equated

(Zimbabwe) v. Secretary of State for the Home Department[108] the Court of Appeal held that:

> If the proposed action giving rise to the persecution is at the core of a human right, the individual is entitled to persist in it notwithstanding the consequences; he is not required to be discreet. However, if the proposed action is at the margins, persistence in the activity in the face of the threatened harm is not a situation of being persecuted and does not attract protection.[109]

The Court of Appeal went on to hold that the requirement of claiming loyalty to a ruling regime engages only the margins of the human rights of the politically indifferent. Such persons "could be expected to be . . . less than frank with the Zimbabwean authorities. They would not be required to modify their beliefs or opinions in any real way."[110]

The U.K. Home Office asserted a similar "core v. margin" argument before the U.K. Supreme Court in *RT (Zimbabwe)*. It argued that there is a distinction between "committed" political neutrals and those to whom neutrality is a matter of indifference.[111] In effect, the government averred that the Refugee Convention does not protect interference with matters at the margins of an individual's right to hold or not hold a political opinion, as opposed to those matters that lie at the core of that right. Justice Scalia adopted a similar analysis in *Elias-Zacarias* when he distinguished between those who affirmatively state their political neutrality from those whose neutrality is based on "indifference, indecisiveness, and risk averseness."[112]

A unanimous U.K. Supreme Court, with an opinion by Lord Dyson, rejected this distinction for several reasons, the foremost of which was that the right not to hold a political opinion is a fundamental right recognized in both international and human rights

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with opposition to a regime. Thus, the *Gomez* decision focuses more on neutrality leading to an imputed political opinion of opposition rather than neutrality as a protected right in itself. Interestingly, the court in *Gomez* referenced a line of Belgian decisions holding that political neutrality constituted a protected ground for asylum under the Refugee Convention. *Id.* (citing Jean-Yves Carlier, Who is a Refugee (1997) at 104 n.215).

108. [2010] EWCA Civ 916.

109. *Id.* para. 40.

110. *Id.* para. 41.

111. *RT (Zimbabwe)*, UKSC 38, para. 41.

112. 502 U.S. 478, 483 (1992).

law.[113] The Court emphasized that those sources of law draw no distinction between "margin" and "core": "[T]he right *not* to hold the protected beliefs is a fundamental right which is recognised in international and human rights law and . . . the [Refugee] Convention too. There is nothing marginal about it."[114]

The Court also noted that it is "unprincipled and unfair" to determine refugee status by reference to an individual's strength of feeling about his protected characteristic; there is no yardstick by which the intolerability of the experience could be measured.[115] Similarly, it held that: "There is no support in any of the human rights jurisprudence for a distinction between the conscientious non-believer and the indifferent non-believer[.]"[116] Lord Kerr made a similar point in his concurring opinion:

> The level of entitlement to protection cannot be calibrated according to the inclination of the individual who claims it. The essential character of the right is inherent to the nature of the right, not to the value that an individual places on it.[117]

The U.K. Supreme Court embarked on a two-part inquiry in reaching its decision to grant asylum to RT.[118] First, it analyzed whether the principle which the Court articulated in its groundbreaking 2010 decision in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* applied to RT.[119] *HJ Iran* recognized that refugee status cannot be denied to a person simply because he could conceal his homosexuality to avoid persecution.[120]

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113. *RT (Zimbabwe)*, UKSC 38, para. 42. Lord Hope, Lady Hale, Lord Clarke, Lord Wilson and Lord Reed agreed with Lord Dyson's opinion. Lord Kerr submitted a brief concurring opinion. The other reasons for the Supreme Court's rejection of the core-margin distinction are: (1) it would be difficult to draw the distinction in practice ("Where is the core/marginal line to be drawn?" (*Id.*, para. 46)); and (2) a misreading of the Court's acceptance of a core/marginal distinction in *HJ (Iran)*, which concerned the nature of the activity which the government is trying to suppress, rather than whether the right being protected is fundamental to human dignity. *Id.* para. 47.

114. *Id.* para. 42 (emphasis in original).

115. *Id.* para. 42.

116. *Id*. para. 45.

117. *Id*. para. 74.

118. *Id*. paras. 22–23.

119. HJ (Iran) v. Secretary of State for the Home Department, [2011] 1 AC 596.

120. *RT Zimbabwe*, UKSC 38, at paras. 23–27. *HJ (Iran)* has been criticized in some quarters for unnecessarily widening the scope of "well-founded fear" to include situations where the risk of harm would never accrue because the

And second, the Court considered whether there was a sufficient risk that RT would face persecution on the grounds that she would be perceived to be a supporter of the opposition MDC. That is, whether there was sufficient risk of persecution to justify an asylum claim based on an imputed political opinion. It is with respect to the first of these inquiries that the Court followed the human rights approach, concluding that the right not to hold or express an opinion is fundamental to human dignity and, as such, is within the scope of the Refugee Convention.[121]

In pursuing this inquiry, the Court first concluded that the same principle which guided its opinion in *HJ (Iran)* applied to any person who has political beliefs and is forced to conceal them in order to avoid persecution.[122] The more difficult question, which the Court addressed, involved whether that principle applied to "the person who has no political beliefs and who, in order to avoid persecution, is forced to pretend that he does."[123]

