Vanderbilt Journal of Transnational Law

Volume 44
Issue 2 *March 2011*

Article 6

2011

# A New Standard for Evaluating Claims of Economic Persecution Under the 1951 Convention Relating to the Status of Refugees

Lauren M. Ramos

# A New Standard for Evaluating Claims of Economic Persecution Under the 1951 Convention Relating to the Status of Refugees


## ABSTRACT

*The United Nations Convention and Protocol Relating to the Status of Refugees define the requirements for qualification as a "refugee" and the protection that should be afforded to qualifying persons. Satisfying the Convention definition of refugee usually qualifies a person for asylum; thus, interpretation of its requirements can determine whether an alien is able to escape alleged persecution in his or her country of origin. Currently, 147 countries are parties to the Convention, the Protocol, or both, including the United States. In order to qualify for refugee status, an asylum seeker must prove a well-founded fear of persecution. However, the Convention does not define what harm rises to the level of persecution, and there is no internationally accepted definition. While physical harm easily suffices, confusion and inconsistency exist regarding when non-physical economic disadvantage constitutes persecution and what standard should be applied to such claims. This Note examines the Convention, development of economic asylum claims in the United States, and trends in international approaches to this issue. It then proposes a uniform standard consistent with general international principles that the United States should adopt.*


## TABLE OF CONTENTS


I. INTRODUCTION ..... 500
II. THE UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES ..... 503
III. UNITED STATES ASYLUM LAW ..... 505
  A. *The Immigration and Nationality Act and Its Regulations* ..... 505
  B. *The Development of Economic Asylum Claims in U.S. Courts* ..... 507

1. Varying Standards in U.S. Courts ..... 507
2. Clarification—The *In re T-Z-* Standard .... 509
3. Continued Confusion Among U.S. Courts.. 510
IV. CLAIMS OF ECONOMIC PERSECUTION AROUND THE WORLD ..... 512
V. PROPOSING AN INTERNATIONAL STANDARD FOR CLAIMS OF ECONOMIC PERSECUTION ..... 516
A. *A Discussion of the Proposed Standard* ..... 516
B. *Addressing Potential Criticisms* ..... 519
VI. WHY THE UNITED STATES SHOULD ADOPT THE PROPOSED STANDARD ..... 521
VII. CONCLUSION ..... 524

## I. INTRODUCTION

*The world has changed; it has become smaller. Nowadays, most refugees are mainly on the run from war and regional conflicts. A part of the asylum seekers who come knocking on our doors are not refugees in the proper sense of the word, but people who are looking for a better life, without poverty and crime.*

*–State Secretary of Justice of the Netherlands, Nebahat Albayrak*[1]

Asylum claims based on non-physical forms of persecution, specifically social and economic deprivation, have received increased attention in recent years. Scholars have analyzed and proposed various approaches to such claims both in the United States and internationally.[2] However, neither the international community nor domestic U.S. courts have come to a consensus in developing an approach, leading to confusion and inconsistent results.

---

1. Nebahat Albayrak, State Sec'y of Justice of the Neth., Opening Speech to the Conference on Recent Developments in European and International Asylum Policy and the Law (Apr. 3, 2009).

2. *See generally* MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION (2007) (exploring the legal challenges presented by economic migration); Jonathan L. Falkler, *Economic Mistreatment as Persecution in Asylum Claims: Towards a Consistent Standard*, 2007 U. CHI. LEGAL F. 471 (2007) (arguing that a grant of asylum is proper when an applicant can show substantiated grounds for fearing harm from targeted economic persecution); Dessi Mathew, *Claims of Political Asylum Based on Non-Physical Forms of Harm Such as Economic Sanctions and Deprivations*, 21 PACE INT'L L. REV. 309 (2009) (urging for an expansion of human rights law to encompass both political and economic spheres).

Social and legal developments demand further examination and resolution of this issue. The number of people fleeing their native countries and seeking asylum is staggering.[3] As United Nations High Commissioner for Refugees (UNHCR) Antonio Guterres noted, "ongoing violence and instability in some parts of the world force increasing numbers of people to flee and seek protection in safe countries."[4] The UNHCR website estimates that there were 983,000 asylum seekers around the globe at the beginning of 2011.[5] Overall, the number of refugees stood at 10.3 million.[6] In the first half of 2009, industrialized nations saw a 10 percent increase in new asylum applications over the first half of 2008,[7] and the United States alone received over 20,000 applications during that period.[8] Consistent with the High Commissioner's assessment, countries suffering from conflict and instability are the largest producers of asylum seekers—Iraqis have constituted the highest percentage of asylum seekers for four consecutive years, with Afghans and Somalis close behind.[9]

---

3. *See Asylum-Seeker Figures*, UNHCR—UN REFUGEE AGENCY, http://www.unhcr.org/pages/49c3646c20.html (last visited Feb. 16, 2011) (estimating the number of asylum seekers at the beginning of 2011).

4. Press Release, U.N. High Comm'r of Refugees [UNHCR], Iraqis, Afghans, and Somalis Top List of Asylum-Seekers in Industrialized World (Oct. 21, 2009) [hereinafter UNHCR Press Release], *available at* http://www.unhcr.org/4adf24079.html.

5. *Asylum-Seeker Figures*, *supra* note 3.

6. *Refugee Figures*, UNHCR—UN REFUGEE AGENCY, http://www.unhcr.org/pages/49c3646c1d.html (last visited Feb. 16, 2010). The UNHCR explains that, "[t]he terms asylum-seeker and refugee are often confused: an asylum-seeker is someone who says he or see is a refugee, but whose claim has not yet been definitively evaluated." When there is generalized violence that causes mass movement, as opposed to individual persecution, individuals who cross the border are prima facie refugees and do not require individual status determination. *Asylum-Seekers*, UNHCR—UN REFUGEE AGENCY, http://www.unhcr.org/pages/49c3646c137.html (last visited Feb. 16, 2010). The UNHCR cares for other groups of people, including internally displaced persons (IDPs), returnees, and stateless people. Unlike refugees, internally displaced people remain in their home countries and have not crossed international borders. "Even if they have fled for similar reasons as refugees . . . IDPs legally remain under the protection of their own government." At the end of 2009, there were an estimated 27 million IDPs around the world. *Internally Displaced People*, UNHCR—UN REFUGEE AGENCY, http://www.unhcr.org/pages/49c3646c146.html (last visited Feb. 16, 2010). Returnees are both refugees and IDPs who are returning home. *Returnees*, UNHCR—UN REFUGEE AGENCY, http://www.unhcr.org/pages/49c3646c1ca.html (last visited Feb. 16, 2010). Stateless people are people who are not considered nationals of any state. "Although stateless people may sometimes also be refugees, the two categories are distinct." *Stateless People*, UNHCR—UN REFUGEE AGENCY, http://www.unhcr.org/pages/49c3646c155.html (last visited Feb. 16, 2010).

