

REPAIRING THE LEGACY OF *INS V. ELIAS-ZACARIAS*

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INTRODUCTION

The 1951 United Nations Convention relating to the Status of Refugees (“Convention”) defines a “refugee” as a person who is unable or unwilling to return to her home country because of a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”¹ The Convention was originally adopted as a political strategy to aid ideological dissidents fleeing Soviet bloc countries after World War II, and its definition of refugee was temporally and geographically limited to facilitate that goal.² The 1967 United Nations Protocol relating to the Status of Refugees (“Protocol”) incorporated the Convention’s definition without these restrictions,³ and the United States signed on as a party in 1968.

Congress passed the Refugee Act of 1980 as part of the United States’ effort to fulfill its international obligations under the Convention.⁴ The Refugee Act defines “refugee” as an alien within the United

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1. Convention relating to the Status of Refugees, July 28, 1951, art. 1(A)(2) 189 U.N.T.S. 2545 [hereinafter Convention].

2. The Convention limited the definition of refugee to those whose flight resulted from a pre-1951 event in Europe. Convention, *supra* note 1, art. 1(B)(1). See generally JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 6–9 (1991) (hereinafter HATHAWAY, *REFUGEE STATUS*) (discussing the political goals of the Convention as evidenced in the *travaux preparatoires*).

3. United Nations Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (hereinafter Protocol).

4. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.). The Senate Judiciary Committee’s Report accompanying the Refugee Act demonstrates Congress’s intent to update the statutory definition of “refugee” to comport with the United States’ obligations under the Convention. See H.R. REP. NO. 96-608, at 1 (1979). See also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (“If one thing is clear from the legislative history of the new definition of ‘refugee’ . . . it is that one

States who is unwilling or unable to return home “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.”⁵ Any refugee who applies for asylum status in the United States must meet this definition.

Refugee decisionmakers in many of the state parties to the Convention have struggled to define the causal relationship between the persecution or threats thereof and the five Convention-protected grounds required by the phrase “for reasons of race, religion, nationality, membership of a particular social group or political opinion.” Courts agree the phrase mandates some sort of causal connection, but disagree as to what the phrase modifies and what degree of causation is required.⁶ In 1992, the United States Supreme Court addressed this causal connection in *INS v. Elias-Zacarias*.⁷ Elias-Zacarias fled Guatemala after being threatened by guerrillas when he resisted their recruitment attempts. The Court denied him asylum status, finding that (1) Elias-Zacarias did not resist recruitment because of his political opinion, and (2) he had not shown the guerrillas threatened him because of his political opinion, and they could have been motivated by the simple goal of increasing their troops.⁸ The Court thus adopted a notion of causation based on the persecutor’s intent, requiring an asylum applicant to provide some evidence, direct or circumstantial, that her persecutor was motivated to persecute her by her race, religion, nationality, political opinion, or membership in a particular social group.⁹ Thus, the Court authorized decisionmakers to focus their inquiry in asylum cases on discerning the persecutor’s reasons for his actions.

Lower courts adjudicating asylum cases since *Elias-Zacarias* have struggled to follow the Supreme Court’s mandate while confined within the limited evidentiary record refugees are able to produce. Appellate

of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol relating to the Status of Refugees.”).

5. 8 U.S.C. § 1101(a)(42)(A) (2000).

6. See, e.g., *Horvath v. Sec’y of State for the Home Dep’t*, [2000] 3 All E.R. 527 (H.L. 2000) (Eng.); *R. v. Immigration Appeal Tribunal, ex parte Shah*; *Islam v. Sec’y of State for the Home Dep’t*, [1999] 2 A.C. 629, [1999] 2 W.L.R. 1015, [1999] 2 All E.R. 545 (H.L. 1999) (Eng.); *Refugee Appeal No. 71462/99* (N.Z. 1999); *‘Applicant A’ and Anor v. Minister for Immigration and Ethnic Affairs and Anor* (1997) 142 A.L.R. 331, 1997 AUST HIGHCT LEXIS 4 (Austl.); *Canada (Att’y Gen.) v. Ward*, [1993] 2 S.C.R. 689.

7. 502 U.S. 478 (1992). In the Refugee Act, Congress substituted “on account of” for “for reasons of,” which will be discussed in more depth, *infra*, Part III.

8. *Elias-Zacarias*, 502 U.S. at 483 (“Elias-Zacarias still has to establish that the record also compels the conclusion that he has a ‘well-founded fear’ that the guerrillas will persecute him *because of* that political opinion, rather than because of his refusal to fight with them.”).

9. *Id.*

decisions have varied, with courts in many cases imposing a stricter evidentiary requirement than the Supreme Court required. Most of the confusion revolves around the Supreme Court's statement that circumstantial evidence of motive is as acceptable as direct evidence,¹⁰ and lower courts' attempts to decipher what inferences from circumstantial evidence are acceptable under the *Elias-Zacarias* framework. As a result, applicants' asylum cases with remarkably similar facts emerge with opposite outcomes, rendering the asylum adjudication process arbitrary. The disparity stems from the almost impossible task of discerning the motives of persecutors who may not articulate their motives to their victims and are not present in the asylum adjudication to be interrogated about them. Not only are these outcomes unfair to asylum-seekers, but they are inconsistent with both the Court's holding in *Elias-Zacarias* and the international requirements of the Convention itself.

This Article examines the evolution of the nexus requirement in United States refugee law since the *Elias-Zacarias* decision. Part I discusses the Supreme Court's decision in *Elias-Zacarias*, identifying the choices the Court made among the arguments presented before it that resulted in the motive-oriented approach to nexus. This Part also delves into the Court's statement about the evidence required to demonstrate motive, concluding that the Court's treatment of the evidence before it foreshadows the confusion lower courts have demonstrated in evaluating evidence of motive. Part II looks at appellate decisions on the nexus issue since 1992, highlighting cases that exemplify the disparity among appellate decisions. This Part concludes that the appellate courts' differing evidentiary requirements have resulted in a lack of uniformity that is both unfair to asylum applicants and contrary to the United States' treaty obligations. Part III addresses how asylum decisionmakers could work within the precedent of *Elias-Zacarias* to bring the United States closer to compliance with international law. Specifically, this Part argues that a thoughtful use of inferences from circumstantial evidence of the applicant's predicament could ensure that applicants receive fair and uniform treatment in the application of the nexus requirement. This Article concludes that, to comply with the mandates of both the Convention and *Elias-Zacarias*, courts must focus on the *predicament* from which the asylum applicant fled, and use circumstantial evidence to *infer* motive instead of placing an undue burden on the applicant to prove the persecutor's state of mind.

10. *Id.*

I. THE SUPREME COURT'S DECISION IN *ELIAS-ZACARIAS*

In *INS v. Elias-Zacarias*, the leading American case on the nexus issue, the Court held that refugee decisionmakers must determine whether or not the asylum applicant's persecutors were motivated to persecute or threaten her by her race, religion, political opinion, nationality, or membership in a particular social group. Part I looks into the background of the case and the arguments leading up to the Court's opinion and discusses the key choices the Court made in the decision. This Part points out the elements of the decision that resulted in the current confusion in the lower courts about how applicants can prove their persecutors' motive, concluding that while the Court's decision may not have been inherently harmful to asylum-seekers, the Court's failure to give more guidance opened the door for inconsistency and harsh outcomes in the lower courts.

