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NOTES

Persecution: How Much is Enough?

*Hillary R. Chambers*

**INTRODUCTION**

Nabil Dandan, from Lebanon, is the husband of Ketty Dandan and the father of four children.² The Dandan family lived in Dubai for eleven years, where Nabil worked as an accountant, until the United Arab Emirates cancelled the family's visas.³ When the Dandans were forced to move back to Lebanon, the country was in the midst of a civil war.⁴ A “green line” divided the capital city of Beirut—the Maronite Christians, part of the Eastern Rite affiliation of the Roman Catholic Church, resided on the east side of the line, and the Muslim part of the population, comprised of both Sunni and Shi'ite Muslims, lived on the west side of the line.⁵ The Christian and Muslim segments of the population began fighting, and each group gathered private militias for defense in 1975.⁶

As Maronite Christians, Nabil and his family resided near East Beirut.⁷ Because there were no private employers, he accepted employment with the Lebanese Christian Forces as an accountant and tax collector.⁸ He worked for the Lebanese Christian Forces in an area near the border of East and West Beirut.⁹ On June 3, 1989, Nabil was kidnapped by the Syrian forces while on his way home from work.¹⁰ He testified that he was deprived of food, beaten, and interrogated during his three-day detention.¹¹ According to Nabil’s testimony, the Syrians wanted the names of those who were supporting the Lebanese Christian Forces.¹² He told the Syrians everything he knew, but, Nabil did not possess the type of information someone of a “higher political status” would possess.¹³

In order for Nabil to be released, his wife was forced to pay ransom money through a Syrian mediator.¹⁴ When he was finally released by the Syrian forces,

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¹ University of Kentucky College of Law, J.D. expected May 2016.
² Dandan v. Ashcroft, 339 F.3d 567, 570 (7th Cir. 2003).
³ Id.
⁴ Id.
⁵ Id.
⁶ Id.
⁷ Id.
⁸ Id. at 570–71.
⁹ Id. at 571.
¹⁰ Id.
¹¹ Id.
¹² Id.
¹³ Id.
¹⁴ Id.
Nabil's face "was swollen because [his kidnappers] beat [him]."\textsuperscript{15} He testified that after he was released the Dandan family's home was shelled, partially destroying the home and causing his family to move from shelter to shelter for almost two months during the summer of 1989.\textsuperscript{16} Nabil understandably decided to flee Lebanon with his family, taking his wife and children at night to Cyprus, where they obtained visas for the United States.\textsuperscript{17} The Dandans arrived in the United States on August 10, 1989.\textsuperscript{18}

One month later, Nabil applied for asylum in the United States.\textsuperscript{19} After several delays, a hearing was held on October 11, 2000, on the merits of Dandan's claim for asylum.\textsuperscript{20} The judge denied relief. The immigration judge found that, although Dandan was a credible witness, the three-day detention did not constitute persecution within the meaning of the asylum statute.\textsuperscript{21} The immigration judge also found that the Country Report showed a change in the country's conditions such that Dandan could no longer have an objectively reasonable, well-founded fear of future persecution within the meaning of the asylum statute.\textsuperscript{22} Nabil's timely appeal to the Board of Immigration Appeals ("BIA") was dismissed by a 2–1 decision.\textsuperscript{23} Like the immigration judge, the BIA stated that Nabil's three-day detention did not constitute past persecution, nor did it establish that he had a well-founded fear of future persecution at the time of the hearing.\textsuperscript{24}

As a last resort, Nabil appealed to the Seventh Circuit Court of Appeals.\textsuperscript{25} However, because Nabil was only subject to a single detention, without more, the court was not compelled to find that he was subject to past persecution.\textsuperscript{26} The court reasoned that the frequency of the alleged harm inflicted is a significant factor in the persecution analysis to determine whether an individual will be granted asylum in the United States.\textsuperscript{27} Although the Seventh Circuit acknowledged that Nabil's three-day detention, beatings, and deprivation of food was "quite serious," the court ultimately concluded the level of severity of a single occurrence was not high enough in Nabil's case to find past persecution.\textsuperscript{28} The court suggested it might be compelled to reverse the Board's decision and find past persecution if Nabil had

\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 572.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 570, 572.
\textsuperscript{23} Id. at 572.
\textsuperscript{24} Id.
\textsuperscript{25} See id.
\textsuperscript{26} Id. at 573 (emphasis added).
\textsuperscript{27} See id.
\textsuperscript{28} Id. at 573–74.
presented evidence that he had lost teeth or broken a bone during the detention.29
These are the sort of trivial details upon which the courts in the United States base their decisions in asylum cases. Courts are forced to engage in and rely upon this type of analysis because there is no standard for determining when an asylum applicant has suffered persecution, which is a necessary element of the asylum statute.30