In order to answer this question, the U.K. Supreme Court first set out to establish that the right not to hold a political opinion lies within the ambit of fundamental rights deserving of international protection. In doing so, it relied heavily on both international law (i.e., treaties and other instruments) and foreign law (i.e., the law of other jurisdictions), as well as academic scholarship. Much of its analysis here centered on the question of whether the right not to

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claimants had "decided that disguising their sexual identity and avoiding conduct associated with their sexuality was the safest course of action." *See* James Hathaway and Jason Pobjoy, *Queer Cases Make Bad Law*, 44 NYU J. Int'l L. & Pol. 315, 331 (2012). Hathaway and Pobjoy also criticize the *HJ (Iran)* decision for focusing on the exogenous harms likely to accrue from an openly gay life in Iran (which, again, the claimants acknowledged they could avoid by disguising their sexuality) while ignoring the more likely endogenous harm that results from the repression of one's sexuality. *Id.* at 333, 347. Finally, Hathaway and Pobjoy fault *HJ (Iran)* for elevating certain behaviors which place openly gay persons at risk of harm (e.g., citing to the U.K. Supreme Court's identification of "a life of Kylie concerts, exotically coloured cocktails and 'boy talk' with straight female friends") to the level of fundamental reasons for risk of harm contemplated by the Refugee Convention's "for reasons of" clause. *Id.* at 339, 374 citing *HJ Iran* at 646. Hathaway and Pobjoy distinguish these activities from those which cannot be avoided without significant human rights cost. *Id.* at 335. The Hathaway and Pobjoy critique has, in turn, been criticized by other scholars. *See, e.g.*, Ryan Goodman, *Asylum and the Concealment of Sexual Orientation: Where Not to Draw the Line*, 44 NYU J. Int'l L. & Pol. 407 (2012).

121. *RT (Zimbabwe)*, UKSC 38, paras. 25–40.

122. *Id.* para. 26.

123. *Id*. para. 29.

hold and express an opinion is fundamental to human dignity. An affirmative answer to that question would undercut the basis for the distinction between core and margin consistently stressed by the Home Office, as well as by the Court of Appeals in the earlier Zimbabwean neutrality case of *TM (Zimbabwe)*.

The U.K. Supreme Court began its inquiry into the scope of the right to freedom of expression by analyzing those international instruments which recognize the importance of fundamental rights generally. Toward this end, the Supreme Court noted that the Preamble to the Refugee Convention references the UN Charter and the UDHR for the proposition that all human beings should enjoy fundamental human rights without discrimination.[124] Moreover, the Court referenced the tenth recital of the 2004 EU Qualification Directive on Asylum Law, which emphasizes respect for fundamental rights, particularly human dignity and the right to asylum.[125] Having established that international human rights instruments protect the wide exercise of fundamental freedoms without discrimination, the U.K. Supreme Court next considered whether the human right to freedom of thought, opinion, and expression extended to the freedom *not* to hold and *not* to have to express an opinion.[126] Here, too, the Court relied on international human rights norms, in particular the UN Human Rights Committee comments on ICCPR Article 18, which protects the right to freedom of thought, conscience, and religion,[127]

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124. *Id*. para. 29.

125. *Id*. para. 30. The 2004 EU Qualification Directive on Asylum Law, by which the U.K. agreed to be bound in 2006, requires EU Member States to offer protection to claimants who fear persecution and serious harm in their home countries and to ensure the maintenance of family unity. *See* Council Directive 2004/83/EC of 29 Apr. 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12 [Hereinafter *2004 Qualification Directive*]. The Tenth Recital of the 2004 Qualification Directive states: "This Directive respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members."

126. *Id.* para. 32.

127. ICCPR article 18 states:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

and ICCPR Article 19, which protects the right to freedom of opinion and expression.[128] According to General Comment 22 to Article 18, the terms "belief" and "religion" are to be "broadly construed."[129] That Comment further indicates that Article 18 protects "theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief."[130] Moreover, the Court cited the General Comment to Article 19 for the proposition that freedom of opinion and expression are "indispensable conditions for the full development of the person."[131] Of particular importance for the Court's analysis here was the admonition in the Comment on Article 19 that: "Any form of effort to coerce the holding or not holding of an opinion is prohibited. Freedom to express one's opinion necessarily includes freedom not to express one's opinion."[132]

> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

128. ICCPR article 19 states:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order . . . or of public health or morals.

129. Human Rights Committee, *General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion)* (48th session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35, para. 2 (1994).

130. *Id*.

131. Human Rights Committee, *General Comment 34: Article 19 (Freedom of Opinion and Expression)* (102nd Session, 2011), para. 2.

132. *Id*. para. 10.