7. UNHCR Press Release, *supra* note 4.

8. *Id.*

9. *Id.* Iraqis accounted for 13,200 claims, with Afghans at 12,000, and Somalis at 11,000. *Id.*

Due to the volume of asylum applications across the globe, UNHCR urges governments to adopt "fair and efficient procedures to determine if an individual asylum-seeker is a refugee, recognizing how difficult it is in many cases to document persecution."[10] In many countries, including the United States, the asylum process ultimately burdens domestic courts with making the difficult refugee determination. As a result, courts struggle to fairly and consistently evaluate asylum applications based on claims of economic and other non-physical persecution.[11] Scholars and U.S. courts have demanded a resolution of the inconsistent standards applied in Board of Immigration Appeals (BIA) and U.S. courts of appeals decisions.[12] Finally, in 2007 the BIA articulated the correct standard for these asylum claims.[13] However, despite the BIA's clarification, applying the standard has caused renewed confusion among U.S. courts.[14]

U.S. courts should look to developments in international law to evaluate and further develop their approach to economic asylum claims. Congress explicitly amended the U.S. Immigration and Nationality Act to bring it into accordance with international law dealing with refugee status.[15] Part II discusses the primary UN convention on refugees, the Convention Relating to the Status of Refugees. Part III addresses U.S. law, beginning with the relevant statutory asylum law. It then discusses the development of economic persecution claims in U.S. courts, including the inconsistent standards that the courts have developed and applied. Part IV examines international trends regarding claims of economic persecution. Part V proposes an international standard for determining refugee status based on non-physical forms of persecution that is consistent with both the international documents and developing trends. Finally, Part VI reconciles the proposed international standard with U.S. law and explains why the United States should adopt the standard.

---

10. *Asylum-Seeker Figures*, *supra* note 3.

11. *See infra* Part III.B.

12. *See* Mirzoyan v. Gonzales, 457 F.3d 217, 221–22 (2d Cir. 2006) ("Had the BIA in past cases stated a standard for economic persecution, we might reasonably assume that it applied that standard in the present case. But as far as we can determine from a review of BIA decisions, the BIA has not applied a consistent standard."); Falkler, *supra* note 2, at 471 (noting inconsistent standards applied by courts).

13. *In re* T–Z–, 24 I. & N. Dec. 163, 170–71 (B.I.A. 2007).

14. *See infra* Part III.B.3.

15. H.R. REP. NO. 96–781, at 20 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 160, 161.

## II. THE UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES

The United Nations Convention Relating to the Status of Refugees (Refugee Convention) was created by a Conference of Plenipotentiaries from twenty-six countries under authority of the UN General Assembly.[16] The Conference adopted the Refugee Convention in 1951, and it entered into force in 1954.[17] As "the key instrument in international law for the protection of refugees,"[18] the Refugee Convention defines the requirements for qualification as a "refugee" and sets out minimum standards of treatment for qualifying persons.[19] The United Nations enacted the Refugee Convention immediately following World War II, as a means of addressing the surge in refugees from European countries.[20] Consequently, the Convention originally applied only to persons who were refugees as a result of events that occurred prior to January 1, 1951.[21]

The 1967 Protocol Relating to the Status of Refugees (Protocol) amended the Refugee Convention so that it applies to anyone who qualifies under the definition of a "refugee," regardless of the timing of the events that cause a person to flee his or her native country.[22] Currently, 147 countries are parties to the Refugee Convention, the Protocol, or both, including the United States.[23] The Convention's definition of "refugee" is the standard that asylum seekers must meet before they can obtain the benefits mandated by the Convention. The Convention defines a refugee as follows:

> A person, who . . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

---

16. THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED 3 (Paul Weis ed., 1995) [hereinafter REFUGEE CONVENTION, 1951].

17. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

18. FOSTER, *supra* note 2, at 1.

19. Refugee Convention, *supra* note 17.

20. REFUGEE CONVENTION, 1951, *supra* note 16, at ix.

21. *Id.*; Refugee Convention, *supra* note 17, art. 1(A)(2).

22. Protocol Relating to the Status of Refugees, art. 1(2), Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Protocol].

23. UNHCR, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol (Oct. 1, 2008), http://www.unhcr.org/3b73b0d63.html.

> outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[24]

This definition breaks down into several necessary elements that an asylum seeker must establish. The potential refugee must establish harm that rises to the level of persecution.[25] This persecution must be suffered on account of one of the listed reasons, such as race or religion, and the asylum seeker must have a well-founded fear of suffering actual harm upon returning to his or her native country.[26]

However, among the factors related to determining refugee status, "the element of a well-founded fear of persecution is clearly the most important."[27] There is some judicial consensus on the meaning of a "well-founded fear." In *Immigration & Naturalization Service v. Cardoza-Fonseca*, the United States Supreme Court determined that an applicant need not show that persecution is a probability, but only that it is a reasonable possibility.[28] The House of Lords in England adopted an equivalent approach, establishing that a "reasonable likelihood" of persecution is sufficient,[29] and the Federal Court of Appeal of Canada followed suit in establishing a test based on a reasonable chance of persecution.[30]

The major problem, which has spawned confusion and debate, is that the Refugee Convention does not define "persecution." In fact, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR Handbook) admits that "[t]here is no universally accepted definition of 'persecution' and various attempts to formulate such a definition have met with little success."[31] Scholars have theorized that the drafters of the Convention intentionally left out a definition of "persecution" so that future decision makers could respond to new situations that the drafters could not have conceived of in 1951, acknowledging that social issues evolve and require evolving law to address them.[32] "Practically speaking, the vagueness of the definition affords states that are party to the treaty greater manoeuvrability [sic] in refugee

---

24. Refugee Convention, *supra* note 17, art. 1(A)(2).
25. *Id.*
26. *Id.*
27. REFUGEE CONVENTION, 1951, *supra* note 16, at xv.
28. *Id.* at xvi (citing INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)).
29. *Id.*
30. *Id.* at xvi–ii.
31. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 51, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1, 1992).
32. Carly Marcs, *Spoiling Movi's River: Toward Recognition of Persecutory Environmental Harm Within the Meaning of the Refugee Convention*, 24 AM. U. INT'L L. REV. 31, 45 (2008).

status determination."[33] The meaning of this crucial term is left to judicial interpretation, resulting in inconsistencies in the adjudication of asylum claims.[34]

## III. UNITED STATES ASYLUM LAW

### A. *The Immigration and Nationality Act and Its Regulations*

Section 208(b) of the Immigration and Nationality Act (INA) empowers the U.S. Attorney General or the Secretary of Homeland Security to grant asylum to an alien who satisfies the statutory definition of a refugee.[35] Congress added the asylum provision to the INA through the Refugee Act of 1980 in order to bring the INA into accordance with the 1967 Protocol.[36] Consequently, the INA definition of a "refugee" closely mirrors that of the Refugee Convention:[37] a person "who is unable or unwilling to return to . . . [a] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[38] The Congressional Committee Report related to the Refugee Act explains that this definition "is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol."[39] Similar to the Protocol, the INA lacks any definition of the term "persecution."[40] U.S. adjudicators are left to evaluate the meaning of persecution on a case-by-case basis.[41]

Through the appeals process, asylum seekers confront adjudicators at several different levels. If an application for asylum is initially denied by an asylum officer or an immigration judge (IJ), the applicant may appeal to the Board of Immigration Appeals (BIA).[42] The BIA is a branch of the Department of Justice, consisting

---

33. *Id.*

34. FOSTER, *supra* note 2, at 87–88.

35. Immigration and Nationality Act § 208(b)(1), 8 U.S.C. § 1158(b)(1)(A) (2006).

36. H.R. REP. NO. 96–781, at 19 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 160, 161; H.R. REP. NO. 96–608, at 9 (1979); S. REP. NO. 96–256, at 4 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141; Falkler, *supra* note 2, at 479. Although the United States did not join the original Refugee Convention, it acceded to the Protocol in 1968. UNHCR, *supra* note 23.