This Note focuses on a specific issue within the most ambiguous element to be proven in order for an alien to be granted asylum in the United States.31 That element is “persecution,” and the issue is whether a remote occurrence or a series of isolated incidents can constitute past persecution for the purposes of the asylum statute. 8 U.S.C. § 1158(a) provides the statutory basis for asylum claims and explicitly uses 8 U.S.C. § 1101(a)(42)(A)’s definition of refugee to specify those individuals eligible for asylum.32

The statutory definition of refugee was amended by the Refugee Act of 1980 and states, in relevant part:

[A]ny person who is outside the country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.33

Accordingly, the standard for asylum may be broken down into four elements: (1) the applicant must be outside his or her home country; (2) the applicant must have been persecuted or fear future persecution in his or her home country; (3) the government of the applicant’s home country must offer no protection from the persecution; and (4) the persecution must be on account of race, religion, nationality, membership in a particular social group, or political opinion.34 The grounds listed in element four are most commonly referred to as protected grounds.

It is critical to correctly determine whether past persecution has occurred because a finding of past persecution creates a rebuttable presumption that the applicant has a well-founded fear of future persecution and shifts the burden of

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29 See id. at 574.
31 While “alien” is a loaded term in the mainstream media, this piece will continue to use the word “alien” because that is the language that the Immigration and Nationality Act uses. 8 U.S.C. § 1101(a)(3) (2014).
34 Id.
proof to the Department of Homeland Security ("DHS").35 "Proof of past persecution alone has been found to satisfy the objective component, so as to bring an applicant within the definition of a refugee, and thus establish eligibility for asylum."36 Despite the fact that thousands of decisions, and in turn the lives of thousands of applicants and their families, hinge on the meaning of persecution within the refugee statute, a consistent definition for the term has yet to be established.37

Much deference is given to the decisions made and standards set by the BIA.38 Therefore, this Note urges the BIA to take a firm position on whether, and under what circumstances, isolated incidents will constitute persecution for the purposes of obtaining asylum in the United States. This Note also encourages immigration judges, the BIA, and United States federal courts to establish a universal standard and method of analyzing persecution issues. The human-rights-based approach used by several other countries invokes international law and would be a more successful method, producing more fair outcomes for parties involved.

Section One will provide background information and briefly explain the process an applicant must go through to gain asylum status in the United States. An explanation of these procedural aspects will be helpful to contextualize the case law found in Sections Two and Three. Section Two discusses the multitude of cases in which courts ruled against granting asylum in the United States after finding that remote occurrences or isolated incidents did not rise to the level of persecution required. Section Three examines the cases in which courts have found that a remote occurrence or a series of isolated incidents constitutes persecution. Section Four evaluates other sources that provide guidance for interpreting what constitutes "past persecution" under 8 U.S.C. § 1101(a)(42)(A). Section Five will set forth an argument for the United States adopting a human rights-based approach similar to that used by other countries.

The current approach used in the United States to determine what constitutes persecution under the asylum statute is unclear and unpredictable; it often results in unfair outcomes for applicants who are in dire need of protection. These variable and often unfair outcomes are a result of the various and differing sources of authority used by immigration judges, BIA, and U.S. federal courts. The outcome of an applicant's case largely depends on the standard used by the particular adjudicator. This Note will urge the authorities in the United States to establish a concrete standard for persecution, and will suggest the human-rights-based analysis.

36 Smith, supra note 32, § 3.
37 Rempell, supra note 31, at 283–84.
38 See Ratnasingam v. Holder, 556 F.3d 10, 13 (1st Cir. 2009).
that several other countries have already found successful as a suitable replacement standard to the current one.

I. BACKGROUND

The asylum application process begins most commonly with the commencement of a removal proceeding by DHS. If the petitioner, the alien against whom the removal proceeding was filed, wishes to remain in the United States, he or she must first file an application for asylum.39 "The [Department] shall adjudicate the claim of each asylum applicant whose application is complete within the meaning of § 208.3(c)(3) and is within the jurisdiction of the [Department]."40

Before an asylum hearing can be scheduled, the applicant must attend an interview with an asylum officer for the purpose of determining the applicant's eligibility.41 Next, assuming the applicant is found eligible, an asylum hearing may be scheduled. A hearing on the merits is held before an immigration judge.42 At this hearing, the applicant may testify as to past persecution or to fear of future persecution.43 At the conclusion of the hearing, the immigration judge will either grant or deny the application for asylum based on the judge's assessment of the applicant's credibility and the sufficiency of the evidence presented.44

If the immigration judge denies the application for asylum, the applicant may appeal to the BIA.45 The Board will review the case and will either affirm the immigration judge's denial of the application or grant asylum status.46 The applicant may then bring his or her objections to the immigration judge's and the Board's decisions to the proper federal Court of Appeals.47 When BIA has chosen to entirely adopt an immigration judge's reasoning and decision, the federal court will review the immigration judge's decision directly and determine whether BIA's adoption should be upheld.48