The facts of Jairo Jonathan Elias-Zacarias' case are typical for refugees fleeing from countries torn apart by civil wars between militant guerrilla groups and the government. Elias-Zacarias left Guatemala in March 1987, two months after two armed, partially masked guerrillas came to his home and tried to recruit him.¹¹ When he refused to join them, the guerrillas threatened that they would be back, and admonished him to "think it [over] well."¹² Elias-Zacarias testified credibly to these facts and presented evidence that the guerrillas in Guatemala engage in forced recruitment.¹³ While the Immigration Judge and Board of Immigration Appeals denied his application, the Ninth Circuit Court of Appeals reversed the Board, concluding the evidence that the guerrillas engaged in forced recruitment created an inference that their threatened persecution of Elias-Zacarias was to further their political goals of overturning the government.¹⁴ Additionally, the Ninth Circuit found Elias-Zacarias' refusal to join the guerrillas functioned as an implied assertion of a pro-government political opinion.¹⁵ Thus, the Ninth Circuit focused

11. *Id.* at 480.

12. *Id.* at 479 (quoting the Immigration Judge's summary of Elias-Zacarias's testimony).

13. *Elias-Zacarias v. INS*, 921 F.2d 844, 848 (9th Cir. 1990), *rev'd*, 502 U.S. 478 (1992).

14. *Id.* at 852.

[T]he threat to Elias was for political as opposed to personal reasons . . . there was no evidence to rebut the common sense inference that the guerrillas were interested in recruiting Elias to further the group's political goals. There was thus a reasonable possibility . . . that the guerrillas would return and take Elias by force, thereby persecuting him on account of political opinion.

Id.

15. *Id.* at 850 ("The persecution is properly categorized as 'on account of political opinion' because the person resisting forced recruitment is expressing a political opinion hostile

on the guerrillas' political motives and how those motives would lead them to interpret Elias-Zacarias' decision, rendering him in a dangerous position, not on Elias-Zacarias' actual political opinion.

The Supreme Court interpreted the Ninth Circuit's opinion as a blanket assertion that any applicant who was a victim of forced recruitment by a political group suffered persecution "on account of" political opinion per se.¹⁶ Indeed, Justice Scalia's majority opinion stated the question presented in the case as "whether a guerrilla organization's attempt to coerce a person into performing military service *necessarily* constitutes 'persecution on account of . . . political opinion.'" ¹⁷ With the issue framed thus, it is easy to see why the Court approached Elias-Zacarias' case with skepticism. Given the prevalence of politically-charged civil war, an affirmative answer to that question would open the floodgates to many asylum applicants from war-torn third world countries, and the Court may have sought a means to limit such an interpretation of the refugee definition.¹⁸

The first question the briefs required the Supreme Court to clarify was whether the "on account of" language modifies "persecution" or "well-founded fear." The amicus brief of the Lawyer's Committee for Human Rights and the American Jewish Committee argued that the five Convention-protected grounds could be connected either to the applicant's fear ("well-founded fear") or the persecutor's motivation ("persecution").¹⁹ The government argued that only the persecutor's motivation was relevant, because the "on account of" language modifies "persecution," and the ordinary meaning of "persecution" includes an element of intent.²⁰ The government equated "on account of" with "because of," concluding that

to the persecutor and because the persecutors' motive in carrying out the kidnapping is political.").

16. *Elias-Zacarias*, 502 U.S. at 480 ("The court ruled that acts of conscription by a non-governmental group constitute persecution on account of political opinion.").

17. *Id.* at 479.

18. The INS raised this "floodgates" argument in its brief, so it must have been at least in the back of the Justices' minds. Brief for Petitioner at Argument A.3, para. 8, *Elias-Zacarias* (No. 90-1342) ("[T]he court of appeals' reading of the 'on account of' clause opens asylum to anyone with a well-founded fear of physical harm at the hands of a political faction.").

19. Brief of Amicae Curiae The Lawyers Committee for Human Rights and the American Jewish Committee at 5, *Elias-Zacarias* (No. 90-1342) ("The reasons can have their nexus either with the applicant's fear or with the persecutor's motivation.").

20. Brief for Petitioner at Summary of Argument A, para. 1, *Elias-Zacarias* (No. 90-1342) ("The state of mind of the persecutor is also an element, since 'persecution' means the infliction of suffering on a person because of the victim's beliefs. Thus, the persecutor's state of mind is determinative of whether persecution is 'on account of' a political belief held by the victim."). The Petitioner's brief defined "persecution" to mean "the infliction of suffering because of the victim's race, beliefs, or nationality, especially religious beliefs." *Id.* at Argument A.1, para. 1.

Elias-Zacarias must show the guerrillas persecuted or threatened to persecute him *because of* his political opinion.²¹ Thus, while the persecutor's motive for persecution is determinative, the persecutor's political opinion is not relevant—only the victim's political opinion matters.²² This argument, which the Court ultimately adopted,²³ undermined the Ninth Circuit's decision that the guerrillas' general political motives established the required nexus to political opinion.

The Court thus adopted a two-step inquiry in nexus cases: (1) whether the applicant actually holds a political opinion, religious belief, and so on; and (2) if so, whether his persecutors were motivated to persecute him by that opinion. The Court first determined that Elias-Zacarias' motive for refusing to join the guerrillas was instrumental, not political, because he was concerned about government retaliation.²⁴ The Court did not decide whether Elias-Zacarias's neutrality constituted an "affirmative expression of a political opinion," or whether his refusal led the guerrillas to impute a political opinion to him, because it found that

21. Brief for Petitioner at Argument A.1, para. 1, *Elias-Zacarias* (No. 90-1342). The INS relied on dictionary definitions to determine that "on account of" means "because of."

22. Brief for Petitioner at Argument A.1, para. 4, *Elias-Zacarias* (No. 90-1342) (asserting that,

'[p]ersecution' is the infliction (or threatened infliction (or threatened infliction) of suffering on a person because of that person's characteristics, not the persecutor's. It is irrelevant that the persecutor's motives are 'political' in nature, or that the persecutor has 'political goals' . . . unless the persecutor intends to hurt the asylum applicant because of the applicant's political opinion, the applicant is not eligible for asylum).

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

The ordinary meaning of the phrase 'persecution on account of . . . political opinion in § 101(a)(42) is persecution on account of the *victim's* political opinion, not the persecutor's . . . Thus, the mere existence of a generalized 'political' motive underlying the guerrillas' forced recruitment is inadequate to establish (and indeed, goes far to refute) the proposition that Elias-Zacarias fears persecution *on account of* political opinion.

Id.

24. *Id.*

The record in the present case not only failed to show a political motive on Elias-Zacarias' part; it showed the opposite. He testified that he refused to join the guerrillas because he was afraid that the government would retaliate against him and his family if he did so. Nor is there any indication (assuming, *arguendo*, it would suffice) that the guerrillas erroneously *believed* that Elias-Zacarias' refusal was politically based.

Id.

the guerrillas were not motivated by his neutrality or imputed political opinion.²⁵

Since *Elias-Zacarias*, courts have uniformly accepted claims of persecution on account of imputed political opinion, where persecutors presume their victims hold a particular political opinion although they do not actually hold that opinion.²⁶ This analysis diverts courts' attention from the victim's political opinion, and focuses instead on the persecutor's political opinion, which is often easier for applicants to prove.²⁷

By accepting the interpretation of "on account of" as modifying persecution and including an element of motive, the Court inserted an unfamiliar element into asylum cases: the persecutor's state of mind.²⁸ For instance, if an asylum applicant from Zimbabwe testifies that he fears persecution by blacks because he is a white farmer, the reasons for his fear are irrelevant unless the court finds that his persecutors' motive for persecuting or threatening to persecute him was his race. This focus on the persecutor's motive is significantly different than the inquiry in cases concerning the other elements of the refugee definition, which is largely limited to consideration of the applicant's fear and evidence

25. *Id.* at 483 ("Elias-Zacarias appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion But we need not decide whether the evidence compels the conclusion that Elias-Zacarias held a political opinion.").