37. Refugee Convention, *supra* note 17, art. 1(A)(2).

38. 8 U.S.C. § 1101(a)(42)(A).

39. H.R. REP. NO. 96–781, at 161.

40. 8 U.S.C. § 1158(b)(1)(A).

41. Falkler, *supra* note 2, at 478.

42. Appellate Jurisdiction over the Board of Immigration Appeals, 8 C.F.R. § 1003.1(b) (2009).

of attorneys "appointed by the Attorney General to act as the Attorney General's delegates."[43] U.S. courts of appeals have exclusive jurisdiction to review IJ and BIA removal orders entered against asylum applicants.[44] Thus, there may be up to four different adjudicating bodies at various levels that apply the refugee definition to asylum applications using inconsistent standards of persecution.

The case *Hu v. Holder* from the Second Circuit provides an example of this process.[45] Su Chun Hu fled from China and sought asylum in the United States, claiming physical persecution under China's strict family planning policy.[46] Hu testified before an IJ that the government forced her to undergo an abortion, and that later, when Hu failed to appear at a clinic to have an invasive contraceptive device implanted, her mother-in-law was taken hostage in retaliation.[47] Hu claimed a well-founded fear that she would be beaten, jailed, and forced to undergo similar invasive procedures if she returned to China.[48] The IJ denied her application on the grounds of an adverse credibility determination; in other words, the IJ did not find Hu's testimony to be credible enough to warrant a grant of asylum.[49] Hu appealed to the BIA, which affirmed the IJ's decision to deny her application.[50] Hu then appealed to the Second Circuit.[51] Applying the "substantial evidence" standard for review of factual determinations, the Second Circuit found that the IJ's adverse credibility determination was not supported by substantial evidence because "it relied on a flawed factfinding process, impermissible speculation, and flawed reasoning."[52] The Second Circuit could not conclude that the record would definitely compel a reasonable factfinder to grant Hu's application for asylum; however, the court was also unsure that the result would have been the same without the IJ's errors.[53] Ultimately, the Second Circuit vacated the decision of the BIA and remanded the case for rehearing before a different IJ.[54]

---

43. 8 C.F.R. § 1003.1(a)(1).
44. 8 U.S.C. § 1252(a)(5).
45. 579 F.3d 155, 157–58 (2d Cir. 2009).
46. *Id.* at 157.
47. *Id.*
48. *Id.*
49. *Id.* at 158.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 160.
54. *Id.*

### B. *The Development of Economic Asylum Claims in U.S. Courts*

#### 1. Varying Standards in U.S. Courts

Prior to the addition of § 208(b) through the Refugee Act of 1980, the INA addressed persecution only with regard to withholding removal of asylum seekers under § 243(h).[55] Initially, § 243(h) required evidence of "physical persecution" in order for an asylum seeker to avoid deportation.[56] In 1965, Congress amended § 243(h), eliminating the word "physical" in reference to the necessary substance of the alleged persecution.[57] When Congress added § 208(b) to explicitly address asylum claims, it was similarly void of any language requiring a showing of physical persecution to obtain refugee status.[58] From the legislative history of the amendments, the Ninth Circuit determined that Congress "intended to effect a significant, broadening change" in the INA, and found that the amendment "eliminated the premise upon which courts . . . based the rule" that economic deprivation would only constitute persecution based on physical suffering.[59] Thus, a body of jurisprudence has developed in the United States addressing and validating asylum claims based on non-physical forms of persecution.

Purely economic persecution is non-physical in the sense that the persecuting government does not make physical contact with the victim for the purposes of confinement or physical abuse. The BIA and U.S. courts of appeals have applied at least three different standards for determining refugee status based on allegations of economic forms of persecution.[60] As early as 1961, in *Dunat v. Hurney*, the Third Circuit recognized that "[t]o belittle economic sanctions regardless of their impact was . . . to bypass the realities of everyday life."[61] However, the court validated a claim for withholding deportation due to "denial of an opportunity to earn a livelihood" only because it was "the equivalent of a sentence to death by means of

---

55. Falkler, *supra* note 2, at 478.

56. Immigration and Nationality Act, Pub. L. No. 82–414, § 243(h), 66 Stat. 163, 214 (1952) (amended 1965) ("The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.").

57. Immigration and Nationality Act of 1965, Pub. L. No. 89–236, § 11(f), 79 Stat. 911, 918 (replacing "physical persecution" with "persecution on account of race, religion, or political opinion").

58. Immigration and Nationality Act § 208(b), 8 U.S.C. § 1158(b)(1) (2006).

59. Kovac v. INS, 407 F.2d 102, 106–07 (9th Cir. 1969).

60. Mirzoyan v. Gonzales, 457 F.3d 217, 221–22 (2d Cir. 2006).

61. 297 F.2d 744, 746 (3d Cir. 1961).

slow starvation," establishing a requirement of extreme physical consequences before economic hardship would rise to the level of persecution.[62] The BIA cited the *Dunat* standard in 1965, holding that "economic proscription so severe as to deprive a person of *all* means of earning a livelihood may amount to physical persecution."[63] Courts have acknowledged that the 1965 amendment to the INA removing the word "physical" effectively superseded *Dunat*.[64] However, in 1991, the BIA once again cited *Dunat* to hold that an applicant failed to establish a well-founded fear of persecution because his claim that the Cuban government prohibited him from returning to his job after detainment did not constitute "a situation so severe as to deprive him of a livelihood."[65]

Two other standards for determining when economic harm rises to the level of persecution developed after the 1965 amendment to the INA. The Ninth Circuit's *Kovac* standard held sufficient a "probability of deliberate imposition of substantial economic disadvantage."[66] The Ninth Circuit reasoned, based on the 1965 amendment, that "Congress intended to . . . lighten the burden imposed on applicants for asylum by removing the requirement that they show threatened bodily harm" and shift the focus away from the physical consequences of oppression.[67] The BIA cited *Kovac* in several decisions since 1969 but never explicitly adopted the decision as the correct standard.[68] At least four other U.S. courts of appeals have applied the *Kovac* test or other less demanding tests that are in accordance with it.[69]

At the same time, the BIA developed a seemingly different standard.[70] In *Matter of Acosta*, citing both *Dunat* and *Kovac* for support, the BIA characterized persecution as "either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."[71] The BIA included in this definition "economic deprivation . . . so severe that [it] constitute[s] a

---

62. *Id.*

63. Matter of Bufalino, 11 I. & N. Dec. 351, 361–62 (B.I.A. 1965).

64. Li v. Attorney Gen., 400 F.3d 157, 166 (3d Cir. 2005); Kovac v. INS, 407 F.2d 102, 105–07 (9th Cir. 1969).

65. Matter of D–L– & A–M–, 20 I. & N. Dec. 409, 414 (B.I.A. 1991). For a discussion of different standards used to establish persecution, including the *Dunat* standard, see *Mirzoyan*, 457 F.3d at 222.

66. *Kovac*, 407 F.2d at 107.

67. *Id.* at 106.

68. Matter of Barrera, 19 I. & N. Dec. 837, 847 (B.I.A. 1989); Matter of H–M–, 20 I. & N. Dec. 683, 687 (B.I.A. 1993).

69. Falkler, *supra* note 2, at 484.

70. *See* Matter of Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (applying a higher standard for persecution).