In buttressing its conclusion that the right not to have or express a political opinion is fundamental to human dignity, the Court drew on foreign case law from the European Court of Human Rights and several common law jurisdictions. For example, in *Kokkinakis v. Greece*, the European Court of Human Rights held that Article 9 of the European Convention on Human Rights, which protects freedom of thought, conscience, and religion, covers "atheists, agnostics, skeptics and the unconcerned."[133] Moreover, the Court cited the Constitutional Court of South Africa for the proposition that "the right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity."[134]

The Court also drew on U.S. law, citing the landmark Supreme Court decision in *West Virginia State Board of Education v. Barnette*[135] for the proposition that "the freedom not to speak [is] an integral part of the right to speak."[136] In that case, the Supreme Court had held that compelling public schoolchildren to salute the flag was unconstitutional.[137] The U.K. Supreme Court quoted with approval the following iconic excerpt from the *Barnette* opinion:

> If there is any fixed star in the our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith

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133. Kokkinakis v. Greece, App. No. 14307/88, para. 31 (Eur. Ct. H.R. May 25, 1993), *available at* http://www.echr.coe.int. Article 9 of the ECHR states:

> 1. Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

134. *RT (Zimbabwe) & Ors v. Secretary of State for the Home Department*, [2012] UKSC 38 (U.K.), para. 38 (quoting Christian Educ. S. Afr. v. Minister of Educ. 2000 (10) BCLR 1051, para. 36 (S. Afr.)).

135. *Id.* para. 37.

136. *Id.* (citing West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 634–35, 642 (1943)).

137. 319 U.S. at 642.

> therein. If there are any circumstances which permit an exception, they do not now occur to us.[138]

Ironically enough, neither the majority nor the dissent in *Elias-Zacarias* referred to *Barnette*.

Finally, the Court cited Professor James Hathaway, the principle proponent of the human rights approach to asylum law, for the proposition that "refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard."[139]

Indeed, the *RT (Zimbabwe)* Court made it abundantly clear that it was adhering to the human rights approach when it stated that:

> it would be anomalous, given that the purpose of the [Refugee] Convention . . . is to ensure to refugees the widest possible exercise of their fundamental rights and freedoms, for the right of the "unconcerned" to be protected under human rights law, but not as a religious or political opinion under the [Refugee] Convention.[140]

In this way, the Court averred that the range of political opinions protected under the Refugee Convention must be equivalent to those protected under international law.[141]

The U.K. Supreme Court thus concluded that the "*HJ (Iran)* principle" applied to the acts in *RT (Zimbabwe)*; that is, as long as the right which is being interfered with by the persecutor is fundamental to a person's dignity, the abrogation of that right is a valid basis for asylum, even if that right is not being actively expressed or could be hidden. Further, as long as the claimant can credibly demonstrate her political neutrality (which RT was able to do in this case) and supplies sufficient evidence regarding the persecution of those who claim neutrality in the applicant's home country (which was provided through the Country Guidance opinion in *RN*), the "political opinion" prong of the Refugee Convention analysis will be satisfied.[142] There is

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138. *RT (Zimbabwe)*, para. 37 (quoting 319 U.S. 624, 642).
139. *Id.* para. 39 (quoting Hathaway, *supra* note 19, at 108).
140. *Id.* para. 40.
141. Lord Dyson made a similar connection between international human rights law and the Refugee Convention when he concluded that "the right *not* to hold the protected beliefs is a fundamental right which is recognized in international and human rights law and, for the reasons I have given, the [Refugee] Convention too." *Id.* para. 42 (emphasis in original).
142. *Id.* para. 61.

no need for the Court to inquire as to (1) whether the claimant would dissemble in the face of government interrogation and (2) whether her dissembling would be believed.[143] Indeed, the very notion of dissembling in order to avoid persecution would seem to be anathema to the Court's characterization of the right not to express an opinion as fundamental to a person's dignity. Thus, it is sufficient if the claimant demonstrates that she is politically neutral and that such neutrality will result in her persecution.[144]

Having determined that the right not to have or express a political opinion is protected under both international law and the Refugee Convention, the Court turned to the second part of its inquiry—whether RT faced persecution on the grounds of imputed political belief.[145] The Court first noted that such a claim will succeed if (1) "a *declared* political neutral is treated by the regime (or its agents) as a supporter of its opponents and persecuted on that account," or (2) "there is a real and substantial risk that, despite the fact that the asylum seeker would assert support for the regime, he would be disbelieved and his political neutrality (and therefore his actual lack of support for the regime) would be discovered."[146]

The U.K. Supreme Court reasoned that the validity of an imputed political claim depended on whether there is a "real and substantial risk" that the political neutrality of RT and the other claimants would be discovered by the militia gangs and war veterans who established road blocks throughout Zimbabwe, even if the

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143. The U.K. Supreme Court did not engage in this speculation in its *RT (Zimbabwe)* opinion.

144. An alternative way of analyzing the Court's first inquiry is that it was concerned less with defining the scope of "political opinion" than with defining those circumstances under which a nexus based on an imputed political opinion claim might exist. In other words, the Court sought to establish whether international law provides protection when someone is harmed for actions related to their failure to have or to express a political opinion. For if it does, any imputation of a political opinion by the government could lead to a finding of the requisite nexus between that imputed political opinion and the harm suffered (my thanks to James Hathaway for this insight). Even under this characterization, however, the human rights approach has an impact: the Court's view of what acts are or are not entitled to protection was informed by international human rights law.

145. *RT (Zimbabwe) & Ors v. Secretary of State for the Home Department*, [2012] UKSC 38 (U.K.), paras. 53–54. The doctrine of implied political opinion under U.K. law mirrors its counterpart in the United States. *See* Symes & Jorro, *supra* note 41, at 220–23.