Initially, the burden of proof is on the applicant.49 If the testimony of the applicant is found to be credible, it "may be sufficient to sustain that burden of

39 See Form of Application, 8 C.F.R. § 208.3(a) (2015); 8 U.S.C. § 1158 (2009); see also Gilaj v. Gonzales, 408 F.3d 275, 280 (6th Cir. 2005).
40 Procedure for Interview Before an Asylum Officer, 8 C.F.R. § 208.9(a) (2015).
41 See id. § 208.9(b).
42 See id. § 208.9(b); Gilaj, 408 F.3d at 280.
43 See 8 C.F.R. § 208.9(b); Gilaj, 408 F.3d at 280.
44 See Approval, Denial, Referral, or Dismissal of Application, 8 C.F.R. § 1208.14(a) (2015); Gilaj, 408 F.3d at 281.
45 See Appeals, 8 C.F.R. § 1240.15 (2016); see also Gilaj, 408 F.3d at 281.
46 8 C.F.R. § 1208.14(a); Gilaj, 408 F.3d at 281.
48 Gilaj, 408 F.3d at 282–83.
49 Establishing Asylum Eligibility, 8 C.F.R. § 208.13(a) (2015); see also Chatta v. Mukasey, 523 F.3d 748, 751–52 (7th Cir. 2008).
proof without corroboration." Applicants must provide credible evidence "that [the applicant] (1) is statutorily eligible for asylum because [the applicant] is a 'refugee,' and (2) merits a favorable exercise of discretion on the part of the Attorney General" to obtain asylum under United States law. This Note is concerned solely with the statutory eligibility for asylum based upon the refugee definition provided by the United States Code. "[T]he burden is on the applicant to establish that he [or she] is a refugee." A refugee is a person who is unable or unwilling to return to his home country because of past persecution or a well-founded fear of future persecution because of his race, religion, nationality, membership in a particular social group, or his political opinions.

An asylum applicant must present specific facts to show past persecution or good reason to fear that he or she will be singled out for persecution in the future. If the immigration judge or the BIA finds that sufficient specific facts have not been presented, an appellate court will not disturb that finding "unless the evidence is 'so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.'"

The immigration judge may exercise his or her discretion and deny an asylum application if during the application process a preponderance of the evidence demonstrates that the situation in the applicant's home country has fundamentally changed so as to invalidate the claim of persecution or that the applicant could avoid future persecution by relocating to a different area of his home country. Determining whether isolated incidents may constitute an event of past persecution is the focus here, not the determination of well-founded fear of persecution in the future. To be clear, this fear is what is actually required, while a showing of past persecution creates a presumption of such fear. After this showing, the burden of proof shifts back to the government to establish a change in circumstances in the applicant's home country or the possibility for the applicant to simply relocate in his or her home country.

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50 8 C.F.R. § 208.13(a).
51 Chatta, 523 F.3d at 751–52.
53 Chatta, 523 F.3d at 752.
54 Id.
55 See id.
56 Id. (quoting I.N.S. v. Elias-Zacarias, 502 U.S. 478, 483–84 (1992); Sayaxing v. I.N.S., 179 F.3d 515, 519 (7th Cir. 1999)).
58 Smith, supra note 32, § 2.
59 8 C.F.R. § 208.13(b)(1)(ii).
II. CASES FINDING THAT A REMOTE OCCURRENCE OR A SERIES OF ISOLATED INCIDENTS DOES NOT CONSTITUTE PERSECUTION

There are several cases determining that a remote occurrence or series of isolated incidents do not constitute persecution. In a recent case, Thapaliya v. Holder, the First Circuit held that the severe beating of the applicant, a native and citizen of Nepal, was an isolated event insufficient to establish past persecution.60 The court began its analysis by acknowledging that "establishing past persecution . . . can be a 'daunting task' for which petitioners 'bear a heavy burden.'"61 Thapaliya testified that a group of Maoist-rebels beat him severely and pointed a gun at him in his home because of his involvement with an anti-Maoist political group as a student-member.62 Even assuming that the pointing of a gun by the persecutors was an implied death threat, the court said that a "single threat during [a] single beating still is not enough to compel a conclusion of past persecution."63 The First Circuit considered factors such as "the severity, duration, and frequency of physical abuse," but ultimately denied the applicant's petition.64

Similarly, in Ratnasingam v. Holder, the First Circuit found that the applicant was not subjected to past persecution in Sri Lanka.65 Although Ratnasingam testified to four fear-invoking, threatening events, the court said, "The record simply does not compel the conclusion that Ratnasingam 'was subjected to systematic maltreatment rising to the level of persecution, as opposed to a series of isolated incidents.'"66