71. *Id.* at 222.

threat to an individual's life or freedom."[72] Evidence of the "threat to life or freedom" test appears earlier in BIA precedent, even in cases where the BIA also cited to *Kovac*.[73] Caught in the BIA's confusion, U.S. courts of appeals applied this stricter standard in cases of alleged economic persecution, resulting in a circuit split.[74] Even the Ninth Circuit, which developed the more lenient test in *Kovac*, circumscribed its own standard and converted to the *Acosta* test in recent cases.[75]

2. Clarification—The *In re T-Z-* Standard

In 2006, the Second Circuit finally demanded clarification from the BIA.[76] In *Mirzoyan v. Gonzales*, the court found that it was unable to give deference to the BIA's construction of economic persecution because it could not identify one consistent construction in BIA precedent.[77] The court further noted that the BIA did not identify which of the many possible standards it had applied in denying Mirzoyan's claim.[78] The Second Circuit went on to discuss the importance of establishing the appropriate standard, as the outcome of Mirzoyan's case would likely differ depending on which construction of economic persecution was applied. While she might prevail under the more lenient *Kovac* standard, success would be unlikely under the *Dunat* or *Acosta* constructions.[79] Ultimately, the court remanded the case to the BIA to clarify the standard governing economic persecution claims.[80]

The BIA responded to *Mirzoyan* in 2007 with a new formulation.[81] Quoting a 1978 House Report, the BIA determined in *In re T-Z-* that the correct standard is "deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."[82] The BIA's newest construction tracks the language of the *Kovac* test but elevates the threshold from "substantial" to "severe," and incorporates a version of

---

72. *Id.*

73. Matter of Maccaud, 14 I. & N. Dec. 429, 434 (B.I.A. 1973) (citing *Kovac* for the standard but going on to hold that the applicant failed to establish a well-founded fear of a threat to his life or freedom).

74. Falkler, *supra* note 2, at 482.

75. *See, e.g.*, Zehatye v. Gonzales, 453 F.3d 1182, 1186 (9th Cir. 2006) (stating that economic deprivation did not amount to persecution).

76. Mirzoyan v. Gonzales, 457 F.3d 217, 220–21 (2d Cir. 2006).

77. *Id.* at 221.

78. *Id.*

79. *Id.* at 222.

80. *Id.* at 223–24.

81. *In re* T-Z-, 24 I. & N. Dec. 163, 170–71 (B.I.A. 2007).

82. *Id.* at 171 (quoting H.R. REP. NO. 95–1452 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4700, 4704).

the *Acosta* "threat to life or freedom" test.[83] Under *In re T-Z-*, an asylum seeker must show more than economic discrimination.[84] However, the BIA rejected the notion that an applicant must demonstrate "total deprivation of livelihood or a total withdrawal of all economic opportunity."[85] The BIA used illustrative examples of situations that could amount to persecution although they do not threaten a person's life or freedom, such as unreasonable fines, confiscation of property, or denial of the opportunity to continue working in an established profession.[86]

3. Continued Confusion Among U.S. Courts

The BIA's clarification of a single standard for evaluating economic deprivation as persecution did not end confusion in the courts of appeals. First, the circuits still split on the treatment of factually similar claims. For example, in *Beck v. Mukasey*, the Eighth Circuit reasoned that the economic hardship of two applicants did not amount to economic persecution.[87] Both applicants were trained in specialized fields but were forced to take menial farm labor jobs as a result of racial prejudice.[88] The Eighth Circuit determined that such disadvantage did not rise to the level of persecution because some employment was available, stating in dictum that "an individual who earns a degree and finds work has *no* claim of economic persecution."[89] This reasoning seems to be at odds with the BIA's determinations that an applicant does not have to show total deprivation of livelihood, and that denial of the opportunity to work in an established profession may rise to the level of persecution.[90] In contrast to the Eighth Circuit, the Third Circuit recently held that a mother's ability to "get by" with a menial job after seizure of her family's farm and truck, which served as the "exclusive source of the family's livelihood," did not bar a claim of economic persecution.[91] Interestingly, the Third Circuit criticized the BIA's evaluation of the

83. *Id.* at 172; Matter of Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985).

84. *In re T-Z-*, 24 I. & N. Dec. at 173.

85. *Id.*

86. *Id.* at 174.

87. Beck v. Mukasey, 527 F.3d 737, 741 (8th Cir. 2008) (dictum). The court first found that it lacked jurisdiction to review the BIA's decision and therefore did not decide the case on the merits, but discussed them anyway. *Id.*

88. *Id.* at 739.

89. *Id.* at 741 (emphasis added) (quoting Mitreva v. Gonzales, 417 F.3d 761, 764 (7th Cir. 2005)).

90. Jason Ullman, Kadri v. Mukasey*: A Legal Blueprint for Extending Asylum to Homosexual Aliens Who Have Not Suffered Physical Persecution*, 18 LAW & SEXUALITY 197, 203 (2009). For the BIA analysis, see *In re T-Z-*, 24 I. & N. Dec. at 173–74.

91. Cheng v. Attorney Gen., 623 F.3d 175, 195 (3d Cir. 2010).

petitioner's economic hardships, finding that the BIA was too harsh in applying its own standard.[92]

Additionally, courts of appeals generally dispute the appropriate interpretation of the BIA standard. The Second Circuit has continually cited *In re T–Z–* since 2007, but has characterized the standard as requiring all economic harm to constitute a threat to life or freedom.[93] In *Maslennikov v. Mukasey*, the Second Circuit equated the two halves of the test so that a showing of "severe economic disadvantage" must rise to the very high level of the second half, which is essentially a "threat to life or freedom" requirement.[94] The Fourth Circuit has taken the same approach, finding that "[i]n both circumstances . . . the harm amounting to 'economic persecution' must be so severe that it threatens the life or freedom of the applicant."[95] The Fourth Circuit seemingly interpreted the language from *In re T–Z–* that economic persecution "may" involve a threat to life or freedom as making the threat a required part of the BIA's test.[96] In comparison, the Tenth Circuit found the two halves of the test to be alternatives that apply to different situations, and to which different standards are applicable.[97] The court reasoned that in some situations the court will focus on whether an alien has been "so impoverished as to support a finding of persecution," and the *Acosta* "threat to life or freedom" test applies. In other situations, the court will focus on an economic loss that is so severe as to constitute persecution without depriving all access to the necessities of life, and the *Kovac* test applies.[98]

Finally, some circuits have failed to cite the new BIA standard and continued to use other formulations. In *Monzon–Ortega v. Holder*, the Ninth Circuit found that an applicant who was a victim of an extortion scheme did not establish past persecution, because he was not physically harmed by the economic deprivation that he suffered and was able to earn a living in some capacity.[99] The court did not address *In re T–Z–* and apparently reverted in part to the 1960s pre-amendment *Dunat* standard requiring severe physical consequences from economic detriment.[100] The Ninth Circuit has not cited *In re T–Z–* since the decision in 2007. Given the above inconsistencies, the state of U.S. law on the issue of economic

---

92. *Id.*
93. *E.g.*, Maslennikov v. Mukasey, 291 F. App'x 446, 447–48 (2d Cir. 2008).
94. *Id.*
95. Mirisawo v. Holder, 599 F.3d 391, 396 (4th Cir. 2010).
96. *Id.* (citing *In re* T–Z–, 24 I. & N. Dec. 163, 171 (B.I.A. 2007)).
97. Vicente–Elias v. Mukasey, 532 F.3d 1086, 1088–89 (10th Cir. 2008).
98. *Id.* at 1089.
99. 325 F. App'x 546, 547 (9th Cir. 2009).
100. *Id.*

persecution claims is hardly clearer than it was before the Second Circuit demanded clarification from the BIA.