26. The Ninth Circuit first identified this ground for relief on remand in *Canas-Segovia v. INS*, the companion case to *Elias-Zacarias*:

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

Canas-Segovia v. INS, 970 F.2d 599, 601–02 (9th Cir. 1992). The other circuits have followed suit. *See, e.g.*, *Morales v. INS*, 208 F.3d 323 (1st Cir. 2000); *Basova v. INS*, 1999 WL 495640, *3 (10th Cir. July 14, 1999) (unpublished disposition); *Bastanipour v. INS*, 980 F.2d 1129 (7th Cir. 1992).

27. The Ninth Circuit recognized this switch: "In establishing an imputed political opinion, the focus of inquiry turns away from the views of the victim to the views of the persecutor." *Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997). The court applied this analysis to find persecution on account of imputed political opinion in *Agbuya v. INS*, stating "[W]e must look at how [the applicant] was viewed in the eyes of the persecutors. Here, the guerilla NPA viewed Agbuya as an enemy of the miners, the NPA, and the communist cause." 219 F.3d 962, 967 (9th Cir. 2000). Thus, the guerrillas' political opinion provided circumstantial evidence that they imputed a political opinion to their victim and persecuted her pursuant to that imputation, rather than merely persecuting her in retaliation for the personal decisions she made against the persecutors' union.

28. Although the persecutor's intent is unfamiliar in the asylum inquiry as a whole, the Board of Immigration Appeals had inquired into intent to determine nexus prior to *Elias-Zacarias*, so the Court's holding did not represent an entirely new approach to the nexus determination. *See* Brief for Petitioner at Argument A.4, para. 2, *Elias-Zacarias* (No. 90-1342) (citing *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 446 (BIA 1987); *Matter of Acosta*, 19 I. & N. Dec. 211, 223 (BIA 1985)).

about the circumstances in her home country.²⁹ Moreover, the Court's holding raises the dilemma of how a court can determine a persecutor's motive from the limited evidence before it. In asylum cases, the persecutor is not a party and is not present during the proceedings. Instead, the judge relies on the applicant's testimony and other corroborating evidence, including documentary evidence of conditions in the applicant's home country. Thus, the obvious difficulty for asylum-seekers—as Elias-Zacarias noted in his brief—is producing evidence that their persecutors were motivated by their race, religion, nationality, political opinion, or membership in a particular social group.³⁰

The Court addressed the struggle for asylum applicants to produce evidence of motive by asserting that direct evidence of motive is not necessary, but circumstantial evidence of intent will suffice.³¹ The Court went on to note, however, that the applicant must produce compelling evidence for the appellate court to overturn the Board of Immigration Appeals—an administrative law requirement that increases the burden on applicants to produce high quality evidence.³² Moreover, despite the Court's explicit rejection of a direct evidence requirement in its opin-

29. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (interpreting the “well-founded fear” requirement to be focused on the applicant’s “subjective beliefs,” provided there is an objective basis for them). See also Brief Amicus Curiae of the Office of the United Nations High Commissioner of Refugees in Support of Respondent at 10, *Elias-Zacarias* (No. 90-1342) stating,

[t]he definition of “refugee” requires focus on the state of mind of the person seeking refugee status, not on that of the persecutor. Under the terms of the 1951 Convention and 1967 Protocol, a person seeking refugee status must demonstrate: (1) that he or she has a well-founded fear; (2) that he or she fears persecution; (3) that the feared persecution is for reasons of, (4) one of the five enumerated factors (e.g. political opinion).

30. Brief for Respondent at Argument I.B., para. 3, *Elias-Zacarias* (No. 90-1342).

If this Court were to accept the government’s position, it would be impossible, as a practical matter, for many if not most refugees ever to establish their eligibility for asylum, because they could not produce direct evidence of their persecutors’ motives. For example, in Elias-Zacarias’ situation, where would one begin? Whose motives should be proven, those of the two masked men carrying machine guns? or those of their officers? or those of the founders of the guerrilla movement? How could Elias-Zacarias—who did not know the names or addresses of his persecutors—obtain evidence of their subjective motivations?

Id.

31. *Elias-Zacarias*, 502 U.S. at 483 (“Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors’ motives. We do not require that. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial.”).

32. *Id.* at 483–84 (“[I]f he seeks to obtain judicial reversal of the BIA’s determination, he must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.”). This requirement is born out of a principle of administrative law that requires courts to defer to administrative courts’ evidentiary determinations except in limited circumstances. See *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939).

ion,³³ the Court refused to infer motive from circumstantial evidence in Elias-Zacarias' case, establishing a high standard of evidentiary precedent. Indeed, the Ninth Circuit inferred from the circumstances of the civil war in Guatemala that Elias-Zacarias' refusal to join the guerrillas would be interpreted by the guerrillas as a pro-government political opinion and, thus, their persecution of him would be "on account of" that imputed political opinion.³⁴ The Supreme Court rejected that inference, despite the dissent's assertion that the petitioner's testimony revealed that the guerrillas would see his refusal to join as expressive conduct.³⁵ Instead, the Court submitted its own alternative motive for the guerrillas to persecute Elias-Zacarias: to increase their troops.³⁶ Given the Court's evaluation of the evidence in Elias-Zacarias' case, it is not surprising that lower courts have often been reluctant to infer motive from circumstantial evidence and have instead resorted to fishing for direct evidence of motive.

The Supreme Court in *Elias-Zacarias* clarified that the "on account of" clause requires courts to inquire into the persecutor's motives for persecuting or threatening to persecute the asylum-seeker. If the asylum applicant cannot produce compelling evidence that her persecutor was motivated by her race, religion, nationality, political opinion, or membership of a particular social group, she will not meet the nexus requirement, and her application will be denied. This holding presented a challenge for lower courts to discover ways to infer the absent persecutor's

33. One Justice also expressed skepticism in the oral argument about relying on direct communication from persecutors to victims when he asked the attorney for the government whether a statement from the guerrillas that they persecuted the applicant because of his political opinion would be enough to change the outcome of an asylum case. Official Transcript of Proceedings Before the Supreme Court of the United States, 1991 U.S. Trans. LEXIS 229, *21, 23, *Elias-Zacarias* (No. 90-1342) ("And all it takes to change our whole immigration law is for the leader of the guerrillas to say, he who is not with us is against us, and if he says that, automatically, these are—they're all being persecuted for their religious views? Is that what the law is really?").

34. *Elias-Zacarias v. INS*, 921 F.2d 844, 850 (1990) ("The persecution is properly categorized as 'on account of political opinion,' because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor.").

35. *Elias-Zacarias*, 502 U.S. at 488 n.5 (Stevens, J., dissenting).

Here, respondent not only engaged in expressive conduct by refusing to join the guerrilla organization but also explained that he did so [b]ecause they see very well, that if you join the guerrillas . . . then you are against the government . . . and if you join them then it is to die there. And, then the government is against you and against your family.' Respondent thus expressed the political view that he was for the government and against the guerrillas.

Id. (citations omitted).

36. *Id.* at 483 n.2 ("It is quite plausible, indeed likely, that the taking [of Elias-Zacarias] would be engaged in by the guerrillas in order to augment their troops rather than show their displeasure.").

motive—other than the inference the Court itself rejected. As Part II will discuss, appellate courts have been struggling since *Elias-Zacarias* to establish a standard for determining motive, and this struggle has produced varying results, many of which are contrary to the requirement the *Elias-Zacarias* Court articulated.