146. *RT (Zimbabwe)*, UKSC 38, para. 55 (emphasis in original).

applicants were to lie about their allegiance to the regime.[147] This issue, in turn, depended on two questions:

> 1. Whether the claimants would be likely to be stopped or face serious interrogation at road blocks at all; and
> 2. If yes, whether their pretended support for the regime would be disbelieved.[148]

Given the prevalence of roadblocks throughout Zimbabwe and the fact that the claimants would not be returning to an area where loyalty to the regime was assumed (i.e., affluent neighborhoods), the U.K. Supreme Court concluded that it would be very likely that the claimants would be stopped at a roadblock and interrogated about their loyalty.[149] In the Court's view, whether their pretended support for the regime would be disbelieved would depend on a number of factors, including the kind of questions the claimant might be asked during a roadblock interrogation, how effective a liar the claimant might be in asserting loyalty to the regime, how credulous the interrogators might be when faced with the claimant's lies, and whether the interrogators would request that the claimant produce a Zanu-PF card or sing its songs.[150] The Court then provided a contradictory answer: it first asserted that it would be difficult for a judge in any given case to provide "confident answers" to these questions, but then concluded that it would be difficult for a judge to avoid concluding that there would be a real and substantial risk that a politically neutral claimant's neutrality would be discovered if she were to untruthfully assert loyalty to the regime.[151] On that basis, the Court found asylum warranted under the doctrine of implied political opinion, as well as because RT's right not to hold a political opinion would be violated were she to return to Zimbabwe.[152]

The U.K. Supreme Court's reasoning here suggests that while the imputed political opinion claim would have been sufficient for RT in this case, there might be situations where the answers to the questions put forth by the Supreme Court would be less clear. For example, under different circumstances it might be less likely that the applicants would be stopped at a roadblock or more likely that their false support for the regime would have been believed. As a

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147. *Id.* para. 56.
148. *Id*.
149. *Id*.
150. *Id.* para. 58.
151. *Id.* para. 59.
152. *Id.* para. 61.

result, their imputed political opinion claim would be weaker. Such scenarios demonstrate that an asylum claim based on an imputed political opinion may not be sufficient to protect an applicant's right to not express a political opinion. A neutrality claim rests on evidence of the applicant's refusal to state a political opinion. An imputed political opinion claim requires more: the applicant must provide evidence of the persecutor's *interpretation* of that refusal. This distinction can make the difference between successful and unsuccessful asylum claims.

In sum, *RT (Zimbabwe)* relied on numerous international human rights instruments and ample case law from the major common law refugee-receiving nations (Australia, Canada, New Zealand, South Africa, the United Kingdom, and the United States), as well as scholarship on the human rights approach to asylum law, to support the notion that the right not to have a political opinion, i.e., the right "not to take sides," is a fundamental aspect of human dignity. In the Court's view, this brings political neutrality—whatever its motivation—well within the sphere of protection afforded by the Refugee Convention. The majority opinion in *Elias-Zacarias*, on the other hand, dismisses this notion with one phrase, asserting that not taking sides between political factions is not "ordinarily" the affirmative expression of a political opinion.[153]

The *RT (Zimbabwe)* decision thus demonstrates the impact of the human rights-based approach to asylum law. The U.K. Supreme Court viewed the issue of political neutrality through the broad lens of fundamental rights under international human rights law and foreign jurisprudence. The majority in *Elias-Zacarias*, on the other hand, viewed it through the much narrower lens of statutory interpretation; i.e., whether not taking sides is a political opinion under U.S. domestic law. Justice Scalia's analysis is bound by the confines of the U.S. Immigration and Nationality Act, whereas Lord Dyson's encompasses the substantial breadth of international human rights law.

The next section of this Article considers the limits of the human rights approach by analyzing whether the results in these two cases would have been different had the claimants appeared before the other court.

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153. I.N.S. v. Zacarias, 502 U.S. 478, 483 (1992). As noted above, earlier in its opinion, the majority more categorically stated that the assertion that a person resisting forced recruitment from guerillas is expressing a political opinion "seems to us untrue." *Id.* at 481.

V. DOES THE HUMAN RIGHTS APPROACH MATTER? A COUNTERFACTUAL ANALYSIS

While the opinions in *RT (Zimbabwe)* and *Elias-Zacarias* demonstrate the analytical differences between the human rights approach to asylum law and the statutory interpretation model, the key issue remains: did that analytical difference matter to the asylum-seekers in those two cases? While it certainly helped the applicants in *RT (Zimbabwe)*, would it have enabled Mr. Elias-Zacarias to obtain relief before the U.S. Supreme Court? Answers to these questions are suggested by analyzing how Mr. Elias-Zacarias' claim would be handled by the U.K. Supreme Court and, conversely, how the claimants in *RT (Zimbabwe)* would fare before the U.S. Supreme Court in the wake of *Elias-Zacarias*.

Before undergoing this analysis, it is important to acknowledge one important factual difference between the two cases: the persecutor *in RT (Zimbabwe)* was the government, whereas in *Elias-Zacarias* it was a non-state actor (anti-government guerillas). Under both U.S. and U.K. law, when the persecutor is a non-state actor, the claimant has the burden to show that the government is unable or unwilling to control the non-governmental perpetrator.[154] While the U.S. Supreme Court in *Elias-Zacarias* never needed to reach this question, given its conclusion that Mr.