## IV. CLAIMS OF ECONOMIC PERSECUTION AROUND THE WORLD

Historically, foreign courts approached the issue of asylum claims based on economic persecution by making a distinction between economic migrants and political refugees.[101] One section of the UNHCR Handbook supports the idea that economic claims are distinct and fall outside of the Refugee Convention.[102] The Handbook defines an economic migrant as "a person who, for reasons other than those contained in the [Convention] definition, voluntarily leaves his country in order to take up residence elsewhere. . . . If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee."[103] Economic migrants who leave their native countries merely in search of a better economic life, but who did not have economic hardship imposed on them because of any of the improper reasons listed in the Convention, are not refugees within the Convention's protection. However, the Handbook explains that the distinction between economic hardship and persecution is "sometimes blurred" when improper racial, religious, or political motivations underlie economic deprivation.[104] The Handbook acknowledges that individuals might, in certain circumstances, suffer persecution when governmental measures destroy their economic existence,[105] transforming economic migrants into bona fide refugees. Scholars have identified additional evidence that the drafters of the Refugee Convention intended for it to encompass these economic claims.[106] Historically, however, foreign courts tended to automatically dismiss asylum claims that were based exclusively on economic disadvantage, even when the asylum seeker suffered the disadvantage because of his race, religion, nationality, or social or political group.

More recently, foreign courts have relaxed their stringent stance against such economic claims of persecution. In a decision from the United Kingdom, the court found that limiting persecution to physical

---

101. FOSTER, *supra* note 2, at 2.

102. *See* UNHCR, *supra* note 31, ¶¶ 62–64 (distinguishing economic migrants from refugees and noting the blurred line between the political and economic motives behind decisions).

103. *Id.* ¶ 62.

104. *Id.* ¶ 63.

105. *See id.* (providing that the victims of economic measures that destroy their economic existence may suffer persecution and thereby qualify as refugees, where the circumstances reveal discrimination and amount to persecution).

106. FOSTER, *supra* note 2, at 88 n.4.

abuse was an incorrect formulation of the standard.[107] The U.K. Immigration Appeal Tribunal (IAT) also stated in another case that if a state does not protect against discrimination that causes "'[a]n inability to earn a living or to find anywhere to live," the Refugee Convention can be engaged.[108] The Federal Court of Australia determined that, under certain circumstances, employment discrimination can constitute persecution for the purposes of determining refugee status.[109] Essentially, these courts have established that they should focus on the reasons asylum seekers endure certain hardship, rather than on whether the hardship is economic or physical, in determining refugee status.

Despite this trend, each country remains free to establish its own threshold for improperly imposed economic deprivation to constitute persecution. The inconsistencies that this autonomy causes mirror those with which U.S. courts are struggling, and similar factual situations lead to different outcomes. Consider economic persecution claims based on a limited ability to access employment: courts sometimes found persecution when the applicant was only able to obtain menial work that was inconsistent with the applicant's qualifications, and other times held that such work precluded refugee status.[110] For example, the Federal Court of Canada adjudicated a claim filed by a Cuban doctor specializing in microbiology.[111] The Cuban government forced the doctor out of her position because she refused to provide the secret police with false positive HIV test results, and she was reduced to earning a living as a seamstress.[112] The applicant was initially denied refugee status, but the court found many of the administrative board's findings "manifestly perverse" and remanded the case for reconsideration.[113] In Australia, the Federal Court found error in a failure to consider how the loss of an applicant's job would affect his job satisfaction and overall career.[114]

Other courts have been less sympathetic, though the claims are similar. In a case from the Federal Court of Canada, the fact that an applicant could find some source of income undermined the claim for

---

107. *Id.* at 93 n.17.

108. *Id.* at 92 (quoting Sec'y of State for the Home Dep't v. Sijakovic, [2001] UKIAT Appeal No. HX–58113–2000, ¶ 16 (unreported)).

109. *Prahastono v. Minister for Immigration & Multicultural Affairs* [1997] 77 FCR 260, 267 (Austl.).

110. *See* JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 123 (1991) (discussing inconsistencies in application of the standard to similar factual scenarios).

111. Cabello v. Canada, [1995] 93 F.C. 156, para. 1 (Can.).

112. *Id.* para. 4.

113. *Id.* paras. 5, 8.

114. FOSTER, *supra* note 2, at 100 (discussing *Ahmadi v. Minister of Immigration & Multicultural Affairs* [2001] FCA 1070 (Unreported, Wilcox J., Aug. 8, 2001), ¶ 48).

refugee status.[115] The Federal Court found that the applicant's experience failed to reach the threshold of persecution because her husband was able to obtain employment and provide economic support for her.[116]

Courts are also conflicted on a broader, ideological level. Australia's Migration Act requires that economic hardship "threatens a person's capacity to subsist," which might be functionally equivalent to the "threat to life or freedom" standard. Embodying the current inconsistency in standards, the Act itself contradicts this by listing "a threat to the person's life or liberty" as a separate category of persecution, implying a distinction.[117] Other standards do not explicitly require a threat to physical well-being. The U.K. IAT stated that "'[e]conomic hardship must be extreme and the discrimination must effectively destroy a person's *economic existence* before surrogate protection can be required.'"[118] The New Zealand Refugee Status Appeals Authority (RSAA) found that restrictions on a person's ability to earn a livelihood amount to persecution "only to the extent that, at the extreme level, the restrictions are tantamount to the deprivation of life or cruel, inhuman, or degrading treatment."[119] The use of the terms "extreme" and "deprivation of life" make this standard seem deceptively harsh; however, it is arguably the most inclusive because it allows an alternative for cruel or degrading treatment without reference to the effect on the asylum seeker's physical or economic existence.

The New Zealand RSAA standard reflects another trend: that relaxation of the stringent stance on economic claims is correlated with an increasing acknowledgement of the importance of human rights and the incorporation of human rights doctrine into the international perspective on the status of refugees.[120] The Refugee Convention is now commonly regarded as a protector of basic human rights rather than merely a legal obligation imposed on state parties.[121] This progression stems from the Convention itself, which recognizes "the social and humanitarian nature of the problem of

---

115. Barkai v. Canada (Minister of Emp't & Immigration), 1994 CarswellNat 732, para. 34 (Can. Fed. Ct.) (WL).

116. *Id.*

117. *Migration Act 1958* (Cth) s 91R(2) (Austl.).

118. FOSTER, *supra* note 2, at 124 (quoting El Deaibes v. Sec'y of State for the Home Dep't, [2002] UKIAT 02582, ¶ 13) (emphasis added).

119. *Id.* (quoting Refugee Appeal No. 71605/99, at 7 (Dec. 16, 1999) (N.Z. Refugee Status Appeals Auth.) (internal quotation marks omitted)).

120. *See* JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 4–6 (2005) (advocating that refugees be considered as a remedial branch of international human rights law).