II. THE APPLICATION OF *ELIAS-ZACARIAS* IN THE LOWER COURTS

The Supreme Court made clear in *Elias-Zacarias* that the persecutor's motive behind carrying out the persecution or threats thereof determines whether the persecution was "on account of" race, religion, political opinion, nationality, or membership in a particular social group. Although this focus is clear from the majority opinion, the Court offered little guidance to courts as to how to investigate the absent persecutor's intent. This Part identifies the resulting confusion among lower courts concerning the appropriate evidentiary burden that asylum applicants must meet to demonstrate that their persecutors were motivated by one of the grounds authorized by the Convention. This Part concludes that many appellate courts have interpreted *Elias-Zacarias* to require direct evidence of the persecutor's intent, thus adding an additional element to the requirements of the Convention definition in violation of the Supreme Court's mandate in *Elias-Zacarias* and the Convention itself.

Many lower courts have demonstrated confusion about what type of evidence refugees must present to prove that their persecutors were motivated, at least in part,³⁷ by a Convention ground. This question of adequacy of evidence has come to permeate the nexus analysis, and issues concerning the sufficiency of evidence of intent have dominated the case law since the Supreme Court articulated the requirement in *Elias-Zacarias*. Courts often require applicants to provide direct evidence of

37. Since *Elias-Zacarias*, lower courts have expanded the motive requirement to include situations where the persecutor was motivated by more than a protected ground (also known as "mixed-motive" cases). See, e.g., *Borja v. INS*, 175 F.3d 732, (9th Cir. 1999); *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995) ("[P]ersecutory conduct may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied."); *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994) ("The plain meaning of the phrase 'persecution on account of the victim's political opinion,' does not mean persecution *solely* on account of the victim's political opinion."); *In re S-P-*, Interim Decision 3287 (BIA 1996) (en banc) ("In some fact situations, the evidence may reasonably suggest mixed motives, at least one or more of which is related to a protected ground."). Thus, as long as the persecution was at least partly motivated by a Convention ground, the applicant can meet the "on account of" requirement. The applicant does not have to show that "but for" the prohibited motive, the persecution would not have occurred. See, e.g., *Gafoor v. INS*, 231 F.3d 645, 653 (9th Cir. 2000) (rejecting as an overly "rigid" approach to causation the dissent's contention that the applicant must prove that but for the Convention ground, the persecution would not have happened).

their persecutors' motives, despite the Supreme Court's specific rejection of such a requirement in *Elias-Zacarias*.³⁸ Particularly, courts favor persecutors' communication of their motives to their victims. When an applicant can recall specific statements her attacker made around the time of the attack indicating a Convention-protected motive, her asylum case is likely to be granted.³⁹ Indeed, the absence of such statements can prove dispositive. Although no court has yet explicitly required evidence of direct communication of intent, some appellate decisions indicate that it is a de facto requirement: in denying asylum, these courts highlight segments of the applicant's testimony to demonstrate that the applicant presented no proof that the persecutor communicated a motive to her. For example, the Ninth Circuit's recent opinion in *Quirino v. INS* relied on the applicant's failure to testify to the Immigration Judge that the guerrillas orally explained to her their reasons for raping her and her daughter.⁴⁰ At minimum, appellate decisions since *Elias-Zacarias* reveal a preference for direct communication of motive, despite the obvious

38. *Elias-Zacarias*, 502 U.S. at 483 ("Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial.").

39. For example, in *Vera-Valera v. INS*, the Ninth Circuit found persecution on account of imputed political opinion where the guerillas "told [the applicant] to quit the cooperative or die and that they would 'cut off his ideas' if he continued to advocate them" and "accused him of being a spy for the government, a capitalist bureaucrat and a traitor." *Vera-Valera v. INS*, 147 F.3d 1036, 1039 (9th Cir. 1998). See also *Agbuya v. INS*, 219 F.3d 962, 967 (9th Cir. 2000).

Once [the applicant] was perceived as an enemy of a particular group of workers . . . the NPA targeted her as an enemy of the 'laborers' of the whole country and thus as an opponent of the guerilla group. This link was made explicitly by Agbuya's NPA persecutors, who berated her for opposing their egalitarian ideology by acting unfairly toward the miners.

Id.

40. *Quirino v. INS*, 254 F.3d 859, 863 (9th Cir. 2001) (including testimony in which the Immigration Judge asked a woman who was raped by guerrillas, "After they completed raping you and your daughter, did they say anything to you?" and "Okay, did these people do anything other than say they were going to rape you?"). The dissent in *Quirino* noted that the majority's conclusion "suggests that [the applicant] could satisfy her burden of proof only by testifying that the rapists explicitly informed her—before, during, or after raping her—that she had been singled out because of her father's political position. We have never held that an asylum applicant must satisfy this impossible evidentiary standard." *Id.* at 870 (Pregerson, J., dissenting). See also *Basova v. INS*, 1999 WL 495640, *3 (10th Cir. July 14, 1999) (unpublished disposition) ("Ms. Basova testified that her attackers never explained anything to her, but she felt that they hated her due to how they dealt with her and called her names."). The court contrasted Basova's case with another case where "[the applicant's] persecutor told the alien that he regarded her actions as subversive and he attributed the political opinion of a subversive to her . . . No such statements were made by Ms. Basova's persecutors." *Id.* (citations omitted).

practical impediments to obtaining such evidence, which at least one appellate court has acknowledged.⁴¹

Courts' preference for persecutors' communication of their motives not only contradicts the plain language of *Elias-Zacarias*⁴² but also provides an additional hurdle for asylum applicants who cannot identify their attackers. In many asylum cases, applicants do not know exactly who their persecutors were, because they were disguised or simply did not identify themselves.⁴³ Without knowledge of their attackers' identity, these applicants can rarely identify their attackers' motive. Although some courts have acknowledged this difficulty, others have shown no lenience and, consequently, have denied these applicants asylum.⁴⁴

Some courts rely too heavily on persecutors' communication of their motives, deferring to the persecutors' articulated reasons for their actions instead of inferring an additional motive from circumstantial evidence.⁴⁵ Other courts infer a motive—typically one not protected by

41. The Ninth Circuit recently acknowledged the difficulty of obtaining evidence of motive directly from the persecutors' mouth, stating

[The nexus] question goes to the motives of [the applicant's] persecutors, and as we have long recognized, motives can be difficult to pin down. Persecutors do not always take the time to tell their victims all the reasons they are being beaten or kidnaped [sic] or killed. Sometimes, they may not want their motives known for fear of public condemnation; other times, the motives may be so clear to both parties that no explanation is needed.

Gafoor, 231 F.3d at 650.

42. *Elias-Zacarias*, 502 U.S. at 483 ("Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that.").

43. The Board of Immigration Appeals acknowledged this difficulty in a 1996 case:

[I]t is often difficult to determine the exact motive or motives for which harm has been inflicted. There are at least two distinct areas of uncertainty in proving motive. First, in some cases, the events are such that no particular motive is readily ascertainable. For example, an unprovoked attack by unknown assailants may or may not have been for reasons protected by the [Refugee] Act. Without some evidence, either direct or circumstantial, of the reasons for the attack, the applicant will fail to prove eligibility for asylum.

In re S-P-, Interim Decision 3287.

44. See, e.g., *Lakhani v. INS*, 175 F.3d 1020, 1999 WL 164921 (7th Cir. 1999) (unpublished disposition) (denying asylum because "Lakhani did not testify that the kidnappers identified themselves as [members of a specific political party], that they wore any clothing or insignia to identify themselves as such, or that they taunted him about his political beliefs."); *Kozulin v. INS*, 218 F.3d 1112, 1114 (9th Cir. 2000) (where the court did not find a causal link between the applicant's denunciation of his ship captain's corruption and refusal to join the Communist party and the attack on him a few weeks later because "[h]e did not know who his assailants were, and he did not testify that they said anything to him.>").