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154. *See Matter of Acosta*, 19 I&N Dec. at 222; *R v. Secretary of State, ex p Aitseguer* [1999] 4 All ER 774; [1999] 3 WLR 1274, [1999] Imm Ar 521, [INLR 176. *See also* Symes & Jorro, *supra* note 41, at 220–23; UNHCR Handbook, *supra* note 29, para. 65.

> Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

UNHCR Handbook, *supra* note 29, para. 65. Under U.S. law, the applicant must present evidence that the government is unwilling or unable to control the non-state actor, which the BIA has held can be met when: (1) there is evidence the government refused protection, or an applicant repeatedly sought protection with little or no response (*Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (B.I.A. 1998)); or (2) country conditions show that seeking government protection would be futile and dangerous. *Matter of S-A-*, 22 I&N Dec. 1328 (B.I.A. 2000).

Elias-Zacarias had failed to show that his alleged persecutors (whether state actors or not) were motivated by political considerations in threatening to retaliate against him, it did represent an additional hurdle that Mr. Elias-Zacarias would have had to overcome. Perhaps more importantly, the fact that the government was the persecutor in *RT (Zimbabwe)* meant that it was easier for the U.K. Supreme Court to conclude that the reach of its persecution was nationwide, and thus difficult for RT to evade.[155] While international refugee law provides protection for those harmed by non-state actors, the inquiry as to whether the state is unable or unwilling to offer protection in such circumstances is often challenging to asylum applicants and decision-makers.[156]

A. Mr. Elias-Zacarias before the U.K. Supreme Court

As the U.K. Supreme Court stated in *RT (Zimbabwe)*, "it is well established that the asylum seeker has to do no more than prove that he has a well-founded fear that there is a 'real and substantial risk' or a 'reasonable degree of likelihood' of persecution for a Convention reason."[157] Mr. Elias-Zacarias was unable to meet that burden in the eyes of the U.S. Supreme Court, in part, because the majority distinguished between persecution on account of political opinion and persecution because of his refusal to fight.[158] The U.K. Supreme Court would draw no such distinction because, based on *RT (Zimbabwe)*, it would view Mr. Elias-Zacarias's refusal to fight as a political opinion in and of itself. Whether that refusal was the result of "indifference, indecisiveness, [or] risk averseness" (a critical factor for the *Elias-Zacarias* majority) would be irrelevant. The Court found that his freedom to make that choice is one of the key ingredients to his personal dignity, protected by numerous human rights instruments and recognized by the highest courts of several common

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155. The decision in *RN* documented that roadblocks where persons were required to pledge loyalty were established throughout the country except in "more affluent low density urban areas or suburbs." *RT (Zimbabwe) & Ors v. Secretary of State for the Home Department*, [2012] UKSC 38 (U.K.), para. 57 (citing *RN*, para. 229). Under U.S. law, when the persecutor is the government, it is assumed that a claimant with a valid well-founded fear of persecution cannot safely return anywhere within her country of origin. *See* 8 C.F.R. § 1208.13(b)(3)(ii) (2013).

156. *See* Hathaway & Foster, *supra* note 16, at 303–32.

157. *RT (Zimbabwe)*, UKSC 38, para. 55 (citing R. v Secretary of State for the Home Department, Ex p Sivakumaran [1988] AC 958).

158. *Elias-Zacarias*, 502 U.S. at 483.

law countries, including the United States. Thus, any persecution resulting from that refusal to fight would be for a Convention-related reason. This demonstrates how the human rights approach broadens the interpretation of "political opinion" under the Refugee Convention.

However, a broader interpretation of "political opinion" would not have automatically led to a grant of asylum for Mr. Elias-Zacarias. He would nevertheless have needed to demonstrate to the U.K. Supreme Court that: (1) he was likely to suffer harm (the well-founded fear or risk element) and (2) that such harm would be on account of his refusal to take sides in the Guatemalan armed conflict (the nexus element). The human rights approach would be of no help in regard to the first hurdle.

We have no way of determining how the U.K. Supreme Court would react to the evidence Mr. Elias-Zacarias proffered regarding the fate of those who resisted guerilla recruitment and later returned to Guatemala. Mr. Elias-Zacarias's brief contained reports documenting the way that Guatemalan guerillas retaliated against those who refused to join them.[159] Mr. Elias-Zacarias testified to what he perceived as threats from the guerillas.[160] Perhaps the U.K. Supreme Court might have examined the country conditions information provided by Mr. Elias-Zacarias and credited his testimony about the threats he perceived from the guerillas, and also found that it was likely he would be persecuted as a result of his political opinion. But the human rights approach to asylum law would be of no assistance to the Court in its evaluation of this evidence.[161]

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159. *See* Respondent's Brief, *supra* note 79, at 29–31.