The first incident occurred in the summer of 2001, when three men in army uniforms aggressively approached Ratnasingam as he returned to his shop after a wedding. His persecutors took him to a camp and proceeded to question him for three hours about various individuals in photographs.67 Ratnasingam stated that he was unable to answer their questions because he did not take the photographs.68 The men also asked whether he or his family supported the Liberation Tamil Tigers of Eelam ("LTTE"), a Tamil separatist group.69 Ratnasingam denied any involvement, but the men held him captive until the next day.70

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60 Thapaliya v. Holder, 750 F.3d 56, 59–60 (1st Cir. 2014).
61 Id. at 59 (citing Butt v. Keisler, 506 F.3d 86, 90 (1st Cir. 2007)).
62 Id. at 57–58.
63 Id. at 60.
64 Id. at 59–61.
65 Ratnasingam v. Holder, 556 F.3d 10, 14–15 (1st Cir. 2009).
66 Id. at 12–14 (quoting Topalli v. Gonzales, 417 F.3d 128, 132 (1st Cir. 2005)).
67 Id. at 12.
68 Id.
69 Id.
70 Id.
Four years later, a group of LTTE members instructed Ratnasingam not to videotape any political functions, and they threatened him that if he told anyone about the encounter, they would tell the Sri Lankan army that he was involved with the LTTE. The next year, Ratnasingam’s brother-in-law was killed near an army camp.

Finally, in 2007, Ratnasingam received anonymous telephone calls from someone demanding money and threatening Ratnasingam’s death if he contacted the police. All of those detailed incidents were not enough to convince the court that Ratnasingam had suffered persecution.

The applicant in Topalli v. Gonzales was arrested, detained, and beaten seven times on account of his political beliefs. Although the First Circuit did note that this was a close case, the court was still unable to conclude that the applicant “was subjected to systematic maltreatment rising to the level of persecution, as opposed to a series of isolated events.”

In Dandan v. Ashcroft, as mentioned in this Note’s Introduction, the Seventh Circuit held that the applicant did not suffer past persecution when Syrian forces detained him for three days without food and he was beaten until his face became swollen. While the court at least recognized the possibility for a single incident to constitute past persecution, it viewed the frequency of events simply as a factor in the analysis. “Although the frequency issue is not dispositive, it does figure significantly in the analysis. However, this court has on occasion based a finding of past persecution on a single episode of detention or physical abuse.”

In Prasad v. I.N.S., the applicant contended that he was driving his taxi when a group of Fijians, some dressed in military uniforms, stopped him and took him to the police station, where he was placed in a jail cell. During his containment, Prasad was hit in the stomach, kicked from behind, and questioned about supporting the ethnic Indian-led Labour Party. Several hours later, he was finally released. The interaction made Prasad feel that if he continued to actively support the Labour Party, a similar arrest and beating would occur. In that case,
the Ninth Circuit did not find enough evidence in the record to conclude that a reasonable factfinder would be compelled to find sufficient evidence to establish past persecution, though such a factfinder certainly could have found such evidence.86

These cases are concerning, and there are countless others just like them. These cases are concerning because the applicants do have legitimate reasons to fear lack of protection in their home countries, yet they cannot gain asylum in the United States because the persecution they experienced was a remote occurrence or a series of isolated events. The harmful incidents that those seeking asylum have experienced would be considered persecution by most under the plain meaning of the word, so it is difficult to understand why the courts, more often than not, find otherwise.

III. CASES FINDING THAT A REMOTE OCCURRENCE OR A SERIES OF ISOLATED INCIDENTS DOES CONSTITUTE PERSECUTION

There are also some cases finding that a remote occurrence of a series of isolated incidents do constitute persecution. Beskovic v. Gonzales involved two isolated events in which Serbian police, arrested the applicant and detained, interrogated, and beat him.87 The Second Circuit discussed the need to take into consideration the context surrounding isolated incidents to determine whether or not such incidents constitute persecution.88 The court noted that in a case such as Beskovic, where the applicant was detained, physically abused, mistreated, and degraded, "the BIA and individual immigration judges must be sensitive to the obvious reality that such detention and physical mistreatment are usually correlative, not coincidental.89 Further, the court said that even though in other contexts mistreatment could be reasonably characterized as "the mere annoyance and distress" of harassment, the BIA and immigration judges must be sensitive to the fact that such mistreatment can, and often should, cause the court to come to a different outcome when the alien is detained and abused on account of protected grounds.90 "In other words, while 'the difference between harassment and persecution is necessarily one of degree,' the degree must be assessed with regard to the context in which the mistreatment occurs."91 Doing just that, the Second Circuit granted the petition for review.92