45. For example, the Ninth Circuit in *Sangha v. INS* found no evidence that the terrorist group persecuted the applicant because it imputed his father's political opinion to him:

[T]he BTF gave two reasons why it wanted to recruit Sangha. First, it wanted Sangha to help fight for Khalistan. This reason suggests that it was acting in furtherance of its own goals, rather than to persecute Sangha for any views he might

the Convention—when the attackers fail to articulate one, despite circumstantial evidence pointing to a contrary conclusion. For example, the Eight Circuit inserted its own logic in place of circumstantial evidence of discriminatory intent in *Miranda v. INS*. The Court decided that guerrillas had chosen to recruit one applicant because she was young, not because of her political opinion, despite the applicant's testimony that they threatened to kill her after she told them she supported the government.⁴⁶ At the other extreme, the Ninth Circuit has held that when there appears to be no logical reason for persecution, it will hold that it must have been on account of political opinion.⁴⁷ These cases reveal the divergent standards emerging among the circuits when some courts rely heavily on evidence of communication of motive because they lack a clear understanding of how much circumstantial evidence is required to meet the burden established by *Elias-Zacarias*.

Courts also prefer evidence that the persecution was a response to applicants' statements revealing a particular political opinion. While this type of evidence is technically circumstantial evidence, since it requires the judge to make an inference that the persecutor acted in response to the victim's statement, it is the most manifest form of circumstantial evidence available. For instance, the Ninth Circuit granted asylum to an applicant who told members of a violent, anti-government group she would not join their group because she was pro-government and did not agree with their organization, and they responded with threats of murder and, subsequently, economic extortion.⁴⁸ Evidence of an applicant's

hold. Second, the BTF wanted to make Sangha unavailable to support his father. This reason suggests that it wanted to punish Sangha's father, rather than persecute Sangha for his political beliefs.

Sangha v. INS, 103 F.3d 1482, 1490–91 (9th Cir. 1997). This excerpt demonstrates that the court chose to defer to the persecutors' articulated motives for pursuing the applicant, and even went so far as to expand on the "logic" of the terrorists' reasoning.

46. *Miranda v. INS*, 139 F.3d 624, 627 (8th Cir. 1998).

While petitioner testified that the FMLN members threatened to kill her after she told them that she supported the government, the evidence suggests that her support for the government was not the reason for their efforts to recruit her or their threats [I]t appeared that they tried to recruit her because of her relatively young age.

Id.

47. *Ernesto Navas v. INS*, 217 F.3d 646, 657 (9th Cir. 2000) ("[T]his court has held persecution to be on account of political opinion where there appears to be no other logical reason for the persecution at issue.").

48. *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999) (en banc), stating:

In contrast to the record in *Elias-Zacarias*, which did not contain any clear evidence of the guerrillas' motive, either direct or circumstantial, Ms. Borja articulated her political opposition to the [New People's Army] as the reason for her refusal to join. We know that the NPA agents acted in direct response to her

communication of political opinion to her attackers can be the deciding factor in an asylum claim, despite at least one court's recognition that demanding an applicant endanger herself further by engaging in a political debate with her attackers is too stringent a requirement.⁴⁹

A comparison of the Ninth Circuit's decisions in the recent, factually similar appeals of *Tecun-Florian* and *Cordon-Garcia* reveals how determinative evidence of a refugee's communication of her political beliefs to her attackers can be.⁵⁰ Both involved refugees from Guatemala who resisted recruitment from guerrillas and were subsequently persecuted. Tecun-Florian refused to join the guerrillas because he was a devout Catholic, and killing for any purpose was against his religion. He attended church twice a week; the guerrillas waited outside the church and watched as he went in. One night, they abducted him and tortured him for ten days. Cordon-Garcia refused to join the guerrillas because she already had a job teaching literacy at a government-funded school. One night, a guerilla abducted her and tried to get her to join his group; when she refused, he beat her. The Ninth Circuit granted Cordon-Garcia's asylum application, but not Tecun-Florian's. The major distinction between the cases seems to be that

statement of political opposition and revulsion at their methods because their immediate reaction was to 'get mad' and point a gun at her.

See also Velasquez-Valencia v. INS, 244 F.3d 48, 50 (1st Cir. 2001); Diaz-Marroquin v. INS, No. 98-70392, 2001 U.S. App. LEXIS 2352, *7 (9th Cir. 2000) (unpublished disposition) (holding that the applicant proved his persecution to be "on account of" political opinion by testifying that "when the guerrillas confronted him, he told them directly that he would not join their forces because of his anti-communist politics"); *Kozulin*, 218 F.3d at 1117 (distinguishing the case at hand from *Borja* because "Kozulin did not 'articulate [his] political opposition'; he gave no indication of political opinion beyond refusing to accept the offer of party membership. Kozulin alleges no 'direct response' to his refusal; three weeks passed before the anonymous attack.").

49. The Fifth Circuit acknowledged the absurdity of such a requirement in a 1993 case, where it overturned the BIA's holding that guerrillas did not persecute the applicant on account of her political opinion because she told them she could not assist them because she needed to care for her child:

[T]he BIA's reasoning implicitly imposes an unrealistic requirement on entitlement to asylum: That an alien must foolhardily court death by informing armed guerrillas to their faces that she detests them or their actions or their ideologies—or all of the above. Otherwise, under the BIA's reasoning, one who tries to avoid cooperation by offering some benign pretext in an effort to avoid cooperating without antagonizing her ruthless recruiters, will effectively be barred from proving that the guerrillas nevertheless knew of her political opposition. Obviously, any person who is not bent on martyrdom is likely to attempt to defuse or avoid the potentially deadly situation by proffering a convincing but non-offensive excuse—here, the sympathetic plea of a recently widowed mother who alone must now care for her child.

Rivas-Martinez v. INS, 997 F.2d 1143, 1147 (5th Cir. 1993).

50. *Tecun-Florian v. INS*, 207 F.3d 1107 (9th Cir. 2000); *Cordon-Garcia v. INS*, 204 F.3d 985 (9th Cir. 2000).

Tecun-Florian did not tell his persecutors that he would not join them because of his religion; in fact, he did not give them any reason at all, and they did not explain their motives for targeting him.⁵¹ Cordon-Garcia, on the other hand, gave her persecutors a reason for not joining their cause: she “already had a position at the school.”⁵² The guerillas also told her the reason they were targeting her: because teaching literacy undermined their recruitment efforts. The Ninth Circuit found a nexus to imputed political opinion in Cordon-Garcia’s case because her response informed the guerrillas that “she planned to continue alignment with a cause obviously at odds with the guerrillas’ goals,” and the guerrillas “unmistakably” believed that she “was aligned with the government as a result of her profession.”⁵³ While Tecun-Florian’s persecutors had not mentioned his religion as their motive for torturing him, Cordon-Garcia’s persecutors articulated their political reasons for targeting her, even though the reasons were not directly related to *her* political opinion, but rather to their own political opinion about her chosen employment. These verbal exchanges made all the difference for Cordon-Garcia. The different outcomes in these cases exemplify the inconsistency and randomness that results from courts’ overly stringent evidentiary requirements.

The Supreme Court in *Elias-Zacarias* specifically stated that circumstantial evidence of a Convention-protected motive can satisfy the nexus requirement.⁵⁴ However, the Court did not provide a standard for determining what circumstantial evidence constitutes motive. Perhaps courts rely heavily on evidence of communication between asylum-seekers and their persecutors because they do not know what circumstantial evidence suffices. Courts vary widely in what circumstances they will rely on as evidence of persecutory intent. Courts have also exhibited confusion about the difference between direct and circumstantial evidence.⁵⁵ In one Ninth

51. *Tecun-Florian*, 207 F.3d at 1110.