160. These direct threats were highlighted in the dissent: "It follows as night follows day that the guerillas' implied threat to 'take' him or to 'kill' him if he did not change his position constituted threatened persecution 'on account of' [his] political opinion." *Elias-Zacarias* 502 U.S. at 489 (Stevens J., dissenting). The majority accused the dissenters of exaggerating the well-foundedness of Mr. Elias-Zacarias's fear by transforming his testimony that the guerillas would "take me or kill me" into both an implied and an express threat to take him or kill him. *Id*. at 483 n.2.

161. Nevertheless, it is not implausible to assume that a court that has embraced the human rights approach to asylum law might also be more interested in viewing individual asylum claims in a larger geopolitical context, and thus more likely to consider evidence of country conditions from a variety of sources, including those provided by amicus briefs. One reason that the U.K. Supreme Court might have taken greater note of the country conditions reports supporting Mr. Elias-Zacarias's case is that the U.K.'s country guidance cases

On the other hand, the human rights approach may have been of more assistance with respect to the nexus (or "for reasons of") requirement. This approach argues that the "for reasons of" requirement should be interpreted according to international anti-discrimination law.[162] Both the ICCPR and the International Covenant on Economic, Social and Cultural Rights prohibit discrimination on the basis of, *inter alia*, race, color, language, religion, political or other opinion, national or social origin, or other status.[163] Unlike the approach taken by the U.S. Supreme Court in *Elias-Zacarias*, these conventions contain no requirement that a person seeking protection from discrimination prove that the violator *intended* to harm her because of her exercise of a particular right or because of her status.[164] While such intent may be obvious in certain

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consider a wide variety of sources in support of its decisions. For example, in *RN*, the country guidance case on which the *RT (Zimbabwe)* Court relied so heavily in its opinion, the Upper Tribunal discussed in great detail the oral and written testimony of numerous witnesses, including several Zimbabweans with first-hand knowledge of the Zanu-PF loyalty policy, a University of Oxford professor, several NGOs and human rights organizations, news reports from several outlets, as well as the British government, in documenting the persecution of those who did not express loyalty to the Mugabe regime: *See RN (Returnees) Zimbabwe CG,* [2008] UKAIT 00083, paras. 51–149. The U.S. judiciary, on the other hand, has been criticized for relying almost exclusively on U.S. State Department reports in its evaluation of country conditions within an asylum-seeker's country of origin. *See* Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, Nw. J. L. & Soc. Pol'y 2:1 1–29 (2007); Susan K. Kerns, *Country Conditions Documentation in U.S. Asylum Cases*: *Leveling the Evidentiary Playing Field*, Ind. J. Global Legal Stud., 8:1, 197–222 (2000). Indeed, except for one article each from the New York Times, the Foreign Broadcast Information Service, and the Christian Science Monitor, the country conditions section of Mr. Elias-Zacarias's brief relied almost exclusively on U.S. State Department country condition reports on Guatemala. *See* Respondent's Brief, *supra* note 79, at 29–31. As noted above, neither the majority nor dissenting opinions cited any of these sources.

162. *See* Hathaway & Foster, *supra* note 16, at 362–91 (elaborating on the nexus requirement for the human rights approach to asylum claims under the Refugee Convention). According to Lord Bingham in the House of Lords, "the Convention is concerned not with all cases of persecution but with persecution which is based on discrimination, the making of distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being." *Fornah* [2006] UKHL at 430 [13].

163. ICCPR, art. 2.1; ICESCR, art. 2.2.

164. As noted above, in *Elias-Zacarias* the U.S. Supreme Court interpreted the nexus requirement in the Refugee Act of 1980 to mean that an applicant must establish the persecutor intended to harm the applicant on account of one of the five protected grounds. *See* Elias-Zacarias, 502 U.S. at 483 (finding that "the statute makes motive critical.").

situations (such as when a persecutor references an applicant's political opinion while persecuting him), the human rights approach does not require an applicant to demonstrate such an intent. Therefore, while evidence of intent to harm or withhold protection for a Convention reason is sufficient to satisfy the nexus requirement, it is not necessary.[165] Instead, that causal link is established when "the applicant's predicament—the reason for exposure to her well-founded fear of persecution—is linked to a Convention ground," without the necessity of demonstrating the intent of the persecutor.[166] Thus, under the human rights approach, Mr. Elias-Zacarias would not have had to show that the guerillas intended to persecute him for his political neutrality.

The U.K. Supreme Court required no such showing with respect to the Mugabe regime or the ruling political party in *RT (Zimbabwe)*. Therefore, Mr. Elias-Zacarias would only have had to demonstrate that the harm he was likely to suffer (assuming he could establish the requisite risk) was linked to his neutrality. He would most likely attempt to establish this through country condition evidence documenting the harm suffered by those who refused the guerillas' recruitment efforts. We of course have no way of knowing how the U.K. Supreme Court would weigh that evidence, but the fact that they would even engage in that inquiry demonstrates the impact of the human rights approach.