86 Id. at 339.
87 Beskovic v. Gonzales, 467 F.3d 223, 224 (2d Cir. 2006).
88 See id. at 226–27.
89 Id. at 226.
90 See id. (quoting Ivanishvili v. U.S. Dep't of Just., 433 F.3d 332, 342 (2d Cir. 2006)).
91 Id. (quoting Ivanishvili, 433 F.3d at 341).
92 Id. at 227.
Manzur v. U.S. Department of Homeland Security further discusses the need to evaluate the context surrounding isolated incidents. There, the Second Circuit provided two reasons why the harm to the applicant is significant: "First, accumulation of harm from the individual incidents may rise to the level necessary for persecution even though an individual incident may not. Second, 'the motive for the harm inflicted must be analyzed in light of the context in which the harm occurred.'" Considering context surrounding the harm that resulted from the alleged persecution may provide evidence to support a conclusion that isolated incidents were "on account of" protected grounds. It is misleading to evaluate isolated events out of context because, as context is the factor that often causes a harmful event to constitute persecution.

The Sixth Circuit looked at applicant testimony concerning isolated incidents in the aggregate in order to find that such incidents constituted past persecution. in Gilaj v. Gonzales. The petitioner in that case, Mrs. Gilaj, was an active member of the Democratic Party in Albania, and was first threatened by police during her involvement with a campaign for Democratic Party candidates. On election day, her husband's was struck in the neck by a knife during a physical confrontation with Socialists. The next year, the police beat Mrs. Gilaj during a search for weapons in her home, telling her they did not need a search warrant because "they were Socialists who were going to make all Democrats suffer." After the search, these same police arrested Mrs. Gilaj's son, jailed him for two days, and beat him.

In early 2000, after Mrs. Gilaj spoke at an anti-government demonstration she had helped to organize, "she and her family received phone calls at home from unidentified people threatening that the family would 'pay dearly' for her speech at the demonstration." Several days after the demonstration, police came to the Gilaj home and told Mrs. Gilaj they were going to kill her. When two relatives came into the house, the police were molesting her.

On a separate occasion, Mrs. Gilaj was arrested and detained for two days for her participation in another demonstration. During the detention, Mrs. Gilaj

94 Id. (quoting Uwais v. U.S. Att'y Gen., 478 F.3d 513, 517 (2d Cir. 2007)).
95 See id.
96 Id.
98 Id. at 280.
99 Id.
100 Id.
101 Id.
102 Id.
103 Id.
104 See id.
105 Id. at 281.
was beaten and deprived of food. 106 Mrs. Gilaj and her family fled to the United States for refuge. 107 After reviewing the facts of the case, the court stated:

When all of the incidents to which petitioners testified are taken into account and considered in the aggregate and in light of the overall context of the Gilaj family's situation, the record compels a finding that Mrs. Gilaj was subjected by her government to past persecution on account of political activities and opinion. 108

The applicant in Bracic v. Holder testified to being called a traitor, beaten, and kicked until he temporarily lost consciousness. 109 When Bracic later saw one of the men who had attacked him in a police uniform outside his home, he fled and never returned home. 110 The Eighth Circuit looked to the record as a whole and, even under the stringent substantial evidence standard of review, disagreed with the immigration judge's finding that Bracic had not suffered past persecution. 111 The court came to the opposite conclusion as the immigration judge because the factual surroundings of the incidents amounted to much more than mere mistreatment, and considered cumulatively provided compelling evidence that the applicant did in fact suffer past persecution. 112

In Corado v. Ashcroft, the Eighth Circuit found that a death threat on account of political opinion is not outside the definition of "persecution" simply because it occurs during a single event. 113 The Eighth Circuit has "consistently . . . defined persecution to include 'the infliction or threat of death' on account of a factor enumerated in the statute, without any suggestion of a 'pattern and practice' requirement." 114 The court's opinion in Corado is an example of a court not only allowing a claim of persecution to stand without require the harm to be systematic, but also allowing such a claim without requiring physical harm at all. To the Corado court, a serious threat was enough.

In Vaduva v. I.N.S., the applicant was able to provide enough testimony to establish past persecution based on a single event. 115 Although Vaduva's application was denied on other grounds, a single beating was enough for the court to find that he experienced past persecution. 116 In a similar case, an applicant's fifteen-day

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106 Id.
107 See id.
108 Id. at 287.
109 Bracic v. Holder, 603 F.3d 1027, 1035–36 (8th Cir. 2010).
110 Id. at 1036.
111 Id. at 1035.
112 Id. at 1035–36.
113 See Corado v. Ashcroft, 384 F.3d 945, 947 (8th Cir. 2004).
114 Id.
115 Vaduva v. I.N.S., 131 F.3d 689, 690 (7th Cir. 1997); see also Michael English, Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law, 60 OKLA. L. REV. 109, 122 (2007).
116 Vaduva, 131 F.3d at 692.
detention and two beatings were also sufficient to constitute past persecution under the asylum statute.\textsuperscript{117}

Reviewing all of these cases as a whole, it is clear that some federal circuit courts are willing to interpret more leniently the unclear requirement that incidents of harm be systematic or part of a pattern in order to constitute past persecution. However, there are also some circuits that insist that the petitioner show that the alleged persecution is systematic. As this Note argues, some harm is so severe, and some events are so significant when evaluated in the surrounding context, that it is unfair and unreasonable for a court not to find past persecution only because the harm came from an isolated incident.