[T]he only evidence suggesting that the guerrillas were motivated by anything other than Tecun-Florian’s refusal to join them was the testimony that they saw him going to church. We cannot say that the BIA was unreasonable in finding that the guerrillas’ actions were not motivated by the guerrillas’ perception of Tecun-Florian’s religious beliefs or political opinion.

Id.

52. *Cordon-Garcia*, 204 F.3d at 991.

53. *Id.* at 991–92.

54. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

55. *Gafoor v. INS*, 231 F.3d, 651, 651–52. Gafoor identified the persecutors’ racist remarks not as direct, but as circumstantial evidence that they were motivated by his race. The court stated that the soldiers’ statement to Gafoor while beating him that he should “go back to India” is “unmistakable circumstantial evidence that they were motivated by his race and imputed political opinion,” although “[t]hey did not tell him specifically that they were motivated by these factors.” *Id.* The dissenting judge went so far as to argue that the remarks

Circuit case, the court referred to racist remarks soldiers made while beating the applicant as circumstantial evidence that they were motivated by his race, although such communication is perhaps the best example of direct evidence available. This widespread confusion leads to an arbitrary and non-uniform application of both the refugee definition and the *Elias-Zacarias* decision. Most asylum-seekers depend on circumstantial evidence of motive, because it is rare that persecutors explicitly disclose their motives. Additionally, unlike many situations where motive is at issue, the persecutor is not present in the courtroom. Asylum-seekers must do their best to put forth evidence of motive when they are not sure how much and what kind of evidence it will take to convince the court to infer a persecutorial motive. Further uncertainty results from the possibility that two applications based on virtually identical facts will have different results based on which appellate circuit the case was filed in, or even which three judges are on the panel.

Some courts have inferred motive from circumstantial evidence of the political situation in the asylum-seeker's home country. In such cases, courts interpret the refugee's actions or statements in light of the context of the home country, finding that these words or actions took on a distinct significance and led to persecution on account of a Convention reason.⁵⁶ For example, the Ninth Circuit granted asylum to an applicant who was repeatedly robbed by ethnic Fijians and denied police protection, finding the racial tension in Fiji provided circumstantial evidence that he was targeted because he was Indian.⁵⁷ Other courts have refused

(which he considered an "off-the-cuff accusation and slur") did not require the conclusion that the beatings were on account of Gafoor's imputed political opinion and race. *Id.* at 658 (O'Scannlain, J., dissenting).

56. *See, e.g.,* *Aguirre-Cervantes v. INS*, 242 F.3d 1169, 1178 (9th Cir. 2001) (using evidence that domestic violence is often used by men "to dominate and persecute members of his immediate family" to conclude that the applicant was abused on account of her family membership).

57. *See Chand v. INS*, 222 F.3d 1066, 1077-78 (9th Cir. 2000), where the court rejected the BIA's finding that the robberies were not on account of the applicant's race.

It is true that, according to Chand's testimony, the robbers never made their motive for robbing him entirely clear, and furthermore that Chand never explicitly alleged that he was robbed because of his race, although he noted that the robbers were ethnic Fijians, and at other places in his testimony described the general racial tension and discrimination faced by Indians in Fiji. Similarly, Chand did not state in so many words that the police did not protect him because of his race. However, as the Supreme Court made clear in its seminal case on the subject, direct evidence of a persecutor's motives is not required to show persecution on account of a protected ground, only some evidence must be shown. Here, the record is replete with evidence that Indians are the victims of racially motivated assaults and other crimes committed against them by ethnic Fijians, and that the Fijian police are sometimes either unwilling or unable to control such crime.

to make such inferences.⁵⁸ In fact, the Supreme Court rejected a similar inference in *Elias-Zacarias* when it chose not to infer from the context of a civil war that Elias-Zacarias' refusal to join the guerrillas would be interpreted by them as a political opinion.⁵⁹

Another possible source of circumstantial evidence is the asylum-seeker's job or political position or former political activities. The Ninth Circuit, for example, inferred a political motive where an applicant who had been the director of a Sandanista prison in Nicaragua during the revolt against the Somoza regime faced threats from prisoners after they had been released.⁶⁰ The court was willing to infer from the political backdrop of the civil war that the former prisoners sought to persecute the applicant because of his political opinion, not because he was in

Id. Thus, the court used evidence that the civil war was generally motivated by race as circumstantial evidence that the applicant was robbed and beaten because of his race, even though he provided no direct evidence of the subjective motivation of his attackers. Evidence of the ethnic Fijians' general policy of persecuting Indo-Fijians because of their race satisfied the intent requirement, and subjective motivation was not necessary.

58. The dissenting judge in *Molina-Morales v. INS*, 237 F.3d 1048 (9th Cir. 2001), admonished his colleagues for failing to consider the context of the claim, stating,

the majority's conclusion can only be believed if one turns a blind eye to the recent political and socioeconomic history of El Salvador. In 1989, when these incidents took place, El Salvador was engaged in a lengthy, devastating and highly polarizing civil war. In such a divided society, it would be unreasonable to presume that the [applicant's] rape accusation against [party leader] Salazar would not also be construed as an overtly political act, posing a direct threat to the established political order Thus, to characterize Salazar's political status as local [party] leader (and now mayor) as being 'merely incidental' to Molina-Morales's persecution completely misreads the nature of El Salvadorean society at the time of these events, and unreasonably downplays the likelihood that Salazar and his ARENA supporters imputed inimical political views to Molina-Morales.

Id. at 1053 (Fletcher, J., dissenting).

59. Elias-Zacarias' counsel argued in the oral arguments that such a refusal to join would be interpreted by the guerrillas in the context as a political statement that "if he's not with us, he's against us." Official Transcript of Proceedings Before the Supreme Court of the United States, 1991 U.S. Trans. LEXIS *21, *Elias-Zacarias* (No. 90-1342).

60. *Gomez-Saballos v. INS*, 79 F.3d 912, 917 (9th Cir. 1996).

The death threats to him by those imprisoned cannot be separated from his political position and the obvious perception to the prisoners that, as the person in charge of their custody, he adhered to political beliefs in opposition to their own. It is far from illogical that the prisoners would assume Gomez-Saballos, as director of the prison, occupied a heightened political role in the revolutionary government. It is reasonable to infer that he, above all others, would become targeted by the prisoners as representing all that was politically wrong with the Sandinista government.

Id. The court noted in a footnote that "[t]he fact that Gomez-Saballos was the politically-assigned director of the prison, made his political opinions known to the prisoners through leading the efforts at rehabilitation, and stated that 'hatred for me . . . shone in the eyes' of the prisoners during rehabilitation sessions is the type of circumstantial evidence that was lacking in *Elias-Zacarias*." *Id.* at 917 n.8.

charge of their imprisonment and they sought revenge.⁶¹ In these cases, courts conclude from circumstantial evidence that persecutors imputed a political opinion to the applicant and consequently persecuted him.⁶² Not all courts make this connection, however; in one notable Board of Immigration Appeals decision, the Board found inadequate evidence that Guatemalan guerrillas persecuted a former army specialist on account of imputed political opinion, although it was clear that his former role marked him as a government sympathizer.⁶³

As demonstrated in this Part, many courts applying *Elias-Zacarias* have developed a *de facto* direct evidence requirement. Courts favor testimony revealing direct communication between the persecutor and victim and often fail to consider circumstantial evidence of motive even when it is available. Such limits on the type of evidence courts consider adequate are particularly burdensome to asylum-seekers when coupled with the Supreme Court's administrative law requirement that appellate courts rely only on evidence "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution."⁶⁴ This restriction on the quality of evidence stems from principles of administrative

61. *Id.* at 917 ("The fact that Gomez-Saballos and Chupamango were on opposite sides of the revolutionary war in Nicaragua, and that Chupamango was responsible for the execution of Gomez-Saballos's brother as a Sandanista revolutionary, is sufficient to demonstrate the ideological origins of the dispute between the two men.").