Mr. Elias-Zacarias's claim for asylum before the U.K. Supreme Court under an imputed political theory would likely also rise or fall on the strength of country condition evidence suggesting that guerillas systematically persecuted those who refused to join their ranks. In *RT (Zimbabwe)*, as noted above, the U.K. Supreme Court observed that an imputed political opinion claim will succeed in one of two situations:

> 1) If a *declared* political neutral is treated by the regime (or its agents) as a supporter of its opponents and persecuted on that account; or
> 2) If there is a real and substantial risk that, despite the fact that the asylum seeker would assert support for the regime, he would be disbelieved and his political neutrality (and therefore his actual lack of support for the regime) would be discovered.[167]

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165. Hathaway & Foster, *supra* note 16, at 367.
166. *Id*. at 367–68.
167. RT (Zimbabwe) & Others v. Secretary of State for the Home Dep't, [2012] UKSC 38, [55] (appeal taken from Eng.).

The second of these options would most likely be inapplicable to Mr. Elias-Zacarias, given that he appeared unlikely to assert support for the guerillas because it would lead to participation in the civil war, which he sought to avoid. As for the first option, it is unclear whether the U.K. Supreme Court would consider Mr. Elias-Zacarias a "declared" neutral, though his refusal to join the guerillas would presumably land him in that category. Even if he did fit into this category, Mr. Elias-Zacarias would nevertheless need to show that neutrality (i.e. refusing to join the conflict) was treated by the guerillas as a sign of support for the regime and that the neutral party would be persecuted as a result. Here again, this would depend on the extent of the evidence in the record supporting such a finding.

In sum, the human rights-based approach to asylum law followed by the U.K. Supreme Court in *RT (Zimbabwe)* would have advanced Mr. Elias-Zacarias's claim beyond the "political opinion" stage that derailed him before the U.S. Supreme Court. That approach would not, however, have automatically resulted in a grant of asylum. He would still need to demonstrate that he would likely suffer harm because of that political opinion. His success here would depend on the U.K. Supreme Court's analysis of evidence demonstrating that guerillas in El Salvador persecute political neutrals. His burden would be lighter than in the U.S. Supreme Court, however, because the U.K. Supreme Court would not require him to show that the guerillas *intended* to persecute him for his political neutrality.

B. The Claimants in *RT (Zimbabwe)* before the U.S. Supreme Court

It would be difficult for the claimants in *RT (Zimbabwe)* to get beyond the U.S. Supreme Court's threshold inquiry regarding whether their political neutrality was "the affirmative expression of a political opinion."[168] The Court, relying on *Elias-Zacarias*, would most likely view their neutrality as being based on indifference rather than conviction. Thus, like Mr. Elias-Zacarias, the claimants in *RT (Zimbabwe)* would not, in the Court's opinion, be able to assert a valid argument on the grounds of an express political opinion.[169]

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168. *Elias-Zacarias*, 502 U.S. at 483.

169. The *RT (Zimbabwe)* claimants would, however, most likely prevail with a "hazardously neutrality" claim in the Ninth Circuit Court of Appeals, which is the one form of neutrality claim that has survived in the aftermath of *Elias-Zacarias*. *See* Navas v. INS, 217 F.3d 646 (9th Cir. 2000). Given the

The claimants would have a far better chance of prevailing by couching their claim as one of an imputed political opinion: i.e., the Mugabe regime would interpret their refusal to pledge loyalty to Zanu-PF party as a sign of support for the opposition MDC, with persecution as a likely result. In *Elias-Zacarias*, the majority noted the lack of any "indication . . . that the guerillas erroneously believed that Mr. Elias-Zacarias's refusal was politically based."[170] In contrast, the record in *RT (Zimbabwe)* was replete with evidence of the way that the Zanu-PF considered a refusal to pledge loyalty to the regime as support for the opposition. While there is no way to know for sure whether the U.S. Supreme Court would have credited this evidence as wholeheartedly as the U.K. Supreme Court did, this is not an inquiry influenced by the human rights approach.

In sum, the broader interpretation of "political opinion" afforded by the human rights approach in *RT (Zimbabwe)* does not automatically lead to a grant of asylum. It does, however, make it easier for asylum applicants to establish that they were expressing a political opinion within the scope of the Refugee Convention, and thus eligible for asylum if they are persecuted for that reason.

VI. CONCLUSIONS

This Article has provided a concrete example of how the human rights approach to asylum law can aid domestic courts in interpreting the meaning of the Refugee Convention and 1967 Protocol: the U.K. Supreme Court decision in *RT (Zimbabwe)* referenced several human rights instruments, as well as jurisprudence from several common law countries (including the United States) in determining that the right not to hold a political opinion is fundamental to human dignity, and thus worthy of protection under international refugee law. In the U.K. Supreme Court's view, international human rights law dictates that political neutrality—regardless of whether motivated by conscious choice or mere disinterest—falls within the scope of "political opinion" under the Refugee Convention. In contrast, in *INS v. Elias Zacarias*, which remains good law, the U.S. Supreme Court determined that in most circumstances (and certainly where motivated by "indifference,

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extensive documentation that failure to demonstrate loyalty to the Mugabe regime routinely results in torture and other forms of persecution, the claimants in *RT (Zimbabwe)* would most likely have convinced the Ninth Circuit that political neutrality in Zimbabwe is "fraught with hazard." *Id.*

170. *Elias-Zacarias*, 502 U.S. at 482.

indecisiveness, or risk averseness"), neutrality does not constitute "political opinion" under the U.S. law of refugee protection. The U.S. Supreme Court's opinion lacks any reference to international law (including the Refugee Convention or 1967 Protocol) or foreign jurisprudence. Indeed, it does not even reference its own seminal opinion on the right not to hold an opinion, *West Virginia State Board of Education v. Barnette*. As a result, most asylum seekers in the United States whose claims are based on neutrality towards warring factions will couch that claim as one of imputed political opinion. This contrast between the approaches of the U.K. and U.S. Supreme Courts on the question of neutrality illustrates the impact of the human rights approach on asylum law. Going forward, in the United Kingdom, applicants need not satisfy a rather arbitrary threshold of demonstrating a commitment to neutrality in order to satisfy the "political opinion" prong of the refugee definition. The human rights approach thus demonstrates a respect for the right not to hold a political opinion, regardless of its motivation or the intent of the claimant's persecutor.