IV. SOURCES OF GUIDANCE FOR INTERPRETING THE MEANING OF “PAST PERSECUTION” UNDER 8 U.S.C § 1101(A)(42)(A)

The term “persecution” is not defined in the statutes, regulations, or the USCIS’s Operations Instructions.\textsuperscript{118} While the United Nations Handbook on Procedures and Criteria for Determining Refugee Status (“Handbook”) notes that “there is no universally accepted definition of ‘persecution,’” it offers some direction by further providing that “a threat to life or freedom . . . can constitute persecution.”\textsuperscript{119} The Handbook introduces a subjective element to the determination of persecution:

> Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element . . . .
> The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological makeup of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.\textsuperscript{120}

Although BIA has not set forth a solid definition of persecution, it has named two significant aspects of persecution.\textsuperscript{121} The first aspect is the reasoning behind the harm caused by the persecutor.\textsuperscript{122} The persecutor must inflict the harm to punish the persecuted individual for a belief or characteristic that the persecutor

\textsuperscript{117} English, supra note 113, at 122.
\textsuperscript{118} Smith, supra note 32, § 4. The USCIS’s Operating Instructions are one of many documents that provide guidance to the agency’s personnel and provide internal administration information. See, e.g. USCIS Policy Manual, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/policymanual/Print/PolicyManual.html (last updated Feb. 25, 2016).
\textsuperscript{120} Id. ¶ (52).
\textsuperscript{121} See Smith, supra note 32, § 4.
\textsuperscript{122} See id.
seeks to overcome. The second significant aspect concerns who inflicts the harm. The persecutor must be either the government of a country or persons or an organization that the government is unable or unwilling to control. The BIA has also implied that the persecution must be organized or persistent, as opposed to random acts of violence.

V. THE UNITED STATES SHOULD ADOPT A UNIVERSAL STANDARD FOR DETERMINING WHETHER AN ASYLUM APPLICANT HAS SUFFERED PAST PERSECUTION

A. Current State of the Law in the United States

There is a trend in BIA decisions not to recognize remote occurrences or a series of isolated incidents as sufficient evidence to show past persecution. In turn, the BIA usually does not find a legitimate fear of future persecution even when such incidents are particularly violent and fear-invoking. The fact that incidents are isolated is a common reason provided by immigration judges and the BIA to deny asylum to applicants seeking refuge in the United States. This often results in an unfair outcome when the event or events actually did cause a well-founded fear of persecution in the future.

The courts give a great amount of deference to the BIA due to the Chevron deference principle.

This principle further bolsters the argument that the BIA should take a more solid and clear position on defining persecution and state an exception to the isolated incidents trend. This exception should allow certain incidents that involve a high level of harm to constitute persecution under the statute, even when the harm is not systematic or persistent. If the United States authorities changed paths and started applying a human-rights-based analysis, the problem of unfair outcomes in cases where the applicant is turned down solely because his or her persecution occurred in the form of a remote occurrence or an isolated incident would be solved.

Despite the high level of deference given to the BIA, courts do “require a certain minimum level of analysis from the [immigration judge] and BIA opinions denying asylum, and indeed must require such if judicial review is to be meaningful.” The federal circuit courts certainly possess the authority to vacate

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123 Id.
124 See id.
125 Id.
126 Id.
127 See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (holding that with regard to judicial review of an agency’s construction of a statute that it administers, if Congress has not directly spoken to the precise question at issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute).
128 Poradisova v. Gonzales, 420 F.3d 70, 77 (2d Cir. 2005).
BIA and immigration judge decisions where the reasoning, fact-finding process, or application of legal standards is clearly flawed. The problem with determining whether persecution has occurred under the asylum statute is that there is no clear, proper legal standard when the harm occurred during a remote occurrence or a series of isolated incidents. Therefore, the main source of guidance for the courts is BIA, an agency that has yet to take a clear position.

B. Why There Was No Initial Definition of Persecution

Originally, the drafters of the United Nations Refugee Convention purposefully chose not to define persecution so as to allow the term to be interpreted with flexibility and to evolve. As one commentator explains, 'the Convention was written with the intent to . . . protect all persons (and groups) then existing in Europe who had been or were likely to be the victims of persecution. No forms of persecution were intentionally excluded.' It makes little sense to compose and utilize some concrete, exclusionary list of harms that constitute persecution because, unfortunately, it "is a concept only too readily filled by the latest examples of one person's inhumanity to another." The entire purpose of asylum law should be to offer protection to those legitimately fleeing persecution, not to conform to arbitrary trends. Thus in the author's opinion, not granting refugee status to someone who has experienced persecution in the form of a remote occurrence or a series of isolated incidents does not serve the goals of asylum law. After all, that occurrence or series of incidents could have been unimaginably harmful and fear-invoking.