121. *See id.* at 4 (noting that high courts that have analyzed the purpose of the Refugee Convention have found it part of human rights law).

refugees" and refers to the Universal Declaration of Human Rights (UDHR).[122] It may also profoundly affect refugees around the world, as approximately 86 percent of refugees live in countries that have signed or ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (ICESCR),[123] which are "enforceable international covenants [drawing] on the scope and content of the UDHR."[124] The High Court of Australia described the Refugee Convention as "an instrument which provides an important . . . form of international responsibility towards a person whose fundamental human rights and freedoms have been violated in a certain respect in the person's country of nationality."[125] The Canadian Refugee Protection Division (RPD) bluntly stated that "'[p]ersecution occurs when an individual's fundamental human rights are violated.'"[126] South Africa's post-apartheid Refugee Act explicitly prescribes that the Act must be construed consistently with the UDHR.[127]

However, this approach is not universal.[128] In some jurisdictions, "the most superior court has not provided a coherent framework of analysis, thus leaving the specialist tribunals and lower courts to adopt a patchwork jurisprudence," while in other jurisdictions lower level decision makers use old approaches despite the fact that the high courts have advocated a human rights framework.[129] Nonetheless, the general human rights-based approach is considered to be the dominant approach regarding how to interpret the term "persecution."[130] Accordingly, claims of economic persecution should be considered within the framework of human rights analysis.[131]

---

122. Refugee Convention, *supra* note 17, pmbl.

123. Adrienne Anderson, *On Dignity and Whether the Universal Declaration of Human Rights Remains a Place of Refuge After 60 Years*, 25 AM. U. INT'L L. REV. 115, 125 (2009).

124. *Id.* at 118.

125. *Minister for Immigration & Multicultural Affairs v Respondents* [2004] 222 CLR 1, 8 (Austl.).

126. FOSTER, *supra* note 2, at 29 n.9 (quoting OQU (Re), [1999] C.R.P.D. No. 157, para. 19).

127. Jennifer A. Klinck, *Recognizing Socio-Economic Refugees in South Africa: A Principled and Rights-Based Approach to Section 3(b) of the Refugees Act*, 21 INT'L J. REFUGEE L. 653, 662 (2009).

128. FOSTER, *supra* note 2, at 28.

129. *Id.* at 28–30.

130. *Id.* at 30–31.

131. *Id.*

## V. PROPOSING AN INTERNATIONAL STANDARD FOR CLAIMS OF ECONOMIC PERSECUTION

### A. *A Discussion of the Proposed Standard*

The United States needs a consistent standard to apply to claims of economic persecution. In addition, with the significant increase in these claims around the world, it is time to adopt such a standard internationally. By ratifying the Refugee Convention, its parties have declared their commitment to providing safe havens for members of the international community who are not afforded the full protection of the laws in their countries of origin. Adopting one standard for evaluating claims of non-physical persecution would help the parties accomplish this goal in a fair and consistent manner.

The parties to the Refugee Convention should first formally acknowledge that claims of economic harm can rise to the level of persecution if the other elements of the Convention's refugee definition are met. Second, the parties should agree on one standard for economic harm as persecution: granting refugee status to those who have a well-founded fear of deliberate imposition of economic disadvantage that threatens life, freedom, or otherwise violates human rights so that life in the country of origin would be intolerable, including severe degradation of personal dignity. This standard begins with economic harm that threatens life or freedom; it should now be clear from the above discussion that granting asylum for these claims is widely accepted, especially because a threat to life or freedom would almost necessarily involve some physical consequences. For example, a total denial of employment would lead to hunger and the inability to afford shelter, as would particularly onerous fines that usurp a person's entire income. In fact, the UNHCR Handbook states that "[f]rom Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is *always* persecution."[132] This inference does not distinguish economic persecution from physical persecution, implicitly recognizing that non-physical harm can also be a threat to life or freedom.

The second prong of the proposed standard recognizes as persecution economic violations of human rights, including severe degradation of personal dignity. Through this prong, the standard embraces the growing international trend of including economic harm

---

132. UNHCR, *supra* note 31, ¶ 51 (emphasis added).

that does not constitute threats to life and freedom in the scope of persecution. Additionally, it directly addresses the concern underlying such claims: that a state may treat a person in such a way that, although it may not amount to physical persecution, it shocks the conscience to the extent that it would seem against international principles of human rights to deny that person refuge. In its simplest form, the term "human rights" refers to "interests [that] are shared by all persons because they are the conditions for a decent human life," and their violation makes enjoyment of a decent life "very difficult if not impossible."[133] Violation necessarily includes systematic and discriminatory affronts on a person's dignity; the concept of respect for personal dignity is one of the underpinnings of international human rights.[134] Countries have implicitly accepted this by becoming parties to the UDHR; some have even stated it explicitly.[135] The proposed standard for persecution, which includes economic violations of human rights, addresses treatment that, despite a lack of physical harm, is so degrading that it makes it difficult for a person to enjoy a decent life. This standard is sufficiently strict to accommodate countries' interest in keeping the bar for economic claims high, so as not to slide down a slippery slope toward granting asylum for claims that should be properly classified as mere economic detriment not rising to the level of persecution. For example, despite setting a strict standard, the New Zealand RSAA included denial of the ability to work as persecution if it constituted "degrading treatment."[136]

The international community is increasingly viewing asylum and refugee status from this human rights perspective, and moreover, the UNHCR explicitly adopts this point of view. The language of the proposed standard is adopted from the Handbook itself. After recognizing threats to life or freedom as persecution, the Handbook

---

133. ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 128 (2004).

134. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III), pmbl. (Dec. 10, 1948) [hereinafter UDHR] ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.").

135. *See* Anderson, *supra* note 123, at 132 (observing that the New Zealand RSAA explicitly affirmed the inviolability of human dignity in its interpretation of "particular social group"). For example, Anderson quotes an RSAA decision in which the RSAA stated the principle that "refugee law ought to concern itself with actions which deny human dignity in any key way." *Id.* (quoting Refugee Appeal No. 1312/93, at 61 (Aug. 30, 1995) (N.Z. Refugee Status Appeals Auth.) (internal quotation marks omitted)).

136. *See* Refugee Appeal No. 71605/99, at 7 (Dec. 16, 1999) (N.Z. Refugee Status Appeals Auth.) (stating that deprivations constitute persecution only insofar as they rise to the level of deprivation of life or cruel, inhuman, or degrading treatment, and that substantial impairment of earning capability may rise to such a level).

goes on to state that "[o]ther serious violations of human rights—for the same reasons—would also constitute persecution."[137] Again, there is no differentiation between physical and non-physical violations of human rights in this discussion.[138] The standard also imputes language from the Handbook's discussion of the element of a "well-founded fear." The Handbook explains that fear is "well-founded if [the applicant] can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable . . . or would . . . be intolerable if he returned there."[139] In further support, the UDHR establishes rights beyond freedom from physical intrusion, including the right to own property,[140] the right to work and free choice of employment,[141] and the right to education.[142] Thus, a standard for economic persecution that allows decision makers to grant refugee status for fundamental violations of basic human rights, whether through physical or purely economic harm, is consistent with UNHCR's interpretation of the Refugee Convention; the declaration of countries, either explicitly or by joining the UDHR, that violations of human rights include more than physical harm; and the international trend of evaluating claims of economic persecution through a human rights standard.

The proposed definition of economic persecution allows for flexibility to accommodate changing perspectives and circumstances over time. A concern about inhibiting this flexibility may underlie the lack of a formal definition for persecution in the Refugee Convention, as well as in the U.S. Immigration and Nationality Act.[143] The proposed standard relies on the international community's understanding of human rights and allows for flexible treatment of asylum claims if shifts in that perspective occur over time. Given that the international trend has been to expand the understanding of persecution to include a greater number of affronts on human rights, it is probable that any future shifts would continue in this direction. Relying on the element of personal dignity roots the definition in norms of international law and provides a stable foundation for future adaptation.