62. For example, in *Briones v. INS*, the Ninth Circuit inferred that the New People's Army persecuted the applicant because of his previous role as a confidential informer for the government against the NPA because, the court reasoned, they must have imputed a political opinion to him due to his prior actions.

Briones's activity as a confidential informer who sided with the Philippine military in a conflict that was political at its core certainly would be perceived as a political act by the group informed upon The record here contains no other reason, plausible or otherwise, why the NPA would want to eliminate Briones other than his contribution to their defeat in the field, the deaths of their combatants, and the capture of one of their leaders.

Briones v. INS, 175 F.3d 727, 729 (9th Cir. 1999). *See also* *Cordon-Garcia*, 204 F.3d, 985, 992 (9th Cir. 2000) ("Absent her affiliation with the government and its push for literacy among Guatemalans, Petitioner likely would not have come to the guerrillas' attention.").

63. *In re C-A-L*, 21 I. & N. Dec. 754, Interim Decision 3305 (BIA 1997), 1997 WL 80985. The BIA held that the guerrillas merely wanted to recruit him and obtain information about the government. The dissent argued that the court should have recognized the circumstantial link, stating,

[i]t would be most unusual if the guerrillas did not attribute any political opinion to the respondent, knowing him to be a former military officer. It would be equally unlikely if the opposing force's interest in the respondent was devoid of any individual political objective to punish him for his affiliation with the military which they found offensive, or if their interest, as posited by the majority, was only to acquire whatever strategic information might be in the respondent's possession or to recruit him.

Id. at 762.

64. *Elias-Zacarias*, 502 U.S. at 484.

law and appellate courts' mandated deference to administrative court decisions. Beyond the difficult burden on applicants to provide sufficient evidence, the disparity among courts interpreting *Elias-Zacarias*—of which not all accept circumstantial evidence—results in arbitrary and inconsistent adjudication of asylum cases. Seemingly similar cases emerge with opposite results depending on the panel of judges deciding the case and the tidbits of communication an asylum applicant is able to recall. This inconsistency may be a result of the Supreme Court's failure to specify appropriate methodology for evaluating direct and circumstantial evidence in *Elias-Zacarias*, or may simply be lower courts' attempts to simplify the decision-making process. Regardless of the reason, the disparate evidentiary requirements in place nearly ten years after *Elias-Zacarias* cannot have been the Court's intention. Moreover, as Part III will show, the *de facto* direct evidence requirement is contrary to the United States' obligations under the Convention.

III. REALIGNING THE *ELIAS-ZACARIAS* NEXUS REQUIREMENT WITH INTERNATIONAL REFUGEE LAW

As discussed in Part II, courts deny many asylum applications based on otherwise legitimate asylum claims because they cannot provide direct evidence of their persecutors' motives, and because the court refuses to infer intent from the circumstantial evidence provided. In other words, as it has been construed in the lower courts, *Elias-Zacarias* adds an additional requirement to the Convention: direct evidence of intent. Because the Refugee Act of 1980 was intended to fulfill the United States' obligations under the Convention, the Supreme Court's construction of the statute should not carry the United States away from compliance with the treaty.⁶⁵ Thus, until the Supreme Court speaks again

65. The Supreme Court has long followed the rule of statutory construction requiring the Court to interpret U.S. statutes consistently with international legal obligations if possible. *See Murray v. Charming Betsy*, 2 Cranch. 64, 118 (1804) ("It has also been observed that an act of congress ought never to be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country."). *See also* Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L LAW 1, 21 (1997):

Elias-Zacarias illustrates the dangers of a domestic asylum system disconnected from an international framework. The Convention and Protocol do not explicitly address procedural issues such as burden of proof. While this leaves states with considerable flexibility to design their refugee status determination systems, they remain fully obligated to act in good faith and consistently with the treaties' requirements—most importantly the prohibition on *refoulement* To require strict proof of a singular cause of persecution defies both human experience and the premises of refugee law.

on the nexus issue, lower courts applying the motive-based approach of *Elias-Zacarias* must find a way to construe it that is compatible with international law. Part III discusses a means of bringing U.S. courts' interpretation of the nexus requirement closer to the text and purpose of the Convention and other state parties' interpretations of the Convention while still adhering to the precedent of *Elias-Zacarias*. Specifically, this Part urges courts to consider refugees' predicaments as circumstantial evidence of their persecutors' intent, thereby focusing the asylum proceedings more on the applicant instead of the persecutor.

An approach that focuses on the asylum applicant's predicament is more consistent with the United States' obligations under the Convention because the text of the Convention supports a predicament-based approach. In the Convention, the nexus requirement ("for reasons of race, religion, nationality, membership of a particular social group or political opinion") modifies the phrase "being persecuted."⁶⁶ The passive voice in the phrase "being persecuted" may indicate the framers' intent to emphasize the refugee's situation—the effects of the acts or threats of persecution—not the motive behind the persecutors' actions that caused the situation. In the refugee definition the United States included within the Refugee Act, however, the nexus requirement modifies the word "persecution"; the causal link is articulated as "on account of" the Convention grounds instead of "for reasons of."⁶⁷ The lack of passive voice in the Refugee Act may explain why American courts have focused on the persecutors' motive, rather than the refugee's predicament, because "persecution" implies an intentional act by a specific actor, whereas "being persecuted" targets the result, not the actor's intentions.⁶⁸ Additionally, the "on account of" language—which the Supreme Court translated into "because of"⁶⁹—points more to the persecutor's personal motives than "for reasons of," which allows for reasons other than the persecutor's motive.⁷⁰ Despite its different statutory language, the United States still has an obligation to adhere to the Convention's requirements, including the definition. As a signatory to the Protocol, the United States

66. Protocol, *supra* note 3.

67. 8 U.S.C. § 1101(a)(42)(A) (2000).

68. The INS focused on the "persecution" language in its Supreme Court brief in *Elias-Zacarias*, arguing that the ordinary meaning of "persecution" is "the infliction of suffering because of the victim's race, beliefs, or nationality, especially religious beliefs." Brief for Petitioner at Argument A.1, para. 1, *Elias-Zacarias* (No. 90-1342) (quoting the definition of "persecution" from 7 Oxford English Dictionary 721 (1933): "The action of persecuting or pursuing with enmity and malignity").

69. *Elias-Zacarias*, 502 U.S. at 483 ("Elias-Zacarias still has to establish that the record also compels the conclusion that . . . the guerrillas will persecute him *because of* that political opinion, rather than *because of* his refusal to fight with them.") (emphasis added).

70. See GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 50–51 (1983).

agreed to apply the Convention's non-derogable definition of a "refugee."⁷¹

Moreover, the framers of the Convention rejected the "on account of" language suggested by the United States.⁷² This outright rejection indicates that a judicial application of the nexus requirement dependent upon the "on account of" language cannot possibly comport with the object and purpose of the Convention. Therefore, in order to meet U.S. obligations under the Convention, U.S. courts must not apply the nexus requirement differently than other state parties regardless of the distinct statutory language in the Refugee Act. U.S. courts must analyze nexus in a manner consistent with other state parties' application of the original Convention definition.