"Protection from persecution is at the heart of the international refugee regime." This exact rationale is why it is surprising and concerning that a set definition of the term persecution is nonexistent. It is one thing if the lack of a definition for the term is so that persecution can be interpreted broadly to cover unexpected situations. However, it is something entirely different when the lack of a definition is due to the desire to exclude certain types of persecution, when in reality the type of persecution being excluded is extremely harmful and based on a protected ground under the asylum statute.

According to the United Nations Refugee Convention, there is a bifurcated framework for determining persecution that is comprised of two key elements.

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127 Marzaur v. U.S. Dep't of Homeland Sec., 494 F.3d 281, 289 (2d Cir. 2007).
130 Id. (quoting Guy S. Goodwin-Gill & Jane McAdam, The Refugee in International Law 93–94 (3d ed. 2007)).
131 Id. § 4:1.
132 See id.
The two elements of the framework are: (1) serious harm and (2) a failure of state protection.\textsuperscript{135} Accordingly, the kind of persecution required to gain asylum “is widely recognized as ‘the sustained or systemic denial of human rights demonstrative of a failure of state protection.’”\textsuperscript{136} This framework for determining persecution is known as the human-rights-based approach to defining and analyzing persecution.\textsuperscript{137}

C. The Problem with the United States’ Approach

Typically, the United States’ approach to defining, analyzing, and making decisions with regard to persecution in the asylum law context deviates significantly from the human-rights-based approach. “[T]he U.S. approach to interpreting persecution has generally been ad hoc.”\textsuperscript{138} Because courts in the United States decide asylum cases, specifically cases on the issue of persecution, on a case-by-case basis, the most common source for courts to look to for guidance are trends from prior cases decided by immigration judges, BIA, and other federal courts. Currently, the most common of these trends is that “U.S. courts have held that ‘[m]ere harassment’ or ‘isolated incidents’ of harassment or intimidation do not generally rise to the level of persecution.”\textsuperscript{139} Thus, rather than evaluating situations presented by various cases on the basis of social norms and humanitarian ideals, case law in the United States requires the persecution to be systematic.\textsuperscript{140}

The United States’ approach has created much confusion in this area of law, and the case law is more of a maze than a clear guide on what exactly is required for an applicant’s harmful experiences to constitute persecution under the law. Some courts have implied that the general principles of international law should be applied by describing persecution as suffering or harm that is inflicted “in a manner condemned by civilized governments.”\textsuperscript{141} Other courts have utilized international human rights principles or documents as interpretive authority.\textsuperscript{142} Some courts do not even treat persecution as a distinct concept, even though it is clearly a distinct element to be proven in an asylum case.\textsuperscript{143} Those particular courts generally conduct their analysis on the basis of questions concerning “standard of risk, nexus, and grounds.”\textsuperscript{144} It is not uncommon for a court to describe persecution is an

\textsuperscript{135} Id.
\textsuperscript{136} Id. (quoting JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 183 (Cambridge Univ. Press 2d ed. 2014)).
\textsuperscript{137} See id.
\textsuperscript{138} Id.
\textsuperscript{139} Id. § 4:4.
\textsuperscript{140} Id.
\textsuperscript{141} Id. (quoting Kane v. Holder, 581 F.3d 231, 238 n.19 (5th Cir. 2009)).
\textsuperscript{142} Id.
\textsuperscript{143} See id.
\textsuperscript{144} Id.
“extreme” concept, meaning that it is by its nature not meant to encompass a broad swath of individuals.\textsuperscript{145}

It is easy to imagine the many ways in which the sources of authority mentioned above might often contradict one another and leave courts with an extremely difficult task in deciding which concepts should be applied and which ones should be compromised or completely ignored. The original draft of the United Nations Refugee Convention and other early refugee protection instruments were written in a manner that would hopefully exclude applicants that were seeking asylum for reasons of mere “personal convenience.”\textsuperscript{146} The definitions and the methods of interpreting “persecution” seems to have changed as the number of individuals possessing a real need for the protection and originally intended to be provided by asylum in the United States has been growing. Certain interests are essential to human dignity, and those interests should be the point around which the standard for persecution revolves and the definition of persecution evolves.\textsuperscript{147}

Although the courts in the United States have recognized to some extent that international human rights norms are relevant in deciding whether an applicant’s harm suffered or fear of harm in the future amounts to persecution, the courts should decide collectively how this issue is to be resolved so a uniform standard can be applied, and the standard and source of authority for that standard can be crystal clear. In the current state of this area of law, and particularly in relation to the persecution standard, it would be easy for courts to find fewer and fewer asylum applicants to be eligible for refugee status simply because of outside forces, or even internal opinions, that are pushing for less immigration into the United States. What is stopping a judge from turning to the source of authority or following the trend that will result in the outcome he or she views as most desirable? Although this is a concern that is hotly debated in all areas of the law, surely the risk is much higher when there exists an abundance of sources of authority that are all saying different things. Such conflicting sources make it much easier for a judge to provide reasoning to support any number of outcomes.