---

137. UNHCR, *supra* note 31, ¶ 51.

138. *See id.* (failing to distinguish between physical and non-physical deprivations of rights in listing violations able to rise to persecution).

139. *Id.* ¶ 42.

140. UDHR, *supra* note 134, art. 17(1).

141. *Id.* art. 23.

142. *Id.* art. 26.

143. Marcs, *supra* note 32, at 45 (noting the vagueness of the term).

### B. *Addressing Potential Criticisms*

It may be argued that the concepts of human rights and intolerability are too amorphous or subjective to be used consistently in evaluating claims for refugee status. However, there has never been an illusion of absolute objectivity in evaluating refugee status. For example, when discussing the element of "fear" in the definition of a "refugee," the UNHCR Handbook calls it "a subjective element in the person applying for recognition as a refugee"[144] and "a state of mind and a subjective condition."[145] The Handbook even goes so far as to instruct that "[a]n evaluation of the *subjective element* is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions."[146] The Handbook then extends this subjectivity to the definition of persecution. "Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs [concerning fear]."[147] Thus, an inherent subjectivity exists in the evaluation of persecution.

On the other hand, as the Handbook also discusses, the objective qualifying term "well-founded" in the Convention definition tempers these subjective elements of fear and persecution.[148] The applicant's claims should not "be considered in the abstract, and must be viewed in the context of the relevant background situation."[149] Similarly, scholars have suggested that in evaluating economic deprivation that does not threaten life or freedom, decision makers can look to external, objective sources, such as the UDHR, the ICCPR, and the ICESCR as a framework.[150] "[R]eference to a uniform standard, such as that provided by international human rights principles, would assist in ensuring that refugee decision makers do not dismiss cases based solely on their own subjective notions of cultural sensitivity, without sufficient regard to the rights of the individual applicant."[151]

---

144. UNHCR, *supra* note 31, ¶ 37.

145. *Id.* ¶ 38.

146. *Id.* ¶ 40.

147. *Id.* ¶ 52.

148. *See* Refugee Convention, *supra* note 17, art. 1(A)(2) (requiring that a qualifying fear be well-founded); UNHCR, *supra* note 31, ¶ 38 (requiring an objective situation to support this frame of mind, thereby adding an objective requirement to the subjective fear).

149. UNHCR, *supra* note 31, ¶ 42.

150. HATHAWAY, *supra* note 110, at 105–07 (1991). Collectively these three documents are known as the International Bill of Rights. *Id.*

151. FOSTER, *supra* note 2, at 39.

Ultimately, however, as with any legal determination, a great amount of judgment is required from the relevant decision makers. The proposed standard does not purport to remove all subjectivity or provide 100 percent consistency, a seemingly impossible task when dealing with individual human circumstances. However, it provides a minimum baseline from which all host countries can work, striving to maximize consistency. There will certainly be threshold cases, but applicants with economic claims that clearly rise above that threshold should no longer be denied asylum for failure to meet the persecution element.

The strongest potential concern among policy makers is that the proposed standard is too expansive and will open the floodgates of asylum seekers, forcing countries to grant a greater number of asylum claims than they are otherwise willing or able to grant. However, an asylum seeker maintains the burden of proving that his or her suffering rises to the required level of persecution. This burden does not change when the claim becomes economic rather than physical, and host countries are free to deny refugee applications that do not meet the standard. In fact, U.S. courts have acknowledged that economic claims could constitute persecution under *In re T-Z-* but still deny claims because the asylum seeker failed to provide sufficient evidence of the economic suffering.[152]

This criticism also fails to take into account that "persecution" is merely one word in the Convention's long definition of a "refugee," which requires proof of several other elements before an asylum seeker satisfies the definition. A potential refugee must establish that deliberate state activity caused the economic hardship. The asylum seeker then has the additional hurdle of proving that the persecution was on account of one of the Convention reasons: "race, religion, nationality, membership of a particular social group or political opinion."[153] The asylum seeker must also prove a well-founded fear of suffering the persecution if the asylum seeker were to return to his or her country.[154] As discussed above, this objective standard provides further protection against uncolorable claims.[155]

---

152. *See* Lian v. U.S. Dep't of Justice, 286 F. App'x. 754, 756 (2d Cir. 2008) (denying a claim based in part on an alleged onerous fine because the petitioner could not prove the amount of the fine and "never explained how any such fine would affect her family's subsistence"); Guan Shan Liao v. U.S. Dep't of Justice, 293 F.3d 61, 70 (2d Cir. 2002) (finding no economic persecution because the petitioner did not present evidence that would allow the court to evaluate his financial situation relative to fines from the government).

153. Refugee Convention, *supra* note 17, art. 1(A)(2).

154. *Id.*

155. *See supra* notes 148–51 and accompanying text (discussing that a well-founded fear must contain an objective basis, providing a better standard for evaluators).

Altogether, these requirements set a high bar for success in obtaining refugee status. The standard continues to safeguard against frivolous claims for asylum, making it unlikely that formally agreeing to include non-physical persecution will substantially increase the burden on host countries.

Finally, history demonstrates that formally including new groups in the definition of refugee does not necessarily increase the number of asylum claims.[156] The "floodgate" did not open when the United States decided to grant asylum to Soviet political refugees during the Cold War, and Canada did not experience a swell in refugees when it expanded asylum to victims of domestic violence.[157] Given that the formal recognition of economic persecution and the application of the new standard will occur on an international scale, rather than an expansion of a single country's policy, any additional legitimate claims will be distributed among many countries, making it especially unlikely that individual countries will experience a significant surge in refugees.

## VI. WHY THE UNITED STATES SHOULD ADOPT THE PROPOSED STANDARD

The proposed standard embraces the international trends of recognizing that non-physical economic mistreatment can rise to the level of persecution and evaluating claims of such persecution from a human rights perspective. The definition is also consistent with the UNHCR's interpretations in its Handbook. Thus, the proposed standard for economic claims of persecution is the most appropriate standard under international law. This section explicitly reconciles the proposed standard with the U.S. precedent discussed above to explain why the United States can and should adopt this standard.

The UNHCR Handbook is designed to provide guidance for interpreting and applying the 1951 Convention and the 1967 Protocol. Congress made it clear that the Refugee Act of 1980 was intended to bring the INA into accordance with the Protocol, and that the INA should be "construed consistently" with the Protocol.[158] Accordingly, interpretations contained in the UNHCR Handbook

---

156. M. Beth Morales Singh, *To Rescue, Not Return: An International Human Rights Approach to Protecting Child Economic Migrants Seeking Refuge in the United States*, 41 COLUM. J.L. & SOC. PROBS. 511, 543 (2008) (observing that Special Immigrant Juvenile Status (SIJS) visas had been available for seventeen years for abused, abandoned, or neglected children and had been perennially underutilized—only 660 SIJS visas were issued in 2006, despite 5,000 being available).

157. *Id.* at 543–44.