In addition to implementing the text of the Convention, a focus on predicament better effectuates the purposes behind the Convention than a focus on motive. As described in Part II, courts' search for persecutors' motives often resembles a criminal trial with an absent defendant, with Immigration Judges interrogating applicants about their persecutors' motives, rather than focusing on the predicament of the applicant. However, the Convention was adopted not to punish persecutors, but to provide surrogate protection to refugees.⁷³ The purpose of the Convention is to respond to the immediate needs of people who need help and have nowhere else to turn, not to rebuke the people who rendered them helpless. A detailed inquiry into the *mens rea* of persecutors is inconsistent with this fundamental purpose, because it shifts the court's focus away from the question of the refugee's need for surrogate protection and toward the state of mind of the absent persecutor.⁷⁴

71. The Convention specifically prohibits states from making reservations to the refugee definition. Convention, *supra* note 1, art. 42(1) ("[A]ny State may make reservations to Articles . . . other than to Article 1.").

72. See *United States of America: Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons) in THE COLLECTED TRAVAUX PREPARATOIRES OF THE 1951 GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES*, vol. I, 359, 359 (Alex Takkenberg & Christopher Tahbaz, eds., 1990).

73. See, e.g., *Horvath v. Sec'y of State for the Home Dep't*, [2000] 3 All E.R. 577 (H.L. 2000) ("The general purpose of the convention is to enable the person who no longer has the benefit of protection against persecution for a convention reason in his own country to turn for protection to the international community."); *Canada (Att'y General) v. Ward*, [1993] 2 S.C.R. 689, 691 ("International refugee law was formulated to serve as back-up to the protection owed a national by his or her state."); HATHAWAY, *REFUGEE STATUS* *supra* note 2, at 124 ("[R]efugee law is designed to interpose the protection of the international community only in situations where there is no reasonable expectation that adequate national protection of core human rights will be forthcoming.").

74. The UNHCR's amicus brief in *Elias-Zacarias* emphasized that asylum determinations must focus on the refugee, not the persecutors. Brief Amicus Curiae of the Office of the United Nations High Commissioner of Refugees in Support of Respondent at 16, *Elias-Zacarias* (No. 90-1342).

A legal analogy more consistent with the purposes of refugee law is anti-discrimination law, which allows claimants to prevail if they can prove either discriminatory intent *or* disparate impact.⁷⁵ The idea behind examining discriminatory impact is a recognition of the difficulty of proving intent, and nowhere is it more difficult to prove intent than in asylum adjudication, where the persecutors are often unidentified, unknown and certainly not present before the court or subject to discovery.⁷⁶ More importantly, in asylum law, unlike both criminal law and anti-discrimination law, it is even more inappropriate to focus on motive because the Convention was not adopted for the purpose of censuring particular acts, but to address particular risks.

In disparate impact cases under American employment discrimination statutes, courts utilize evidence of discriminatory impact on protected groups as circumstantial evidence of discriminatory intent.⁷⁷ Likewise, asylum adjudicators should use evidence of the applicant's predicament as circumstantial evidence of her persecutor's motive. Con-

[T]he focus on a persecutor's intent injects into a refugee status determination the burden of proof required in an unrelated field of criminal law. [The INS's] interpretation of the 'on account of' language would require an asylum-seeker to prove something akin to *mens rea* on the part of the persecutor. But refugee status examiners are not called upon to decide the criminal guilt or liability of the persecutor, and refugee status is not dependent on such proof. The legal regime of refugee protection—of which the Refugee Act is a part—is centered on the grant of a humanitarian benefit, not on the punishment of persecutors. Thus, an asylum-seeker's burden is to show himself worthy of the benefit; he need not establish his persecutor's state of mind.

Id.

75. For a domestic example, plaintiffs who bring claims of employment discrimination on the basis of race, sex, religion, national origin, or disability under United States civil rights statutes can prove discrimination either through showing discriminatory intent or demonstrating that neutral policies have a disparate impact on certain protected groups. *See* Americans with Disabilities Act, 42 U.S.C. § 12101–12213 (1994); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994). Discriminatory impact is also an acceptable theory under international anti-discrimination law. *See, e.g.*, Convention on the Elimination of All Forms of Discrimination against Women, Sep. 3, 1981, art. 1, 1249 U.N.T.S. 13, 16; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

76. As the Supreme Court has acknowledged, it is contrary to the purpose of U.S. anti-discrimination law to treat two policies that have the same discriminatory effects differently because a plaintiff cannot prove a discriminatory intent behind the policy. *See, e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (“[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.”).

77. For instance, courts use statistical evidence that a certain group is adversely impacted by a facially neutral policy when proof of discriminatory intent is elusive or nonexistent. *See* *Watson*, 487 U.S. at 986–89; *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971). *See generally* JOHN J. DONAHUE III, FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 260–61 (1997).

sider, for example, Molina-Morales, whose asylum case was rejected by the Ninth Circuit as discussed in Part II.⁷⁸ Molina-Morales was tortured by an opposition group in El Salvador because he reported to authorities that his aunt was raped by the leader of that group. The court denied his asylum claims, finding no evidence that his attackers tortured him because they thought he opposed their political goals.⁷⁹ The court might have considered the predicament in which the applicant found himself—tortured by an opposition group for reporting their misdeeds, in a country long embittered by civil war—as circumstantial evidence that his attack was “on account of” his imputed political opinion. Drawing such inferences of nexus from circumstantial evidence is appropriate under *Elias-Zacarias*, in which the Supreme Court emphasized that circumstantial evidence of a Convention-related motive will suffice to establish nexus.

Asylum decisionmakers should use circumstantial evidence of both the applicant’s individual predicament and the circumstances in her home country to draw inferences of a Convention-related motive. This approach is more consistent with the text and purposes of both the Convention and *Elias-Zacarias*, and will likely lead to fewer arbitrary and inconsistent decisions. Recognizing that a predicament-based approach to nexus is consistent with the Convention, the *Michigan Guidelines on Nexus to a Convention Ground* propose such an approach.⁸⁰ Under the Guidelines, an applicant can establish a nexus to a Convention ground even without evidence of her persecutors’ motive, so long as she demonstrates that the Convention ground contributed to her exposure to the risk of persecution. U.S. courts should engage in the predicament analysis advocated by the *Michigan Guidelines* to move the

78. *Molina-Morales v. INS*, 237 F.3d 1048 (9th Cir. 2001). See also *supra* note 58 (discussing the dissenting opinion in the case).

79. *Molina-Morales*, 237 F.3d at 1051.

Molina has not presented any evidence that supports, much less compels, a conclusion that his persecutors attributed a political opinion to him. Rather, as the BIA stated, ‘the evidence suggests that he fears harm because of a personal matter between him and Carmen Salazar.’ There is no evidence that Molina’s attackers thought that he was aligned with any opposition to the ARENA party.

Id.

80. James C. Hathaway, *Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT’L L. 207, 210 (2002). Additionally, the UNHCR’s amicus brief in *Elias-Zacarias* condoned a predicament based approach. Brief Amicus Curiae of the Office of the United Nations High Commissioner of Refugees in Support of Respondent at 16, *Elias-Zacarias* (No. 90-1342) (“As long as persecution or fear of it may be related to the grounds given in the definition, it is irrelevant whether the [persecutor] intended to persecute. It is the result which matters.”) (quoting Office of the United Nations High Comm’r for Refugees (Geneva), Inter-Office Memorandum/Field-Office Memorandum (unnumbered) (Mar. 1, 1990)).

U.S. nexus approach closer to compliance with the mandates of the Convention.

CONCLUSION

This Article has discussed the evolution of the nexus requirement in the United States, from the *Elias-Zacarias* decision in 1992 to the present. As Part II identified, in the ten years since the Court delivered the decision, lower courts have proven reluctant to rely on the applicant's predicament as circumstantial evidence of motive and, as a result, have rendered many inconsistent asylum decisions. Not only is this practice contrary to the United States' obligations under the Convention, but it is also contrary to *Elias-Zacarias* itself. As Part III argued, courts should focus less on the nearly impossible task of determining the persecutors' states of mind, and more on asylum applicants' predicaments.