\textit{D. How Cases Would Be Decided Differently Under the Human-Rights-Based Approach}

Looking back to the above-mentioned cases in which courts found that a remote occurrence or a series of isolated incidents did not constitute persecution under the asylum statute, it is quite likely those cases would have been decided differently under the human-rights-based approach. The credible testimony in

\textsuperscript{145} Id.


\textsuperscript{147} See id.
Thapaliya v. Holder that the applicant was severely beaten and threatened by a gun in his home because of his political affiliation would likely be considered persecution under such a standard.\(^{148}\) Although the harm occurred in the form of one isolated event, the applicant was physically hurt and lived in fear because of the attackers actions and the threat made.\(^{149}\) The experience should be considered sufficiently serious in nature to constitute a severe violation of basic human rights.\(^{150}\)

In Topalli v. Gonzales, the applicant’s detention and seven beatings on account of political belief surely would have constituted persecution, even though the First Circuit found that the “isolated events” did not rise to the level of persecution.\(^{151}\) Under a flexible standard based on human rights law, two main criteria are required: serious harm and a lack of state protection.\(^{152}\) Seven separate occasions of beatings and detention constitute serious harm under any definition of the term, and it is clear that there was no form of state protection. It is hard to see how those two requirements would not be met in the Topalli case.

Similarly, in Dandan v. Ashcroft, the applicant’s three-day detention, which involved severe beatings and the deprivation of food, would meet the two human rights requirements.\(^{153}\) There, the applicant was beaten until his face became swollen, which shows that the harm was serious.\(^{154}\) There was no state protection because the country was in a state of civil war.\(^{155}\) Therefore, the harm would rise to the level of persecution in order to gain refugee status under the human-rights-based approach.

The same is true for Prasad v. I.N.S., where the applicant was taken to jail, hit, kicked, and intensely questioned.\(^{156}\) There is no imaginable way that harm involving detention, accusations, and physical acts of hitting and kicking could be categorized as less than serious.\(^{157}\) As long as the harm was caused due to some protected ground, it would almost certainly constitute persecution under the human-rights-based method; the harm was serious and there was a lack of state protection.

\(^{148}\) See Thapaliya v. Holder, 750 F.3d 56, 57–58 (1st Cir. 2014).

\(^{149}\) See id.

\(^{150}\) See ANKER, supra note 127, § 4:3. The international human-rights-based approach to determining whether action constitutes persecution requires: (1) a universal but flexible standard; (2) serious harm and a lack of state protection; and (3) sufficiently serious harm. Although there is no set list of harms, “[v]iolations of physical integrity, ‘threats to life or freedom,’ and violations of certain fundamental human rights constitute persecution.” Id. (citing § 4:5). Since the applicant in Thapaliya experienced a violation of physical integrity, a threat to his life or freedom, and the beating violated his fundamental human rights, this would suffice under the human-rights-based standard.

\(^{151}\) See Topalli v. Gonzales, 417 F.3d 128, 132 (1st Cir. 2005).

\(^{152}\) ANKER, supra note 127, § 4:3.

\(^{153}\) Dandan v. Ashcroft, 339 F.3d 567, 573–74 (7th Cir. 2003).

\(^{154}\) See id. at 574.

\(^{155}\) See id. at 572.

\(^{156}\) Prasad v. I.N.S., 47 F.3d 336, 339 (9th Cir. 1995).

\(^{157}\) See id.
Thus, the harm would have satisfied the bifurcated framework of the human-rights-based approach.

CONCLUSION

The ultimate problem in fairly deciding asylum applications in the United States at this time is that there is no uniform standard for determining whether an asylum applicant has suffered past persecution; there are no set guidelines for the courts to apply in making a persecution decision. The case law shows there are individuals who seek refuge in the United States by applying for asylum but are denied refugee status because the harm they have suffered occurred during a remote occurrence or a series of isolated incidents. Although there is no concrete definition of persecution, and the BIA has not formally taken a position on the particular issue, the United States authorities, for the most part, follow the same trend. The trend is that harm must be systematic or part of a pattern, but the case law also shows that some courts do find persecution even where the harm is isolated.

This area of immigration law is in a state of confusion and unpredictability. One standard should be used in all cases, and the best way for that to be accomplished is for BIA to set that standard. The human-rights-based approach has been successful in other countries, and it would prove to decrease the number of cases in the United States resulting in unfair outcomes.