158. H.R. CONF. REP. NO. 96–781, at 19 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 160, 160; H.R. REP. NO. 96–608, at 9 (1979); S. REP. NO. 96–256, at 4 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141; Falkler, *supra* note 2, at 479.

should guide the United States' application of its asylum law. This guidance is not binding; in fact, the Supreme Court has explicitly stated that the Handbook is "not binding on the Attorney General, the BIA, or United States courts."[159] The Supreme Court has, however, looked to the Handbook for guidance.[160] In *Cardoza-Fonseca*, which set the burden of proof on an applicant for establishing a well-founded fear of persecution, the Court acknowledged "the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes."[161] Examining the provisions of the Handbook to interpret the INA is consistent with U.S. legislative history and judicial precedent, and the Handbook supports the proposed standard.[162]

The proposed standard is also consistent with the BIA's current formulation. The *In re T-Z-* standard has two parts: "severe economic disadvantage" and "the deprivation of liberty, food, housing, employment, or other essentials of life."[163] The second part of the standard essentially reduces to a "threat to life or freedom" requirement. The Second Circuit attempted to equate the two halves,[164] but this is an incorrect interpretation of the BIA's standard. The two parts of the test are connected by "or" rather than "and."[165] In *In re T-Z-* the BIA noted that "[g]overnment sanctions that reduce an applicant to an impoverished existence may amount to persecution even if the victim retains the ability to afford the bare essentials of life."[166] The language of *In re T-Z-* indicates that the BIA meant to include severe economic deprivation as an alternative to threats to life or freedom. Thus, the BIA formulation parallels the proposed standard—an equivalent "threat to life or freedom" provision with an alternative provision to include other economic harm that does not rise to that level.

The alternative provisions to threats to life or freedom are comparable. The BIA went to great lengths to emphasize and justify that its new formulation requires "severe" economic disadvantage, finding that it was appropriate to elevate the "substantial" criterion

---

159. INS v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999).

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

161. *Id.*

162. *See supra* Part V.A (discussing the merits of interpreting the INA with reference to the UNHCR Handbook and a human rights perspective).

163. *In re* T-Z-, 24 I. & N. Dec. 163, 171-74 (B.I.A. 2007).

164. *See* Maslennikov v. Mukasey, 291 F. App'x. 446, 447-48 (2d Cir. 2008) (finding that petitioners must demonstrate that such economic deprivations amount to a threat to life or freedom to rise to a severe economic disadvantage).

165. *In re T-Z-*, 24 I. & N. Dec. at 171.

166. *Id.* at 174.

of the *Kovac* test.[167] The BIA relied on congressional legislative history using the term "severe" and found it "consistent with the principle that persecution is 'an extreme concept that does not include every sort of treatment our society regards as offensive.'"[168] The proposed standard, violations of human rights such that the violations make life intolerable, is not inconsistent with this provision or its requirement of severe disadvantage. The Supreme Court quoted the intolerability language of the UNHCR Handbook in *Cardoza-Fonseca*, and the BIA not only referred to this quotation but even stated that "[u]se of the term 'intolerable' to describe the level of harm for persecution supports setting the minimum threshold for economic persecution at 'severe.'"[169] The second half of the proposed standard uses the term "intolerable," and the BIA used that language to justify its requirement of "severe economic disadvantage." The conclusion that the BIA would view these two provisions as alternative formulations of the same condition finds support in court precedent and practice.

The use of an explicit reference to human rights in the proposed definition is also consistent with the BIA "severe economic disadvantage" standard. The examples that the BIA gives for severe economic damage are consistent with those rights established by the UDHR. For example, the BIA's example of "large-scale confiscation of property"[170] is equivalent to a violation of the right to own property and the right to avoid arbitrary deprivation of property in Article 17 of the UDHR.[171] The BIA's "sweeping limitation of opportunities to continue to work in an established profession"[172] equates to a violation of the "right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment" in Article 23.[173] Legislative history suggests that Congress viewed persecution as a facet in determining violations of fundamental human rights. In the House Report from which the BIA extracted its *In re T-Z-* standard, the committee noted that prior legislation defined victims of persecution as those who had "been denied *the full rights of citizenship* on account of race, religion, or political belief."[174]

---

167. *Id.* at 172–73.
168. *Id.* at 172 (quoting Nagoulko v. INS, 333 F.3d 1012, 1016 (9th Cir. 2003)).
169. *Id.* (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 439 (1987)).
170. *Id.* at 174.
171. UDHR, *supra* note 134, art. 17.
172. *In re T-Z-*, 24 I. & N. Dec. at 174.
173. UDHR, *supra* note 134, art. 23.
174. H.R. REP. NO. 95–1452 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4700, 4704 (emphasis added).

In sum, the proposed standard for evaluating economic disadvantage is equivalent to and consistent with the BIA's current standard. Thus, the United States should join the agreement in order to endorse the adoption of an international standard. In addition, the proposed standard actually improves on the *In re T-Z-* formulation. The confusion and inconsistency that has resulted in U.S. decisions since *In re T-Z-* shows that a more elaborate, instructive standard than "severe economic disadvantage" is required.[175] The proposed standard strives to achieve this clarity and guidance explicitly using fundamental human rights principles as an element of the definition. These principles of human rights provide a foundation that potential countries of asylum, including the United States, are already familiar with, as "such rights transcend subjective and parochial perspectives and extend beyond national boundaries."[176]

## VII. CONCLUSION

By joining the 1951 United Nations Convention Relating to the Status of Refugees and its Protocol, 147 countries have declared that they believe in fundamental rights that governments should afford to all members of the international community. Unfortunately, these rights are often violated, and refugees are forced to flee their homelands in search of asylum from persecution. Many successfully find refuge, but many are turned away at the end of their long journeys because the country in which they seek asylum finds that the harm that they fear does not rise to the level of "persecution." The dichotomy between economic migrants and political refugees is shrinking. The gradual international acceptance of asylum claims arising from economic disadvantage rather than pure physical persecution has opened the door for a greater number of refugees; this development, however, lacks uniform standards for evaluating these claims.

Not only is the United States a party to the Protocol Relating to the Status of Refugees, but it also modeled its domestic asylum law after the Protocol. The confusion and inconsistency playing out on the world stage regarding economic claims of persecution is reflected within U.S. borders, as the Board of Immigration Appeals and the federal courts of appeals struggle to clarify multiple abstract legal standards and apply them to the factual circumstances on a case-by-

---

175. *See supra* Part III.B.3 (observing considerable disagreement in the interpretation of the standard).

176. FOSTER, *supra* note 2, at 40 (quoting Chan v. Canada (Minister of Emp't & Immigration), [1995] 3 S.C.R. 593, 635).

case basis. With these claims growing, an internationally uniform framework is increasingly necessary.

This Note has examined the 1951 Convention and its Protocol, guidelines from the United Nations High Commissioner on Refugees, and trends in the approaches of countries similar to the United States to asylum claims based on economic disadvantage. For various reasons, these documents and approaches are relevant and instructive to the United States in assessing its own approach. However, it is not enough to develop a fair and consistent standard within the United States. Thus, this Note has proposed an international agreement that establishes a fair and appropriate standard under international law and principles. The proposed standard incorporates the dominant view that persecution involves violations of human rights, which necessarily include severe degradations of personal dignity, whether or not they involve significant physical harm. It addresses both threats to life or freedom and other violations of human rights, the meaning of which is universally understood. Additionally, by referencing human rights, the standard implicitly gives countries external guideposts in the form of international human rights documents. The proposed standard is also entirely consistent with, and in fact improves upon, the current BIA standard. Consequently, the United States should join the proposed agreement in order to endorse the standard and to promote uniformity in the approaches of the 147 countries.

*Lauren Michelle Ramos*[*]

---

[*] J.D. Candidate, 2011, Vanderbilt University Law School.

***