On a larger scale, the human rights approach encourages a shared interpretation of the definition of refugee under the Refugee Convention. Scholars and courts around the world have identified such a common interpretation as critical to a uniform standard for refugee protection.[171] When courts—like the U.S. Supreme Court in *Elias-Zacarias*—fail to consult authority beyond domestic statutory interpretation to determine the scope of the refugee definition, they undermine human rights norms convergence and contribute to the fragmentation of asylum law.[172]

This Article has also contributed to the treaty effectiveness literature. It has demonstrated that human rights treaties have more of an impact on state actors (in this case domestic court judges) when a country has adopted the human rights approach to asylum law. In decisions like *RT (Zimbabwe)*, human rights treaties have an impact on the outcome by informing a domestic court's interpretation of key concepts such as "political opinion" under international refugee law. In contrast, such treaties have little sway on U.S. domestic courts. As such, one of the variables relevant to the effectiveness of international human rights treaties in the asylum litigation context is

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171. *See*, *e.g.*, Marouf, *supra* note 15, at 393; Hathaway (2005), *supra* note 19; Lambert, *supra* note 15, at 4–5.

172. Marouf, *supra* note 15, at 393.

the extent to which the country in question has adopted the human rights approach to asylum law.

RT (Zimbabwe) thus presents a compelling opportunity for U.S. courts to develop a shared understanding of "political opinion" with its sister signatories to the Refugee Convention. As the U.K. Supreme Court's thorough analysis demonstrated, numerous common law refugee-receiving nations support the principle that not expressing a political opinion is, itself, a political opinion. This support has developed, for the most part, since *Elias-Zacarias* was decided. And it is an interpretation of the law perfectly consistent with well-established U.S. Supreme Court precedent on not expressing an opinion, as exemplified by its 1943 decision in *Barnette*. Thus, adopting the *RT (Zimbabwe)* approach to political neutrality would bring the United States in accord not only with the jurisprudence of several influential refugee-receiving nations, but also with its own precedent.

Broadening "political opinion" to include political neutrality regardless of motivation would come with little risk of a "floodgates" phenomenon (i.e., a cascade of successful asylum claims based on the failure to take sides in a civil conflict). For even if asylum applicants can credibly establish their political neutrality, they must still show that they will be persecuted upon return to their country of origin because of that neutrality. A shared understanding of the definition of political opinion as encompassing the right not to express an opinion does not make that burden any easier.

Because most U.S. judges are unlikely to adopt a human rights approach *sua sponte*, refugee lawyers in the Unites States should seriously consider including a human rights-based argument on behalf of asylum applicants who choose not to take sides in a civil conflict and fear persecution as a result. While such a claim would not supplant the more typical imputed political opinion claim, it would offer an alternative means for the applicant to establish that she held a political opinion for purposes of U.S. law. In situations where it is difficult to establish the facts for an imputed political opinion claim, this could make the difference between a successful and unsuccessful asylum application.

Invoking human rights treaties in support of asylum claims in U.S. courts is not without risks. Even in countries such as the United Kingdom where lawyers regularly reference human rights treaties on behalf of their clients, such arguments can prove counterproductive. They may alienate judges who are antagonistic toward human rights

treaties generally. And even among sympathetic judges, they may appear to be irrelevant at best or a sign of desperation at worst.[173] Thus, references to international human rights law in interpreting the asylum provisions in the Immigration and Nationality Act must be carefully considered and artfully argued.

However, such risks would appear to be minimal in the case of using human rights instruments to assist in the interpretation of the meaning of "political opinion" under U.S. law, which is, of course, based on the Refugee Convention. Moreover, given the willingness of at least some U.S. courts to follow a human rights approach in the two decades since *Elias-Zacarias* was decided, it would seem entirely fitting for U.S. lawyers to assert such arguments.[174] Invoking human rights law in U.S. courts would carry the additional benefit of encouraging those courts to contribute to a uniform interpretation of human rights norms.

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173. Meili (2015), *supra* note 38.

174. *See, e.g.*, Stenaj v. Gonzalez, 227 F. App'x 429 (6th Cir. 2007) (embracing the human rights approach to interpret the meaning of "persecution" under the Refugee Convention); Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004) (relying on international human rights treaties to establish that a daughter and her mother were refugees eligble for asylum under the Immigration and Nationality Act); Ngengwe v. Mukasey, 543 F.3d 1029 (8th Cir. 2008) (relying on an adherence to international human rights norms to overturn a BIA decision not to grant asylum to an alien).